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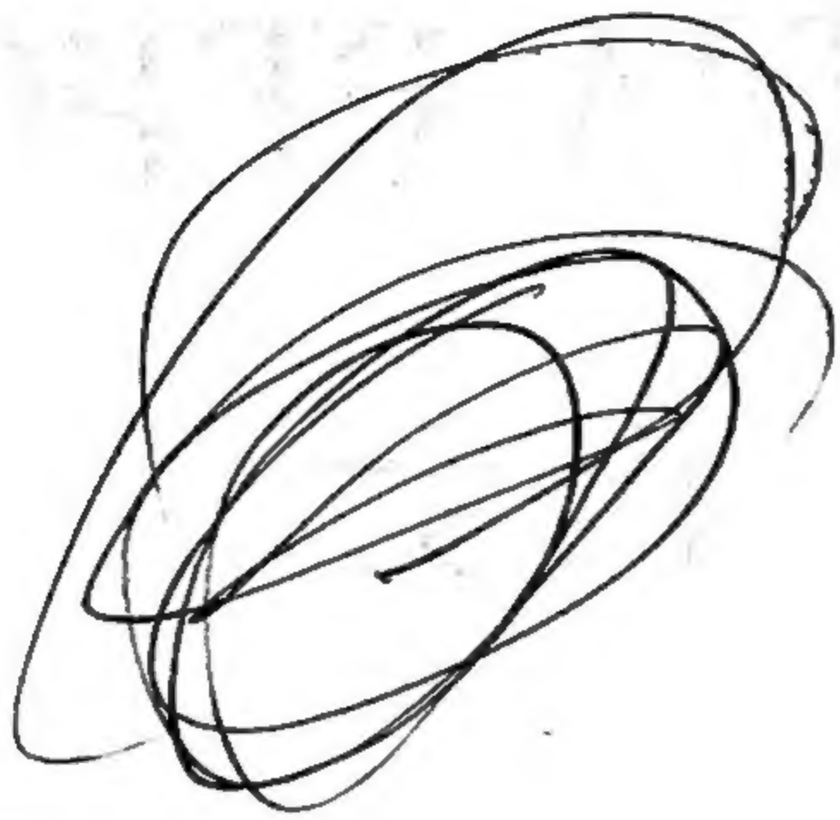

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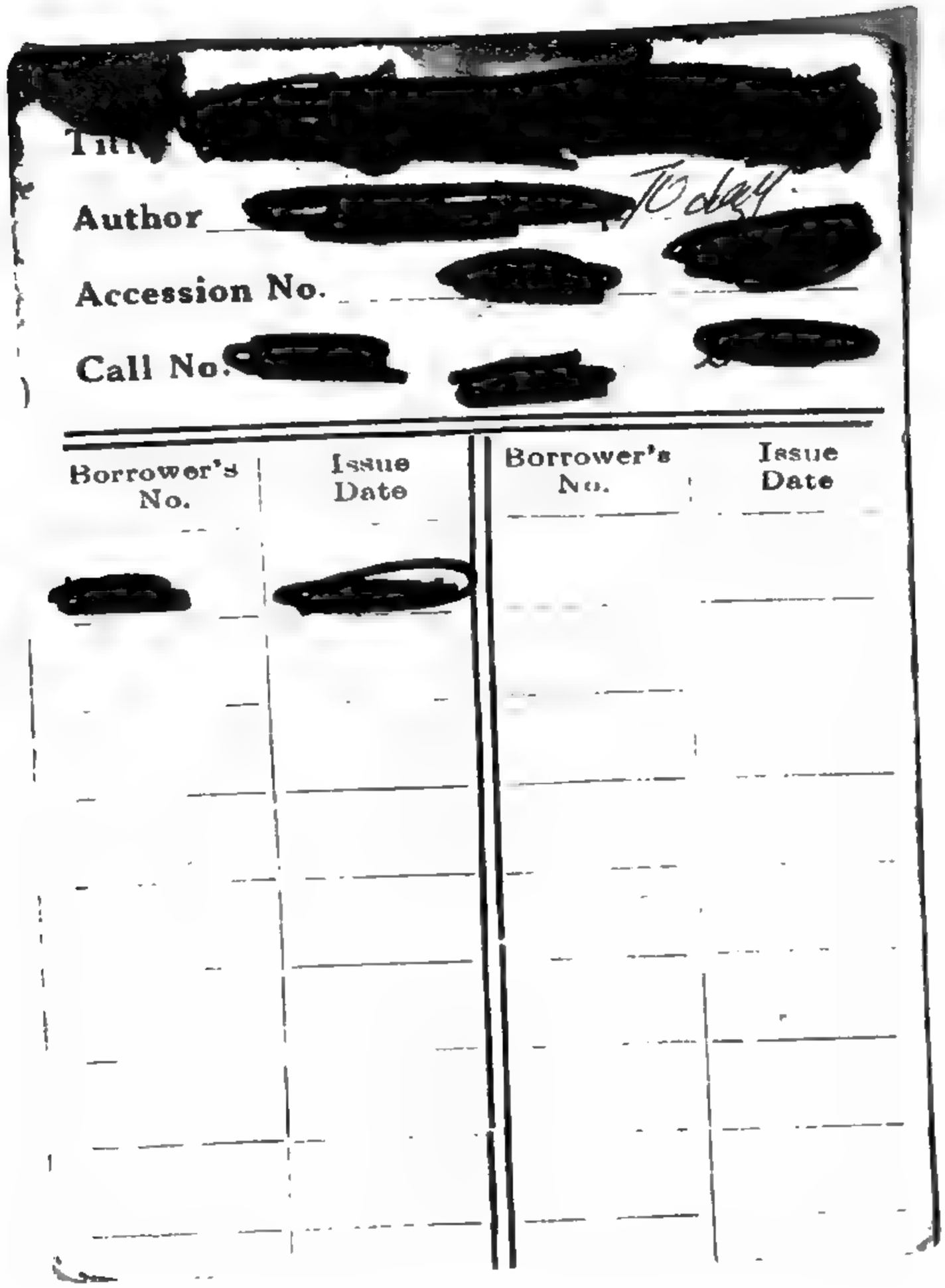
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	165 I C 659
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241	1936 M W N1056
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253	1936 M W N 1212
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254	1936 M W N1362
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259	1937 M W N 3
FB	1937-1 M L J 108
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261	71 M L J 850
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264	44 M L W 953
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265	44 M L W 949
	168 I C 681
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266	71 M L J 804
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	171 I C 202
268	173 I C 90
270	1937-1 M L J 264
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	45 M L W 88
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272	1937 M W N 50
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273	1937 M W N 22
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274	46 M L W 300
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284	45 M L W 28
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285	1937 M W N 41
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286	1937 M W N 23
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287	45 M L W 498
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289	1936 M W N 840
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291	1936 M W N1337
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	45 M L W 236
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	38 Cr L J 464
	44 M L W 567
	71 M L J 607
295	1936 M W N1175
	169 I C 244
	45 M L W 347
	172 I C 690
	45 M L W 184
300	1937-1 M L J 182
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FB	45 M L W 226
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	38 Cr L J 457
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303	1937 M W N 189
303	173 I C 307
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308	45 M L W 188
SB	1937-1 M L J 216
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	ILR 1937 M 510
311	38 Cr L J 582
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313	1937 M W N 53
	1937-1 M L J 128
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	169 I C 80
	38 Cr L J 690
314	45 M L W 208
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315	45 M L W 398
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316	45 M L W 233
SB	168 I C 13
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	169 I C 372
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325	1937-1 M L J 89
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326	45 M L W 230
	168 I C 715
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327	1937-2 M L J 477
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332	45 M L W 61
	1937 M W N 115
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335	45 M L W 114
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338	1937 M W N 375
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339	169 I C 346
340	45 M L W 205
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	171 I C 72
341	1937 M W N 90
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	38 Cr L J 695
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344	1937-1 M L J 231
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	1937 M W N 512
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345	1937-1 M L J 16
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	168 I C 731
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348	1937-1 M L J 197
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	169 I C 358
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	45 M L W 661
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366	1937 M W N 27
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367	45 M L W 72
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368	1937-1 M L J 10
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370	1937-1 M L J 287
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375	1937-1 M L J 587
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	168 I C 442
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379	1937-1 M L J 511
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382	45 M L W 284
	1937-1 M L J 580
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385	1937 MWN 31&35
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385	1937-1 M L J 453
FB	168 I C 561
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393	1937-1 M L J 351
SB	45 M L W 441
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401	1937 M W N 24
	45 M L W 119
	1937-1 M L J 219
	168 I C 555
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	45 M L W 720
	171 I C 572
403	1937 M W N 143
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	171 I C 684
405	45 M L W 405
	1937 M W N 518
	171 I C 690
406	1937 M W N 52
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	1937 M Cr C 36
	45 M L W 87
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407	45 M L W 262
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411	1937 M W N 150
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	171 I C 21
419	45 M L W 276
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421	45 M L W 278
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424	1937 M W N 113
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427	1937 M W N 9
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429	1937-1 M L J 440
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431	1937 M W N 76
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433	45 M L W 260
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434	1937 M W N 87
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436	1937 M W N 57
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438	173 I C 147
444	1937 M W N 203
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446	1937-1 M L J 384
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448	1937 M W N 173
	45 M L W 240
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449	1937 M WN 230
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451	45 M L W 100
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466	45 M L W 328
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458	1937 M W N 122
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	170 I C 914
461	1937 M W N 264
	45 M L W 667
	1937-2 M L J 386
	171 I C 559
472	1937 M W N 28
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476	45 M L W 153
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478	1937 M W N 186
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480	1937 M W N 323
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481	1937 M W N 199
	45 M L W 475
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	170 I C 344
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	1937-1 M L J 447
	170 I C 157
487	1937 M W N 210
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	1937 M Cr C 77
	170 I C 193
487	38 Cr L J 864
490	1937 M W N 212
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	38 Cr L J 594
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492	1937 M W N 822
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	38 Cr L J 619
494	45 M L W 473
	1937 M W N 636
	1937 M Cr C 180
	170 I C 390
	38 Cr L J 892
495	1936 M W N 770
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496	1937 M W N 125
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501	1937 M W N 132
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	45 M L W 602
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503	1937 M W N 195
	45 M L W 717
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	ILR 1937 M 607
	171 I C 533
504	1937 M W N 239
	45 M L W 501
	170 I C 883
509	1937 M W N 227
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	170 I C 86
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511	45 M L W 291
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515	45 M L W 573
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	ILR 1937 M 797
520	1937 M W N 245
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	170 I C 242
523	1937 M W N 145
	169 I C 597
	1937-2 M L J 178
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528	1937 M W N 320
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	169 I C 688
529	1937 M W N 284
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534	45	M L W	239
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	1937	M W N	184
	168	I C	511
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535	1937	M W N	172
	45	M L W	400
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	1937	M Cr C	97
	168	I C	848
	38	Cr L J	820
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	172	I C	70
538	1937	M W N	309
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	170	I C	107
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	172	I C	268
547	45	M L W	431
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	168	I C	783
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549	1937	M W N	515
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	170	I C	37
	ILR	1937 M	784
551	45	M L W	704
FB	1937	M W N	524
	1937-2	M L J	11
	170	I C	198
	ILR	1937 M	777
554	1937	M W N	353
	45	M L W	546
	170	I C	939
555	45	M L W	688
	1937	M W N	602
556	1937	M W N	374
	45	M L W	637
	171	I C	608
557	1937	M W N	197
	45	M L W	594
	170	I C	489
559	1937	M W N	293
	45	M L W	489
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	169	I C	930
560	45	M L W	486
	1937-1	M L J	569
	1937	M W N	526
	172	I C	247
562	1937	M W N	399
	45	M L W	774
	169	I C	737
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563	1937	M W N	382
	1937-1	M L J	672
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563	170	I C	819
565	1937	M W N	363
	169	I C	516
	46	M L W	602
569	1937	M W N	14
	45	M L W	266
	1937-1	M L J	346
	169	I C	407
	ILR	1937 M	936
571	1937	M W N	303
	45	M L W	616
	170	I C	279
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576	1937	M W N	220
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	1937-1	M L J	616
	169	I C	957
577	45	M L W	565
	1937-1	M L J	637
	1937	M W N	577
	ILR	1937 M	679
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578	45	M L W	697
	1937	M W N	638
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	170	I C	481
	38	Cr L J	950
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	169	I C	860
580	1937	M W N	232
	46	M L W	683
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582	1937-1	M L J	667
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584	1937	M W N	354
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586	45	M L W	767
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589	1937	M W N	262
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594	1937	M W N	317
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	172	I C	90
599	45	M L W	749
	173	I C	194
604	1937	M W N	341
	45	M L W	563
	1937-1	M L J	640
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605	1937	M W N	872
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	169	I C	704
606	45	M L W	541
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607	45	M L W	598
	1937	M W N	614
607	172	I C	304
610	1937	M W N	427
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	1937-2	M L J	251
	171	I C	101
	ILR	1937 M	880
618	1937	M W N	442
FB	1937-2	M L J	60
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	171	I C	245
	38	Cr L J	1027
631	1937	M W N	296
	172	I C	666
634	1937	M W N	456
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	ILR	1937 M	684
	171	I C	694
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637	1937	M W N	521
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	169	I C	71
	38	Cr L J	664
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640	1937-1	M L J	28
	45	M L W	729
	1937	M W N	603
	169	I C	627
641	1937-1	M L J	597
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	170	I C	919
642	45	M L W	684
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644	45	M L W	691
	1937	M W N	605
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645	1937	M W N	301
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647	1937	M W N	403
	45	M L W	555
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648	45	M L W	483
	1937-1	M L J	507
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651	1937	M W N	167
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654	1937	M W N	924
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660	45	M L W	623
	1937	M W N	694
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666	1937-2	M L J	221
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	172	I C	581
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674	1937	M W N	422
	172	I C	256
675	1937	M W N	358
	173	I C	33
677	1937	M W N	404
	172	I C	727
679	1937	M W N	419
	46	M L W	680
	172	I C	767
681	1937	M W N	313
	46	M L W	889
	173	I C	233
685	1937	M W N	282
	171	I C	133
	1937-2	M L J	573
694	1937	M W N	342
	169	I C	783
696	46	M L W	48
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	1937	M Cr C	222
	171	I C	93
	38	Cr L J	1000
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	1937-2	M L J	209
	171	I C	7
	ILR	1937 M	948
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	1937-2	M L J	802
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716	45	M L W	257
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717			...
718	1937	M W N	1313
	47	M L W	60
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725	1937-2 M L J 29
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727	1937 M W N 279
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730	1937 M W N 510
731	46 M L W 302
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735	1937-2 M L J 189
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	46 M L W 531
	173 I C 251
741	1937 M W N 506
	1937-2 M L J 100
	46 M L W 916
	172 I C 776
745	1937 M W N 790
FB	46 M L W 247
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760	1937 M W N 708
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755	1937 M W N 537
	46 M L W 144
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760	1937 M W N 355
763	1937 M W N 693
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764	1937 M W N 747
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	1937-2 M L J 627
767	1937 M W N 754
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769	1937 M W N 700
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775	46 M L W 327
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777	46 M L W 242
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785	1937 M W N 757
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794	46 M L W 324
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799	1937 M W N 661
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	46 M L W 319
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	1937-2 M L J 435
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809	1937 M W N 565
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810	46 M L W 245
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811	46 M L W 266
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813	1937 M W N 888
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816	46 M L W 275
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819	46 M L W 270
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823	1937 M W N 690
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	46 M L W 466
825	1937 M W N 864
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	1938-1 M L J 293
835	46 M L W 660
840	1937 M W N 672
	46 M L W 524
842	1937 M W N 692
	46 M L W 326
	1937-2 M L J 358
843	46 M L W 375
	1937 M W N 1001
	1937-2 M L J 728
	ILR 1937 M 970
846	1937-2 M L J 236
	46 M L W 255
	1937 M W N 1290
848	...
849	...
852	1937-2 M L J 413
	1937 M W N 1032
	46 M L W 587
858	46 M L W 370
	1937 M W N 1010
	1937-2 M L J 546
861	...
862	1937-2 M L J 505
	1937 M W N 1089
	46 M L W 804
864	...
865	...
869	1937-2 M L J 653
	46 M L W 761
	1937 M W N 1215
872	1937-2 M L J 378
	46 M L W 439
	1937 M W N 1090
874	...
876	46 M L W 484
	1937 M W N 1004
	1937 M Cr C 272
	1937-2 M L J 616
878	46 M L W 411
	1937 M W N 973
879	46 M L W 676
882	1937-1 M L J 679
FB	ILR 1937 M 638
	171 I C 444
	46 M L W 818
894	1937 M W N 960
	46 M L W 489
	1937-2 M L J 569
895	46 M L W 481
	1937-2 M L J 590
	1937 M W N 1054
897	46 M L W 380
	1937 M W N 1138
902	1937 M W N 773
	46 M L W 492
915	1937 M W N 1014
	46 M L W 550
918	1937 M W N 891
	46 M L W 544
922	1937 M W N 946
	1937-2 M L J 666

AIR	Other Journals
930	1937 M W N 762
	46 M L W 416
937	1937-2 M L J 552
FB	1937 M W N 1060
	46 M L W 734
	172 I C 489
940	46 M L W 528
	1937 M W N 1117
942	46 M L W 584
	1937-2 M L J 622
	1937 M W N 1163
944	1937 2 M L J 725
	1937 M W N 981
	46 M L W 811
	1937 M Cr C 374
	172 I C 496
	39 Cr L J 153
945	46 M L W 442
	1937 M W N 1047
948	46 M L W 403
	1937-2 M L J 429
	1937 M W N 1167
951	1937 M W N 874
	46 M L W 477
	1937 M Cr C 272
	172 I C 485
	39 Cr L J 149
953	1937 M W N 805
	46 M L W 643
957	1937 M W N 817
	46 M L W 472
960	46 M L W 517
	1937-2 M L J 540
	1937 M W N 1136
961	1937 M W N 928
	46 M L W 515
962	1937 M W N 942
	46 M L W 449
	1937-2 M L J 508
964	1937-2 M L J 543
965	1937 M W N 706
	46 M L W 555
967	46 M L W 448
	1937 M W N 962
	1938-1 M L J 232
968	1937 M W N 733
	1937 M Cr C 269
	172 I C 501
	47 M L W 140
	39 Cr L J 144
970	1937 M W N 970
	1937-2 M L J 660
	46 M L W 782
973	46 M L W 388
	1937 2 M L J 485
	1937 M W N 1145
975	1937 M W N 978
	46 M L W 522
	1937-2 M L J 620
	1937 M Cr C 311
	172 I C 498
	39 Cr L J 147
976	46 M L W 514

Other Journals=All India Reporter.

ILR (1937) Madras=All India Reporter

ILR		AIR		ILR		AIR		ILR		AIR		ILR		AIR		ILR		AIR	
1	1936	PC	264	203	1937	M	131	383	1937	M	51	607	1937	M	503	828	1937	M	270
14	"	M	835	211	"	"	241	471	1936	"	656	612	"	"	716	834	"	"	509
28	"	"	707	248	"	"	146	479	1937	"	40	616	"	"	385	841	"	"	667
35	"	"	910	253n	1936	"	16	491	"	"	117	638	"	"	882	854	"	"	490
42	"	"	828	257	"	"	958	495	"	"	31	664	"	"	801	862	"	PC	209
51	"	"	905	263	1937	PC	1	498	"	"	217	672	"	"	529	880	"	M	610
59	"	"	626	275	"	M	81	504	"	"	232	679	"	"	577	906	"	"	496
66	"	"	887	284	"	"	46	510	"	"	310	684	"	"	634	919	"	"	703
90	"	"	793	299	"	"	182	515	"	"	222	695	"	"	618	936	"	"	569
94	"	PC	309	320	"	"	239	517	"	PC	27	734	"	"	393	943	"	"	434
103	"	M	907	324	1936	"	964	532	"	"	31	753	"	"	382	948	"	"	699
112	"	"	613	329	1937	"	134	545	"	M	214	764	"	"	407	970	"	"	843
121	"	"	881	335	"	"	100	553	"	"	308	772	"	"	548	980	"	"	786
132	"	"	669	339	"	"	14	559	"	"	259	775	"	"	547	985	"	"	562
147	"	"	919	347	"	"	110	565	"	"	444	777	"	"	551	990	"	"	571
161	1937	"	357	353	"	"	35	571	"	"	370	784	"	"	549	1004	"	"	434
171	"	"	167	358	"	"	209	584	"	"	161	792	"	"	300	1012	"	"	538
178	1936	"	789	362	"	"	406	589	"	"	219	797	"	"	515	1023	"	"	481
189	1937	"	86	364	"	"	254	600	"	"	169	814	"	"	316	1034	"	"	637
197	"	"	106	376	"	"	345												

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MLJ		AIR		MLJ		AIR		MLJ		AIR		MLJ		AIR		MLJ		AIR	
1	1937	M	81	122	1937	M	366	254	1937	PC	39	422	1937	M	496	610	1937	M	528
8	"	"	110	125	"	"	152	262	"	M	367	432	"	PC	21	611	"	"	647
10	"	"	868	128	"	"	313	264	"	"	270	440	"	M	429	613	"	"	402
14	"	"	227	130	"	"	191	268	"	"	476	442	"	"	453	616	"	"	576
16	"	"	345	133	1936	"	971	274	"	"	291	447	"	"	484	618	"	"	547
21	"	"	178	138	1937	"	155	278	"	"	140	453	"	"	385	619	"	"	316
23	"	"	27	143	"	"	360	287	"	"	370	469	"	"	501	632	"	"	503
28	"	"	610	147	"	"	161	296	"	"	511	473	"	"	535	635	"	"	585
33	"	"	101	151	"	"	145	303	"	"	357	475	"	"	106	637	"	"	577
36	1936	"	961	154	"	"	209	310	"	"	534	479	"	PC	46	640	"	"	604
37	1937	"	159	157	"	"	284	312	"	PC	36	489	1936	M	656	642	"	"	44
41	1936	"	605	163	"	"	364	321	"	M	314	496	1937	"	559	646	"	PC	101
50	"	"	709	166	"	PC	4	324	"	"	427	498	"	"	637	654	"	M	444
58	1937	PC	8	174	"	M	308	329	"	"	340	501	"	"	398	658	"	"	342
60	1936	M	612	178	"	"	208	331	"	"	434	507	"	"	648	662	"	"	169
74	1937	"	406	180	"	"	253	334	"	"	301	511	"	"	379	667	"	"	582
75	"	"	181	182	"	"	300	338	"	"	448	515	"	PC	27	672	"	"	563
77	"	"	219	189	"	"	409	341	"	"	407	529	"	"	31	676	"	"	698
83	"	"	214	192	"	"	332	346	"	"	569	543	"	M	182	679	"	"	882
88	"	"	264	197	"	"	348	351	"	"	393	559	"	"	481	702	"	PC	107
89	"	"	325	200	1936	PC	269	364	"	"	436	566	"	"	478	707	"	M	515
91	"	"	217	216	1937	M	310	367	1936	PC	312	569	"	"	560	719	"	PC	50
95	"	"	335	219	"	"	401	384	1937	M	446	572	"	"	402	727	"	M	549
101	"	"	272	224	"	"	472	388	"	"	273	575	"	"	651	732	"	"	548
105	"	"	232	231	"	"	344	390	"	"	353	580	"	"	382	735	"	"	645
108	"	"	259	233	"	"	254	396	"	"	716	587	"	"	375	739	"	"	529
113	"	PC	1	243	"	"	458	399	"	"	349	597	"	"	641	743	"	"	634
120	"	M	222	249	"	"	424	407	"	"	421	600	"	PC	24	750	"	"	321
								414	"	"	223	605	"	M	163	759	"	"	17

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MLJ		AIR		MLJ		AIR		MLJ		AIR		MLJ		AIR		MLJ		AIR	
1	1937	PC	163	131	1937	M	40	232	1937	M	711	323	1937	PC	119	402	1937	M	822
11	"	M	551	139	"	PC	223	236	"	"	846	329	"	M	411	404	"	PC	228
17	1936	"	985	151	"	"	233	240	"	PC	209	345	"	"	806	413	"	M	852
24	"	"	943	160	"	M	696	251	"	M	610	347	"	"	786	427	"	"	791
29	1937	"	725	165	"	"	176	273	"	"	767	350	"	"	823	429	"	"	948
37	"	"	509	170	"	"	642	278	"	"	809	358	"	"	842	435	"	"	808
43	"	PC	133	175	"	"	653	279	"	"	200	359	"	PC	260	437	1936	"	449
54	1936	M	848	178	"	"	523	286	"	PC	251	362	"	"	271	459	1937	PC	124
60	1937	"	618	189	"	"	735	296	"	M	787	368	"	M	750	466	1936	M	583
87	"	PC	14	202	"	PC	143	299	"	"	644	373	"	"	872	477	1937	"	827
100	"	M	741	209	"	M	699	301	"	"	819	381	"	"	807	485	"	"	973
108	"	"	173	221	"	"	666	307	"	"	810	383	"	"	825	488	"	"	794
114	"	PC	61	223	"	"	667	310	"	"	745	386	"	"	461				

MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
490	1937	M	792	594	1937	PC	306	717	1938	M	185	802	1937	M	713	881	1938	M	144
493	"	PC	127	602	1938	M	27	725	1937	"	914	805	1939	"	75	883	"	"	142
505	"	M	862	606	"	"	2	728	"	"	843	809	"	"	70	885	"	"	66
508	"	"	962	616	1937	"	870	734	1938	"	172	812	"	"	143	887	"	"	256
511	1938	"	133	620	"	"	975	737	"	"	53	814	"	"	171	888	"	"	190
518	1937	PC	174	622	"	"	942	741	"	"	29	817	"	"	77	893	"	"	71
527	"	"	185	627	"	"	764	744	"	"	33	820	"	"	154	896	"	"	212
536	"	M	799	631	"	PC	69	749	"	"	35	825	"	"	96	902	"	"	192
540	"	"	960	650	"	"	146	753	"	"	141	830	"	"	98	903	"	"	211
548	"	"	954	658	"	M	869	757	"	"	173	834	1937	PC	244	906	"	"	136
546	"	"	858	660	"	"	970	760	"	"	5	848	1938	M	124	916	"	"	253
552	"	"	937	666	"	"	922	763	1937	PC	139	853	"	"	69	920	"	"	132
559	"	"	816	684	"	PC	179	772	"	"	310	864	"	"	130	922	1937	"	714
565	"	PC	121	689	"	"	152	779	1938	M	107	868	"	"	177	926	1938	"	176
569	"	M	934	700	1938	M	189	783	"	"	67	871	"	"	100	928	"	"	59
573	"	"	685	703	"	"	19	789	"	"	153	876	"	"	214	931	"	"	250
590	"	"	895	711	1937	PC	242	798	"	"	206	878	"	"	129	936	"	"	174

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MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1936	PC	318	179	1937	PC	21	284	1937	M	382	473	1937	M	494	616	1937	M	571
7	"	"	301	184	"	M	300	291	"	"	511	475	"	"	481	623	"	"	660
10	"	"	332	186	"	"	267	297	"	"	379	480	"	"	645	633	"	"	342
15	1937	M	254	188	"	"	310	300	"	"	451	483	"	"	648	637	"	"	556
23	"	"	214	191	"	PC	42	308	"	"	356	486	"	"	560	639	"	"	638
28	"	"	284	198	"	"	39	313	"	"	444	489	"	"	559	641	"	"	579
30	"	"	345	202	1936	M	954	316	"	"	368	491	"	"	529	643	"	"	654
35	"	"	153	203	1937	"	253	318	"	"	427	495	"	"	651	646	"	"	554
38	"	PC	4	205	"	"	340	323	"	"	456	498	"	"	287	648	"	"	520
43	"	"	1	206	"	"	325	326	"	"	370	501	"	"	504	653	"	"	594
49	"	"	10	208	"	"	314	333	"	"	316	508	"	"	478	656	"	"	398
55	"	"	8	210	"	"	273	340	"	"	496	510	"	"	591	661	"	"	349
57	"	M	232	212	"	"	424	347	"	"	295	515	"	"	431	667	"	"	461
60	"	"	222	217	"	"	434	355	"	PC	50	519	"	"	163	684	"	"	642
61	"	"	332	219	"	"	272	361	"	"	46	522	"	"	173	688	"	"	555
72	"	"	367	222	"	"	191	367	"	M	487	527	"	"	179	689	"	"	548
74	"	"	217	224	"	"	348	375	"	"	484	531	"	"	114	691	"	"	644
78	"	PC	24	226	"	"	301	380	"	"	449	536	"	"	193	693	"	"	596
83	"	"	35	230	"	"	326	384	"	"	403	540	"	"	585	695	"	"	653
84	"	M	259	232	"	"	285	387	"	"	656	541	"	"	606	697	"	"	578
87	"	"	406	234	"	"	145	394	"	"	536	543	"	PC	54	698	"	"	694
88	"	"	270	236	"	"	291	398	"	"	315	555	"	M	647	704	"	"	551
91	"	"	366	239	"	"	534	400	"	"	535	557	"	"	533	709	"	"	667
93	"	"	321	240	"	"	448	401	"	"	509	560	"	"	576	717	"	"	509
100	"	"	209	242	"	"	341	405	"	"	405	562	"	"	605	720	"	"	402
103	"	"	472	244	"	"	344	408	"	PC	61	563	"	"	604	722	"	"	446
109	"	PC	36	246	"	"	436	422	"	M	538	565	"	"	577	725	"	"	159
114	"	M	335	249	"	"	311	431	"	"	547	568	"	"	582	728	"	"	529
119	"	"	401	251	"	"	286	432	"	"	531	573	"	"	515	729	"	"	640
123	"	"	308	253	"	"	353	435	"	"	637	580	"	PC	69	731	"	"	641
126	1936	PC	269	257	"	"	716	437	"	"	490	594	"	M	557	733	"	"	549
139	1937	"	27	260	"	"	433	441	"	"	393	598	"	"	607	739	1936	PC	312
146	"	"	31	262	"	"	407	449	"	PC	107	602	"	"	501	749	1937	M	599
153	"	M	476	266	"	"	569	451	"	"	101	605	"	"	360	757	"	"	375
158	"	"	411	270	"	"	357	457	"	M	385	609	"	"	364	764	"	"	563
171	"	"	101	276	"	"	419	470	"	"	492	612	"	"	429	767	"	"	586
174	"	"	458	278	"	"	421	471	"	"	480	614	"	"	409	771	"	"	589
																774	"	"	562

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MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1937	PC	233	52	1937	PC	163	105	1937	PC	114	175	1937	PC	124	223	1837	PC	239
7	"	"	209	60	"	"	139	112	"	M	610	180	"	"	152	225	"	"	240
14	"	"	185	67	"	"	143	125	"	PC	108	188	"	"	127	227	"	"	271
21	"	"	133	72	"	"	189	134	"	"	119	198	"	"	260	232	"	"	265
30	"	"	121	79	"	"	223	139	"	M	713	201	"	"	251	242	"	M	777
33	"	"	179	88	"	"	201	141	"	"	711	209	"	"	256	245	"	"	810
37	"	M	639	94	"	"	105	144	"	"	755	214	"	"	261	247	"	"	745
48	"	"	696	98	"	"	228	152	"	"	618	219	"	"	276	255	"	"	846

MLW		AIR		MLW		AIR		MLW		AIR		MLW		AIR		MLW		AIR	
258	1938	M	6	411	1937	M	878	550	1937	M	915	700	1938	M	144	811	1937	M	944
260	1937	"	883	413	"	"	789	555	"	"	965	701	"	"	256	812	1938	"	172
263	"	"	766	416	"	"	930	559	1938	"	19	703	"	"	192	815	"	"	58
266	"	"	811	426	1938	"	92	565	"	"	27	704	"	"	173	818	1937	"	882
270	"	"	819	433	"	"	23	568	"	"	102	706	"	"	141	839	"	"	681
275	"	"	816	437	1937	"	807	576	"	"	126	709	"	"	130	846	1938	"	171
280	"	"	779	439	"	"	872	584	1937	"	942	712	"	"	107	848	"	"	73
289	"	"	825	442	"	"	945	587	"	"	852	719	1937	"	725	851	"	"	146
291	"	PC	14	448	"	"	967	599	"	"	672	721	"	PC	306	855	"	"	29
302	"	M	731	449	"	"	962	602	"	"	565	728	1938	M	132	858	"	"	35
309	"	"	274	452	1938	"	117	607	"	"	795	729	"	"	128	862	"	"	180
318	"	"	809	463	1937	"	813	610	1938	"	43	730	"	"	100	869	"	"	124
319	"	"	808	466	"	"	823	617	"	"	25	733	"	"	77	877	"	"	33
321	"	"	785	470	"	"	763	620	"	"	13	734	1937	"	937	880	"	"	157
323	"	"	922	472	"	"	957	629	"	"	129	740	1938	"	214	887	"	"	154
324	"	"	794	477	"	"	951	632	1937	"	787	742	"	"	85	892	"	"	90
326	"	"	842	481	"	"	895	635	1938	"	1	745	1937	PC	146	895	"	"	177
327	"	"	775	484	"	"	876	641	"	"	74	748	"	M	523	898	"	"	218
332	"	"	769	486	"	"	792	642	"	"	112	757	1938	"	87	900	"	"	175
340	"	"	703	489	"	"	894	643	1937	"	953	758	"	"	71	901	"	"	59
350	"	"	721	492	"	"	902	649	1938	"	153	761	1937	"	809	904	"	"	234
358	1938	"	47	512	1938	"	68	651	"	"	8	766	1938	"	66	908	"	"	52
367	1937	"	799	514	1937	"	876	660	1937	"	885	768	"	"	96	910	"	"	133
370	"	"	858	515	"	"	961	668	"	"	750	772	"	"	242	916	1937	"	741
375	"	"	843	517	"	"	960	676	"	"	879	778	"	"	87	924	1938	"	252
380	"	"	897	520	1938	"	5	680	"	"	679	782	1937	"	970	925	"	"	176
388	"	"	973	522	1937	"	975	683	"	"	580	787	1938	"	98	929	"	"	69
391	"	"	791	524	"	"	840	686	"	"	806	790	"	"	206	932	"	"	164
394	"	PC	292	528	"	"	910	688	1938	"	111	794	"	"	149	943	1937	PC	244
399	"	"	296	531	"	"	785	690	"	"	143	797	"	"	81	953	1938	M	70
403	"	M	948	540	1938	"	113	692	"	"	75	804	1937	"	862	956	"	"	190
407	"	"	764	544	1937	"	918	695	1937	"	347	806	"	PC	242	959	"	"	233

1937 Madras Weekly Notes = All India Reporter

MWN		AIR		MWN		AIR		MWN		AIR		MWN		AIR		MWN		AIR	
3	1937	M	259	100	1937	PC	27	206	1937	M	531	318	1937	M	548	410	1937	M	597
5	"	"	232	103	"	"	31	210	"	"	487	320*b*	"	"	528	412	"	"	666
7	"	"	217	108	"	M	367	212	"	"	490	321	"	"	687	419	"	"	679
9	"	"	427	109	"	"	349	217	"	"	591	322	"	"	492	422	"	"	674
14	"	"	569	113	"	"	424	220	"	"	576	323	"	"	480	423	"	"	409
17	"	"	301	115	"	"	332	221	"	"	703	324	"	"	654	424	"	PC	101
22	"	"	273	118	"	"	656	227*a*	"	"	340	330	"	"	716	427	"	M	610
23	"	"	286	122	"	"	458	227*b*	"	"	509	336*b*	"	"	421	439	"	"	364
24	"	"	401	125	"	"	496	230	"	"	449	340	"	"	419	442	"	"	618
27	"	"	366	129	"	"	353	232	"	"	580	341	"	"	604	456	"	"	634
28	"	"	472	132	"	"	501	234	"	"	529	342	"	"	694	460	"	"	672
31	"	"	385	135	1936	PC	301	236	"	"	831	344	"	PC	4	462	"	"	713
35	"	"	385	137	1937	M	533	239	"	"	504	348	"	M	721	464	"	"	547
41	"	"	285	138	"	"	484	243	"	"	325	353	"	"	554	465*a*	"	"	429
42	1936	PC	332	141	1938	"	41	244	"	"	267	354	"	"	584	489	"	"	375
46	1937	M	360	143*b*	1937	"	403	245	"	"	520	355	"	"	760	506	"	"	741
48	"	"	356	145	"	"	523	248	"	PC	39	356	"	"	675	510	"	"	780
50	"	"	272	150	"	"	411	251	"	"	42	363	"	"	565	511	"	"	300
52	"	"	406	158	"	"	482	255	"	M	335	368	1936	"	876	512	"	"	344
53	"	"	313	164	"	"	476	258	"	"	582	372	1937	"	605	513	1938	"	259
56	"	"	311	167	"	"	651	261	"	"	227	374	"	"	556	515	1937	"	549
57	"	"	436	169	"	PC	24	262	"	"	589	375	"	"	338	518	"	"	405
59	"	"	310	172	"	M	535	264	"	"	461	376	"	"	579	519	"	"	585
63*a*	"	PC	35	173	"	"	448	277	"	"	342	377	"	"	270	520	"	PC	46
63*b*	"	"	36	178	"	"	321	279	"	"	727	379	"	"	308	524	"	M	551
66	"	"	1	184*a*	"	"	534	282	"	"	685	381	"	"	284	526	"	"	560
70	1936	"	285	186	"	"	478	293	"	"	559	382	"	"	563	528	"	"	446
74	1937	M	161	189	"	"	303	294	"	"	797	385	"	PC	108	529	"	"	511
76	"	"	481	194	1938	"	111	296	"	"	631	392	"	M	314	536	"	"	265
78	"	"	345	195	1937	"	503	299	"	"	544	399	"	"	562	537	"	"	755
82	"	"	158	196	"	PC	8	301	"	"	645	400	"	"	398	546	"	PC	119
84	"	"	219	197	"	M	557	303	"	"	571	403	"	"	647	551	"	M	711
87	"	"	434	199	"	"	481	309	"	"	538	404	"	"	677				
90	"	"	341	203	"	"	444	313	"	"	681	406	"	"	433	565	"	"	809
97	"	PC	21	205	"	"	348	317	"	"	594	409	"	"	315	577	"	"	577

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
578	1937	M	287	708	1937	M	750	928	1937	M	961	1073	1938	M	98	1193	1938	M	248
582	"	"	451	712	"	PC	143	929	1938	"	19	1075	"	"	23	1195*b*	"	"	128
587	"	"	699	717	"	"	139	933	1937	"	810	1077	"	"	107	1197	1937	"	794
591	"	"	699	721	"	M	696	934	"	PC	261	1091	"	"	199	1201	1938	"	174
593	"	PC	69	730	"	"	822	937	"	"	276	1084	"	"	141	1202	1937	PC	299
602	"	M	555	733	"	"	968	939	"	"	271	1086	"	"	27	1204	1938	M	242
603*a*	"	"	640	744	"	PC	146	942	"	M	962	1083	1937	"	791	1208	1937	PC	306
603*b*	1936	"	954	746	"	M	807	943	1938	"	113	1089	"	"	862	1211	"	"	292
604	1937	"	653	747	"	"	764	946	1937	"	922	1090	"	"	872	1215*a*	1938	M	132
605	"	"	644	749	"	"	779	960	"	"	894	1092	"	PC	174	1215*b*	1937	"	869
606	1936	PC	318	754	"	"	767	962*a*	"	"	967	1099	1938	M	124	1219	1938	"	177
610	1937	M	456	757	"	"	785	966	"	PC	185	1104	"	"	90	1221	"	"	85
611	"	"	326	759	"	"	789	970	"	M	970	1106	"	"	96	1223*b*	"	"	227
613	"	"	606	762	"	"	930	973	"	"	878	1103	"	"	164	1229	"	"	190
614	"	"	607	773	"	"	902	974	1938	"	68	1117	1937	"	940	1231	"	"	189
615	"	PC	50	787	1938	"	115	981	1937	"	944	1118	1938	"	146	1242	"	"	112
619	1936	"	312	790	1937	"	745	996	1938	"	130	1124	1937	"	792	1249	"	"	236
626	1937	M	648	794	"	PC	127	999	"	"	129	1126	1938	"	74	1251	"	"	175
627	"	"	368	800	"	M	731	1001	1937	"	843	1131	"	"	66	1252	"	"	241
629	"	PC	10	805	"	PC	209	1004	"	"	876	1132	"	"	192	1254	"	"	202
633*b*	"	"	179	810	"	"	242	1010	"	"	858	1136	1937	"	960	1256	"	"	255
636	"	M	494	817	"	M	957	1014	"	"	915	1138	"	"	897	1259	"	"	215
638	"	"	578	821	"	"	735	1017	1938	"	69	1145	"	"	973	1261	"	"	224
641	"	PC	61	834	"	"	725	1018	"	"	33	1146	1938	"	70	1262	"	"	161
649	"	"	107	835	1938	"	136	1020	"	"	1	1148	1937	PC	223	1267	"	"	232
650	"	M	316	840	1937	PC	189	1024	"	"	87	1153	1938	M	157	1268	"	"	263
654	"	"	667	844	"	M	515	1027	"	"	81	1157	"	"	67	1269	"	"	214
659	"	"	786	849	1938	"	92	1032	1937	"	852	1159	"	"	266	1271	1937	PC	201
661	"	"	799	853	"	"	102	1040	1938	"	30	1163	1937	"	942	1280*a*	1938	M	226
663	"	PC	114	858	1937	PC	133	1042	"	"	32	1166	1938	"	25	1281	"	"	225
667	"	M	393	864	"	M	825	1043	"	"	78	1167	1937	"	948	1285	"	"	133
672	"	"	840	865	"	"	808	1047	1937	"	945	1170	1938	"	71	1288	"	"	246
675	"	PC	124	874	"	"	951	1050	1938	"	75	1171	"	"	209	1290	1937	"	846
678	"	"	163	878	"	"	975	1052	"	"	77	1173	"	"	212	1292	1938	"	257
683	"	"	233	888	"	"	813	1053	"	"	143	1175	"	"	178	1297	1937	PC	240
689*a*	"	"	239	891	"	"	918	1054	1937	"	895	1176	1937	"	819	1299	"	"	244
690	"	M	823	895	"	"	953	1056	1938	"	185	1179	"	PC	296	1305	1938	M	153
692	"	"	842	899	1938	"	47	1060	1937	"	937	1183	1938	M	55	1307	"	"	283
693	"	"	763	904	1937	PC	152	1063	1938	"	5	1185	"	"	171	1309	"	"	206
694	"	"	660	913	"	M	816	1065	"	"	50	1186	"	"	100	1313	1937	"	718
700	"	"	769	916	"	"	642	1068	"	"	29	1189	"	"	151	1321	1938	"	172
706	"	"	965	918	"	"	811	1070	"	"	173	1190	"	"	53	1337	"	"	154
				921	1938	"	117	1072	"	"	213	1192	"	"	144	1343	"	"	252

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MCrC	AIR			MCrC	AIR			MCrC	AIR			MCrC	AIR			MCrC	AIR		
6	1937	M	191	88	1937	M	272	133	1937	M	547	255	1937	M	672	317	1938	M	66
7	"	"	291	92	"	"	286	144	"	"	711	267	"	"	822	318	"	"	192
10	1936	PC	242	95	"	"	356	151	"	"	713	269	"	"	968	332	"	"	172
36	1937	M	406	97	"	"	535	153	"	"	634	272	"	"	951	334	1937	"	792
37	1936	PC	176	98	"	"	273	179	"	"	809	278	1938	"	129	337	1938	"	130
41	1937	M	301	100	"	"	341	180	"	"	494	284	1937	"	794	374	1937	"	944
48	"	"	311	105	"	"	448	188	"	"	578	289	1938	"	173	376	"	PC	119
51	"	"	313	112	"	"	716	189	"	"	755	295	"	"	29	381	"	"	179
73	"	"	490	113	"	"	480	196	"	"	618	298	"	"	35	384	1938	M	112
77	"	"	487	114	"	"	637	222	"	"	696	310	"	"	74	391	"	"	128
80	"	"	534	116	"	"	492	226	"	"	808	311	1937	"	975	392	"	"	248
81	"	"	321	124	"	"	654	228	"	"	825	314	1938	"	213	395	"	"	283

5 Income Tax Reports=All India Reporter

ITR	AIR			ITR	AIR			ITR	AIR			ITR	AIR			ITR	AIR		
44	1937	L	445	111	1937	P	1	246	1937	C	583	416	1937	PC	239	464	1937	L	721
49	"	M	316	116	"	S	41	267	"	N	154	417	"	O	416	490	"	"	884
62	"	L	305	118	1938	C	143	270	"	PC	189	424	"	M	777	502	"	"	814
65	"	"	397	127	1937	L	172	279	"	L	338	428	"	PC	261	506	1938	"	105
70	"	M	300	137	"	"	830	307	1933	"	44	435	"	M	745	511	1937	"	880
78	"	"	515	160	1938	M	57	329	1937	"	308	448	"	R	258	519	"	S	201
90	"	PC	36	170	1937	PC	133	338	"	B	214	456	"	"	257	527	"	"	234
97	"	M	393	202	"	"	139	345	"	L	878	459	"	L	876				

ITR	AIR		ITR	AIR		ITR	AIR		ITR	AIR		ITR	AIR	
534	1938	M 52	560	1937	R 380	591	1937	L 915	648	1938	C 241	680	1938	S 33
539	1937	B 479	569	"	L 905	596	1938	N 16	664	1937	R 102	697	"	M 145
544	"	A 708	580	"	R 337	600	"	M 59						
548	"	L 897	584	1938	B 41	631	1937	A 770	677	1938	S 49	703	"	" 148

LIST OF CASES OVERRULED & REVERSED

IN

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Aiyaswami Iyer v. District Board, Tanjore, (1930) 52 Mad 972=57 M L J 510=30 M L W 289=1929 M W N 773=A I R 1930 Mad 43=121 I C 601	Overruled in A I R 1937 Mad 786.
Ganapathi Bhatta, *In re*, (1913) 36 Mad 308=24 M L J 463=13 M L T 360=14 Cr L J 214=19 I C 310	Impliedly Overruled in A I R 1937 Mad 301 (F B).
Karri Bapanna v. Yerramma, (1923) 45 M L J 324=18 M L W 49=1923 M W N 452=33 M L T 46=A I R 1923 Mad 718=74 I C 218	Overruled in A I R 1937 P C 1
Krishnan Chettiar v. Maniokammal, (1934) 57 Mad 718=66 M L J 70=39 M L W 73=1933 M W N 1401=A I R 1934 Mad 138=147 I C 1139	" A I R 1937 Mad 699 (F B).
Kumara Appan Srirangachariar v. Annamalai Chettiar, (1935) 1935 M W N 348=41 M L W 485=A I R 1935 Mad 647=156 I C 331	Reversed in A I R 1937 Mad 134.
Rajagopala Chettiar v. Hindu Religious Endowment Board, (1934) 40 M L W 288=1934 M W N 1125=A I R 1934 Mad 555=152 I C 386	Overruled in A I R 1937 Mad 232 (F B).
Subramania Pillai v. Seethai Ammal, (1911) 36 Mad 135=24 M L J 457=(1911) 2 M W N 198=10 M L T 260=12 I C 38	" A I R 1937 Mad 385 (F B).
Vellayappa Chetti v. Subramanian Chettiar, (1927) 50 Mad 482=51 M L J 880=24 M L W 803=1926 M W N 978=A I R 1927 Mad 137=99 I C 559	" A I R 1937 Mad 254 (F B).

THE
ALL INDIA REPORTER
1937
Madras High Court

** A. I. R. 1937 Madras 1

VENKATARAMANA RAO, J.

S. Muthuswami Maniagaran.

v.

P. E. R. M. Annamalai Chettiar Firm.

Second Appeal No. 492 of 1934, Decided on 2nd March 1936.

*** (a) Negotiable Instruments — Promissory note—Right to sue—Party to instrument is not allowed to plead that the executant was acting for undisclosed principal—But plaintiff can make alternative claim on consideration.**

It is contrary to all established principles that in an action on a bill of exchange or promissory note against a person whose name properly appears as a party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. None but the executants must be made liable. But it is open to the plaintiff to frame his case in an alternative form and to sue both on the hundi and alternatively upon the consideration: *A I R 1918 P C 146* and *23 Mad 597, Rel. on.* [P 3 C 1, 2]

*** (b) Promissory note—Minor not party to it—Obligation arising external to that under pro-note—Ss. 91 and 92, Evidence Act, do not apply—Suit against minor is maintainable.**

Where the obligation is external to the obligation arising on the making of the promissory note and the minor is not a party to the pronote, the bar of Ss. 91 and 92 of the Evidence Act will not apply and suit against minor is maintainable: *23 Mad 597*; *A I R 1925 Cal 1153* and *A I R 1935 Mad 23, Ref.* [P 3 C 2]

*** (c) Minor—Guardian is not empowered to impose personal liability on minor by contracts made—Minor is not bound by contracts not charging his estate.**

A guardian has no power to make contracts in the name of his ward so as to impose a personal liability upon him and a minor cannot be bound by contracts entered into by the guardian which do not purport to charge his estate: *11 Bom 551* (*P C*) and *20 Bom 61, Ref.* [P 3 C 2]

**** (d) Hindu Law—Minority and Guardianship—Guardian entering into contract—His fastening liability on minor's estate—Essential requisites mentioned—Mere question of benefit and incurring of debt for necessary purposes is not a correct test of liability of minor.**

Two essential requisites for fastening the liability on the estate of a minor on a contract entered into by the guardian, apart from any question of necessaries, are:(1) the liability must be one imposed by the personal law and (2) the contract should purport to be on behalf of the minor. Therefore the test is not a mere question of benefit nor the mere fact that the debt was incurred for necessary purposes: *A I R 1931 Mad 140, Ref.* [P 4 C 1]

**** (e) Hindu Law—Minority and Guardianship—No personal binding on minor unless promise by guardian is made to pay or keep alive debt for which minor's property is liable.**

Although a guardian may under certain circumstances sell or charge his ward's property, he cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages unless such promise is made merely to pay or to keep alive a debt for which the ward's property was liable: *Case law referred.* [P 4 C 2]

(f) Hindu Law—Minority and Guardianship—'Personal law' meaning of.

By 'personal law' in *A I R 1919 Mad 641* in the case of a minor is meant Hindu Law and must not be understood in contradistinction to the statute law: *A I R 1919 Mad 641, Expl.*; *AIR 1931 Mad 140*; *A I R 1928 Mad 467, Rel. on*; *Case law referred.* [P 4 C 2]

*** (g) Hindu Law—Minority and Guardianship—Contract by guardian in his name and not for minor—No decree can be passed against minor's estate.**

Where the contract is entered into by the guardian in his own name and does not purport to be on behalf of the minor no decree can be passed against the estate of the minor on such a contract: *19 Cal 507* (*P C*), *Rel. on.* [P 6 C 1, 2]

**** (h) Hindu Law — Minority and Guardianship—Debt—Promissory note executed by guardian even for necessary purposes or necessaries does not bind minor nor his estate unless the moneys are proved to be spent for the purposes.**

Where the only evidence of the debt is the promissory note and it connotes prima facie an obligation incurred by the guardian, it cannot at the same time be inferred that the obligation is also on behalf of the minor. Hence though the money borrowed for cultivation and Court

expenses may be for a necessary purpose, still the estate of the minor cannot be rendered liable. Cultivation and litigation expenses may be deemed to be necessaries. But when the supplies were not necessaries but the moneys were advanced for the purchase of necessaries, it must be shown that the money was actually expended on necessaries. Therefore the actual application of the money for the necessaries must be shown. [P 6 C 2 ; P 7 C 1]

****(i) Hindu Law—Minority and Guardianship—Guardian's right to be reimbursed and his right to indemnity from minor's estate—Creditor of guardian can be subrogated and directly paid from minor's estate—Establishment of facts and foundation must be laid for such decree—Guardian's right to indemnity must be proved in each case.**

Where as between the minor and the guardian, the guardian wants to be reimbursed, and entitled to indemnity from the minor's estate, the creditor of the guardian can be subrogated to his right and can have direct recourse against the estate of the minor. But before such a decree can be given, facts must be established and foundation must be laid for such a decree. It must be shown in each case that the guardian has a right of indemnity. There seems to be no machinery for ascertaining that indemnity in an ordinary suit brought by a creditor to enforce a debt. All that the creditor will be entitled to will be a declaration that he should be subrogated to the guardian's right of indemnity leaving the creditor to work out his rights against the estate of the minor in an appropriate action. [P 7 C 1, 2]

B. Sitarama Rao and *G. Thiagarajan* —for Appellant.

A. C. Sampath Ayyengar—for Respondent.

Judgment.—The suit is upon a promissory note executed by defendants 1 and 2 in favour of the plaintiff for Rs. 2,000 on the 1st August 1929. Defendant 3 is the son of defendant 1. The father of defendant 3 died on 8th May 1923, leaving behind him a widow who is defendant 1 and a minor son defendant 3 herein and two unmarried daughters. The properties left by the father were managed by defendant 1 as defendant 3's guardian. In 1926 she purported to execute a power of attorney in favour of defendant 2 authorising him to manage the estate on her behalf. On the 27th September 1927 both defendants 1 and 2 borrowed a sum of Rs. 1,000 from the plaintiff on a promissory note Ex. A-1 bearing the said date. The said promissory note runs as follows :

Promissory note executed on 27th September 1927, in favour of P. A. R. M. Annamalai Chettiar Avergal by us both jointly, viz., (1) Kamakshi Ammal, wife of Nithyananda Muthuswami Moniyagarar, residing at Puthayakudi, Ayakudi Zamin, Palni Taluk and (2) her authorized Agent, Vadivelu Maniyagarar, son of Viswanatha Maniyagarar, residing at the said place.

We have on this date received in cash Rs. 1,000 from your partner Periakaruppan Chettiar Avergal, for our family expense and for pannai, etc., expense. We shall on demand bring and pay you or order in cash the same together with interest thereon at 2 per cent per mensem from this date and get back this.

Two other promissory notes were executed : one on 28th November 1927 for Rs. 200 and another on 8th January 1928 for Rs. 100. In renewal of these three promissory notes on 1st August 1929 defendants 1 and 2 executed the suit promissory note Ex. A for Rs. 2,000. The said promissory note is in these terms :

Promissory note executed in favour of P. A. R. M. Annamalai Chettiar Avergal, son of Valayapatti Nagappa Chettiar, by us both jointly, viz., (1) Kamakshi Ammal, wife of Nithyananda Muthuswami Maniagarar, residing at Pudhiyakudi, Ayakudi Zamin, Palni Taluk, and (2) her authorized agent, Vadivelu Maniagarar, son of Viswanatha Maniagarar, the said place :

The sum due to you by us as on this date inclusive of the principal and interest in respect of our looking into the account with your partner Periakaruppan Chettiar Avergal, as regards the three pronotes executed by us in your favour for Rs. 1,000 on the 11th Purattasi of Prabhava (27th September 1927) and for Rs. 200 on the 13th Karthikai and for Rs. 100 on the 24th Margali is Rs. 2,000. We shall on demand bring and pay you or order in cash the same together with interest thereon at 2 per cent per mensem from this date and get back this.

(Sd. on four one-anna stamps) Kamakshi Ammal.
" " " V. Vadivelu Maniagarar.

The defence on behalf of defendant 3 is that on the promissory notes he cannot be rendered liable and further that there was no necessity to incur the said debt. The District Munsif who tried the case was of opinion that in so far as Ex. A-1 was concerned, there was necessity and therefore he would support the plaintiff's claim to the extent of the amount advanced under Ex. A, and gave a decree for Rupees 1,000 with interest thereon against the defendants. The learned Subordinate Judge confirmed his decision to the extent of the amount covered by Ex. A-1. On the evidence he came to the conclusion that on the date of the promissory note Ex. A-1 the resources of the family were considerably crippled with the result that for purposes of cultivation, etc., money had to be borrowed, that the income from the properties of the minor were hardly sufficient even for paying interest on the debts, that the lands were not leased out but were kept under pannai cultivation of the family which required naturally a large establishment, that these circumstances

being known to the plaintiff there was no necessity to make an elaborate enquiry as to the purpose of the loan, that these facts clearly showed to the mind of the plaintiff that, for urgent family and litigation expenses, the money was required and therefore the circumstances in which the loan was taken showed clearly that there was a necessity for the loan, namely

for the purpose of carrying on the ordinary vocation of agriculturists by which crops had to be raised for the purpose of maintaining the family and also for the expenses of the litigation which was actually pending.

In second appeal before me it is contended by Mr. Sitarama Rao on behalf of the minor defendant 3 that the decree of the Subordinate Judge is wrong for more than one reason. His main contentions are: (1) On the promissory note the minor cannot be rendered liable and this action is not maintainable ; (2) even if the claim is based upon the consideration and not on the note, there is no borrowing on behalf of the minor and therefore his estate could not be rendered liable. From the form of the note it is clear that none but the executants were intended to be made liable. In 46 Cal 663,[1] their Lordships of the Privy Council have definitely laid down that the promissory notes must be so drawn that in form they bind the person intended to be made liable and that it is of the utmost importance that the name of the person or firm to be charged upon a negotiable instrument should be clearly stated on the face or on the back of the document and it

is contrary to all established principles that in an action on a bill of exchange or promissory note against a person whose name properly appears as a party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

This statement of the law gives effect to the view taken by Davis, J. in 23 Mad 597[2] and overrules that of Subramania Aiyer, J. in that case where the learned Judge observed :

No doubt according to the English law none but those whose signatures appear on a bill of exchange or a negotiable promissory note can be sued thereupon. No authority was cited to show that that rule has been adopted in this country.

Their Lordships of the Privy Council in the said case[1] also stated that :

It would have been open to the plaintiffs, had they thought fit, to have framed their case in an alternative form and to have sued both on the hundis and alternatively upon the consideration.

Therefore in this case having regard to the allegations in the plaint, especially para. 6, the plaint may be treated as having made a claim in the alternative upon the consideration. To this Mr. Sitarama Rao contends that under the recent ruling of the Full Bench in 1935 M W N 855,[3] that where the loan and the note are simultaneous, action on the consideration is not permissible and you cannot sue upon the consideration apart from the note. But there are two answers to this contention, viz., (1) there was an antecedent liability covered by Ex. A-1 and (2) further so far as the minor defendant 3 was concerned, the action cannot be viewed as one on the note. The obligation so to speak, as described by Shepherd, J. in 23 Mad 597,[2] "is external to the obligation arising on the making of the promissory-note" and in such cases the bar of Ss. 91 and 92, Evidence Act, will not apply, because the minor defendant 3 was not a party to the note: vide 41 C L J 535[4] and 67 M L J 595.[5] I am therefore of opinion that the suit is maintainable.

The next argument of Mr. Sitarama Rao deserves more consideration. It is settled law that a guardian has no power to make contracts in the name of his ward so as to impose a personal liability upon him and that a minor cannot be bound by contracts entered into by the guardian which do not purport to charge his estate: vide 11 Bom 551[6] at p. 561 and 20 Bom 61.[7] When it is said that a minor is not personally liable it means not only exemption from liability to arrest but also that a decree cannot be passed against his estate (vide the observations of Wallis, C. J. in 42 Mad 185[8] at p. 192). But there are two exceptions engrafted on this rule (1) where the contract is for necessaries supplied to or on behalf of the minor, (2)

1. Sadasuk Janki Das v. Sir Kishen Pershad, A I R 1918 P C 146=50 I C 216=46 I A 33=46 Cal 663 (P C).
2. Krishna Ayyar v. Krishnaswami Ayyar, (1900) 23 Mad 597.
3. Ramaswami Pillai v. Murugiah Padayachi, A I R 1936 Mad 179=161 I C 273=59 Mad 268=70 M L J 267=1935 M W N 855 (F B).
4. Hari Mohan Ghose v. Surendra Nath, A I R 1925 Cal 1153=88 I C 1025=41 C L J 535.
5. Chockalinga Chettiar v. Palaniappa Chettiar, A I R 1935 Mad 23=155 I C 184=58 Mad 261=67 M L J 595.
6. Waghela Rajsanji v. Shekh Masludin, (1887) 11 Bom 551 (P C).
7. Maharana Shri Ranmal Singh v. Vadilal Vakhat Chand, (1896) 20 Bom 61.
8. Ramajogayya v. Jagan Nadhan, A I R 1919 Mad 641=49 I C 872=42 Mad 185=36 M L J 29.

where the liability is one to which the minor is subject under the personal law, in this case the Hindu law. The latter exception is thus enunciated by the Full Bench of the Madras High Court in 42 Mad 185[8] at p. 196 :

> No decree should be passed against a minor or his estate on a contract entered into on his behalf by a guardian under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject.

The reason for the rule is thus stated by Seshagiri Ayyar, J.:

> Where an infant's estate would be liable but for the interposition of the guardian, I fail to see why the latter undertaking that liability should not bind the estate.

Thus two essential requisites for fastening the liability on the estate on a contract entered into by the guardian apart from any question of necessaries are (1) the liability must be one imposed by the personal law and (2) the contract should purport to be on behalf of the minor. Therefore the test is not a mere question of benefit nor the mere fact that the debt was incurred for necessary purposes (vide also 54 Mad 163[9] at p. 183), the observations made in some of the cases that where the debt is one incurred by the guardian for necessary purposes his estate can be rendered liable, are too broadly made. In 20 Bom 61,[7] where a suit was brought against a minor to recover the money advanced to his mother and guardian, it was proved that a greater portion of the moneys advanced was for legal and necessary purposes of the minor and the Subordinate Judge who dealt with the case gave a decree against the estate of the minor. Their Lordships of the High Court reversed the decision. Foulton, J. observed as follows :

> The case in 6 M I A 393[10] was one in which the guardian had exercised her powers of mortgaging the estate, and the ruling that in respect of such a transaction a bona fide creditor should not suffer when he had acted with due caution cannot in our opinion be extended to a case in which it is sought to make the ward personally liable for the debt.

That this is the correct view in 6 M I A 393[10] derives support from the observations of the Privy Council in 19 Cal 507[11] and 54 All 564[12] at p. 571. The result of the case law is in my opinion correctly summed up thus by Trevelyan in his book on minors at p. 169 :

> Although a guardian may under certain circumstances sell or charge his ward's property, he cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages, unless such promise is made merely to pay or to keep alive a debt for which the ward's property was liable.

Mr. Sampath Ayyangar contended that the expression "personal law" in the answer to the reference to the Full Bench in 42 Mad 185[8] should not be understood as referring to Hindu law but must be understood in contradistinction to the statute law, and that the cases referred to by Seshagiri Ayyar, J. at p. 195 support his contention. I do not think his contention tenable. I am inclined to agree with Curgenven, J. that by "personal law" is meant only Hindu law : vide 54 Mad 163;[9] also Wallace, J. in 27 M L W 322[13] at pp. 324 and 325. This is also clear from the following observations of Seshagiri Ayyar, J., at pp. 194 and 195 :

> Almost all the High Courts have, since 11 Bom 551,[6] held that the liability of the minor under Hindu law is not affected by the fact that the guardian has incurred that obligation.

After referring to a number of cases in support of his view the learned Judge wound up by saying that "Serjeant, C. J., Telang, Mookerjee, and Muthuswami Ayyar JJ. are among the Judges who enunciated this view." Besides, the examination of some of the cases referred to by him at p. 195 tends to confirm the view that an exception was intended to be made only in the case of a liability imposed by Hindu law: 14 Bom 562,[14] one of the cases referred to by him, is a case decided by Serjeant, C. J. and Telang, J. In that case the debt was incurred for the funeral ceremony of the father and Serjeant, C. J. observes thus:

> He was the nearest male relative and guardian according to Hindu law, of the orphan minor, whose duty it was to provide for the funeral ceremonies of his deceased father . . . . So far, therefore, as the loan was required for the proper

9. Zamindar of Polavaram v. Maharaja of Pithapuram, A I R 1931 Mad 140=135 I C 17=54 Mad 163=60 M L J 56.
10. Hanuman Prasad v. Mt. Bobooee, (1854-1857) 6 M I A 393=18 W R 81=2 Suther 29=1 Sar 552 (P C).
11. Indur Chunder Singh v. Radha Kishor Ghose, (1892) 19 Cal 507=19 I A 90=6 Sar 185 (P C).
12. Benares Bank Ltd., v. Hari Narain, A I R 1932 P C 182=137 I C 781=59 I A 300=54 All 564 (P C).
13. Ramakrishna Reddiar v. Chidambara Swamigal, A I R 1928 Mad 407=108 I C 282=54 M L J 412=27 M L W 322.
14. Nathuram v. Shoma Chhagan, (1890) 14 Bom 562.

discharge of that duty, it was a charge on the estate of the deceased.

20 Bom 61[7] has already been referred to by me. 26 Mad 330[15] was a clear case of liability under Hindu law. As pointed out by the learned Judges:

At the time of the execution of the note the defendant's share of the ancestral estate was liable in respect of the original debt.

Referring to the Privy Council cases in 11 Bom 551[6] and 19 Cal 507[11] the learned Judges make the following observations:

In these cases the guardian purported to contract on behalf of a ward so as to impose a personal liability on the latter, there being no pre-existing liability on the part of the ward at the time the guardian entered into the contract. In the present case the effect of the guardian's contract was to keep alive a liability to which, at the date of the contract, the minor's share of the ancestral estate was already subject.

23 I C 877[16] was a case decided by Ashutosh Mookerjee and Beachcroft, JJ. In that case the mother of the minor son executed a bond to pay the debt of his deceased father. Referring to 20 Bom 61[7] and 35 Cal 320,[17] the learned Judges observe as follows:

But the cases mentioned are clearly distinguishable. Here, as the recitals in the bond amply indicate, the debt had been contracted during the life time of the father of defendant 1. He was under a pious obligation to pay the debt and it could have been recovered by the creditor out of the assets in his hands. Under the bond the mother entered into an arrangement with the creditor for repayment of this money in instalments convenient to the infant. It is impossible for us to hold that defendant 1 is not liable for repayment of the ancestral debt the satisfaction of which was undertaken on his behalf by his mother under the bond mentioned. The view we take is supported by the decision in 26 Mad 330.[15]

In 39 Mad 915[18] Seshagiri Ayyar, J., himself a party to that decision, observed at p. 917 as follows:

As we are not hampered by any legislative provision regarding documents executed on behalf of a minor, we must be guided by the principles of Hindu law in deciding such cases.

There can be no doubt that what the learned Judges meant in 42 Mad 185[8] by the expression "personal law" is Hindu law. The next case relied on by Mr. Sampath Ayyangar was the decision of a Bench reported in 67 M L J 573,[19] where Pandrang Row, J. made the following observations:

To put the case of the minor at its lowest, the appellant Bank can succeed in fixing the liability on the minor in respect of the promissory-note only if it is shown that the Bank after making reasonable enquiry into the necessity for the execution of the promissory-notes believed in good faith that there was a real necessity for the execution of the promissory-notes.

I do not think the learned Judge meant to lay down any principle which would conflict with the principles laid down in the cases referred to by him in the earlier part of his judgment. After referring to 11 Bom 551[6] and 19 Cal 507,[11] as laying down that on a covenant or a contract entered into by a guardian, though beneficial to the minor, the estate of the minor cannot be rendered liable, he cites 35 Mad 692[20] and 42 Mad 185[8] and concludes:

These Madras decisions have stood unchallenged all these years and must be considered to be good law as far as this presidency is concerned.

After expressing himself thus, the learned Judge considers that even assuming the power of the guardian is the same as that of a manager of a joint family and applying the test enunciated in regard to him, the estate of the minor cannot be rendered liable. Both the cases, 6 M I A 393[10] & 53 All 190,[21] referred to by him in making the said observations, deal with the case of a charge created by the manager of an infant heir on the infant's estate on the one hand and the manager of a joint family estate on the other. As pointed out by the Privy Council in 19 Cal 507,[11] the considerations by which the validity of a charge is judged are not the same in adjudging the binding nature of a contract or a covenant entered into by the guardian. 35 M L W 397[22] is again a case of a liability under the Hindu law coming within the principle enunciated in the Full Bench ruling in 42 Mad 185;[8] also 31 Mad 458.[23] Mr. Sampath Ayyangar also relied on the recent Full Bench

15. Subramania Ayyar v. Arumuga Chetty, (1903) 26 Mad 330.
16. Siva Narayan Ghosh v. Kamakhya Ghose, A I R 1914 Cal 500=23 I C 877.
17. Bhawal Sahu v. Baijnath Pertab Narain Singh, (1908) 35 Cal 320=12 C W N 256.
18. Padma Krishna Chettiar v. Nagamuni Ammal, A I R 1916 Mad 677=30 I C 574=39 Mad 915.
19. The Imperial Bank of India, Madras, v. Veerappan, A I R 1934 Mad 595=151 I C 928 =67 M L J 573.
20. Sankakrishnamurthi v. The Bank of Burma, (1912) 35 Mad 692=11 I C 79=21 M L J 620.
21. Ramkrishna Muraji v. Ratanchand, A I R 1931 P C 136=132 I C 613=58 I A 173=53 All 190 (P C).
22. Meenakshisundaram Chetty v. Ranga Ayyangar, A I R 1932 Mad 696=139 I C 383=35 M L W 397.
23. Duraisami Reddi v. Muthial Reddi, (1908) 31 Mad 458.

decision in 58 Mad 735[24] and some of the observations therein. It was again the case of a father's debt and, therefore, a Hindu law liability coming directly within the decision in 42 Mad 185.[8] Referring to this decision Ramesam, J. observes at pp. 739 and 740 :

> This decision has always been followed in this Court as settling the law, and I do not think that anything has happened since to induce me to depart from that decision. Its effect, as stated by Curgenven, J. in 54 Mad 183,[9] is that any liability to which the minor would be subject under the Hindu law is not the less a liability because it was incurred by his guardian on his behalf.

This supports the view that I have already indicated. Ramesam, J. on the same p. 740 proceeds to refer to 67 M L J 573,[19] and the observations of Pandrang Row, J. referred to by me already, and winds up as follows :

> That decision implies that the minors may be liable on a promissory note under such circumstances.

I do not know whether Ramesam, J. intended to express his concurrence with that view, namely, the belief in the existence of a necessity would entitle a creditor to recover a debt on a promissory note executed by a guardian in respect of a liability which is not imposed by Hindu law from the minor's estate without a charge being created on the estate. If so it is in direct conflict with what he has previously expressed. Reliance was next placed on a commentary on the text of Cautyayana on p. 14 of Colebrooke's Digest, Vol. 1, which states that a loan may be advanced to a guardian on a deed executed by him in his ward's name. The same commentary itself mentions there is no text in support of this view but it is proved by the frequent practice of wise men.

Mr. Sampath Ayyangar next contended that it would work real hardship in practice that a guardian should be obliged to borrow only on a charge being created on the estate where the liability is not imposed by Hindu law. So long as the view expressed by the Full Bench of the Madras High Court on an interpretation of 11 Bom 551[6] and 19 Cal 507[11] prevails, the question of hardship is not a matter for consideration. Again if the contract was entered into by the guardian in his own name and does not purport to be on behalf of the minor, no decree can be passed against the estate of the minor on such a contract. This is clear from the decision of their Lordships of the Privy Council in 19 Cal 507.[11] In that case both the grandmother and the adoptive mother of a minor renewed a lease agreeing to pay a certain annual rent. A suit was brought for the recovery of rent against the minor on the strength of that lease. They were at the time of renewal admittedly managing the estate and it was during the course of such management this renewal was made. Their Lordships refused to pass a decree against the estate of the minor. Dealing with an argument advanced on behalf of the plaintiff that the lease was taken really for the minor and for his benefit, based on 6 M I A 393,[10] their Lordships observe :

> In that case, however, the managers of an infant estate were actually dealing by way of mortgage with a portion of that estate, and it was held that the manager might do so in a case of need or for the benefit of the estate. In the present case the mother and widow of Gopi Mohun Ghose were not *dealing with, and did not purport to deal with or affect his estate, but merely incurring new obligations which it is now sought to transfer from them to the estate.* (The italics are mine.) It may be that, as between them and the infant, they might be able, in some circumstances, to show that the estate ought to bear the burden they had taken upon themselves, but that is not the question raised in this case, in which the plaintiffs seek to establish a direct relation between themselves and the estate of the infant and a liability on the part of the infant now that he is of age, and of his estate, to fulfil the obligations entered into by the lessees in their own name.

It is contended by Mr. Sampath Ayyangar that the borrowing must be deemed to be also on behalf of the minor. But the only evidence of the debt is the promissory note and it connotes prima facie an obligation incurred by the guardian and it cannot at the same time be inferred that the obligation was also on behalf of the minor. It seems to me, therefore, that though the money borrowed for cultivation expenses may be for a necessary purpose, still the estate of the minor defendant 3 cannot be rendered liable.

It is contended by Mr. Sampath Ayyangar that the cultivation and the litigation expenses may be deemed to be necessaries, and, therefore, the minor's estate can be rendered liable. But when the supplies were not necessaries, but the moneys were advanced for the purchase of necessaries, it must be shown that the money was actually expended on necessaries. Therefore, the actual application of the money

24. Satyanarayana v. Mallayya, A I R 1935 Mad 447=155 I C 581=58 Mad 735=68 M L J 540 (F B).

for the necessaries must be shown. In fact an issue was raised in the first Court, Issue 3, viz.:

Whether the estate of defendant 3 or defendant 3 has derived any benefit out of the consideration of the promissory note and whether the suit debt is binding on defendant 3.

The finding of the learned District Munsif on this issue is as follows :

The plaintiff admits that he has not made enquiries as to the actual utilization of the amounts borrowed from him and there is no evidence to the effect that the estate of defendant 3 has been benefited from the amounts borrowed.

But the learned Subordinate Judge after holding in para. 3 of his judgment that the plaintiff believed in the existence of a necessity and, therefore, lent the money and that the requirements of the law were satisfied, proceeded to find in para. 4 thus :

The loan was for the purpose of cultivating the minor's lands. The litigations were litigations against the minor and the amounts were utilized and spent by defendant 1, certainly as guardian of defendant 3, and not in her personal capacity.

Mr. Sitarama Rao attacks this finding on the ground that there is absolutely no evidence on record to justify this observation of the learned Judge. The learned Judge does not find whether the amounts borrowed under Ex. A-1 was spent for litigation and cultivation expenses and how much for each. No evidence has been pointed out to me by Mr. Sampath Ayyangar on which the observation or the finding is based. In fact the plaintiff himself admits in his evidence :

I am responsible for the language in Ex. A-1. I did not think it necessary to refer to Court expenses. I have not made any subsequent enquiry as to how the sum of Rs. 1,000 lent under Ex. A-1 was actually utilized.

Therefore on the record as it stands there is absolutely no evidence that any portion was actually utilized either for cultivation or litigation expenses, except the bare recital in the promissory note which does not refer to any Court expenses at all. Another argument advanced is that as between the minor and the guardian, the guardian would be certainly entitled to be reimbursed, and therefore the guardian would be entitled to indemnity from the minor's estate, and in such circumstances the creditor can be subrogated to his right and can have direct recourse against the estate of the minor. For this contention reliance is placed on 35 Mad 692,[20] and on the observations of the learned Judges of the Full Bench in 42 Mad 185.[8] It is not in every case that such a decree can be given. Before such a decree can be given facts must be established and foundation must be laid for such a decree. The nature and extent of the right of indemnity is thus stated by Jessel, M. R. in 15 Ch D 548[25] :

With regard to the point that has been argued, I understand the doctrine to be this: that where a trustee is authorized by a testator, or by a settlor—for it makes no difference—to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say: "I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets, that is I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade." The first right is his general right by a contract, because he trusted the trustee or executor; he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in equity in which persons are allowed to follow trust assets. But if the trustee has wronged the trust estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts has put them into his own pocket, then it appears to me there is no such equity, because the cestui que trust are not taking the benefit. The trustee having pocketed the money, the title of the creditor, so to speak to be put in the place of the trustee is a title to get nothing, because nothing is due to the trustee.

Thus it must be shown in each case that the guardian has a right of indemnity and as pointed out in 35 Cal 320[17] at p. 327 :

It would have to be proved that the guardian was entitled to indemnity against the estate of the infant for the whole of the transactions of her guardianship: vide also 34 Ch D 597.[26]

Till that is done no decree can be given against the estate. So far as I know there seems to be no machinery for ascertaining that indemnity in an ordinary suit brought by a creditor to enforce a debt. All that the creditor will be entitled to will be a declaration that he should be subrogated to the guardian's right of indemnity leaving the creditor to work out his rights against the estate of the minor in an appropriate action. Any how in this case no foundation is laid for passing a decree against the estate because it cannot be known if, when the entire accounts of the transactions of the guardian are taken into consideration, the guardian will be entitled to a right of indemnity or not. In the result I allow the appeal and reverse the decree of the Subordinate Judge and dismiss the suit against defendant 3 with costs. Memo-

25. *In re* Johnson Shearman v. Robinson, (1880) 15 Ch D 548=49 L J Ch 745=43 L T 372=29 W R 1068.

26. *In re* Evans, (1887) 34 Ch D 597.

randum of objections dismissed. No costs. Leave granted.

C.R.K./R.W. *Appeal allowed.*

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* A. I. R. 1937 Madras 8

KING, J.

Muthuvelu Kudumbaran and *another*—Accused.

v.

Samiah Kodumburan—Complainant.

Criminal Revn. No. 224 and Case Referred No. 18 of 1936, Decided on 6th May 1936, from order of Sess. Judge, West Tanjore, D/- 24th February 1936.

*** Criminal Trial—Court must consider all facts together—No splitting up of facts allowed—All facts together disclosing offence for which complaint under S. 195, Criminal P. C., necessary—Court cannot proceed except under complaint under S. 195, Criminal P. C.—Motive being one of prosecution, false complaint is offence under S. 211, I. P. C. and not under S. 182 and sanction is not required.**

When a complaint is made there must be no splitting up of the facts, and the Court is not entitled to disregard some of the facts and try or convict an accused person for an offence which the remaining facts disclose but the Court must consider the facts as a whole, and if these facts disclose an offence for which a special complaint is necessary under the provisions of S. 195, a Court cannot take cognizance of the case at all unless that special complaint has been filed: *A I R 1932 Mad 253, Ref.* [P 9 C 1]

If the motive was to induce the public servant not merely to do what he would not otherwise have done but to take a specific action of investigating the offence and prosecuting the person complained against, the only section which is appropriate and which must be applied is S. 211, I. P. C.; and it would be obviously anomalous and in every respect undesirable if the law were that simply because an offence under S. 182 was also disclosed and because for the trial of such an offence a written complaint from a public servant is necessary, the Court should be debarred from inquiring into the real nature of the offence which comes within S. 211. [P 9 C 1]

Public Prosecutor—for the Crown.

A. Narasimha Iyer and *S. Suryanarayana*—for Complainant.

V. Viswanatha Sastri—for Accused.

Order.—This reference from the learned Sessions Judge of West Tanjore raises an interesting point of law. The facts are that on 25th September 1935, the wife of one Samiah Kodumburan died in the village of Avarampatti. Information was given to the Village Munsif of that village that the death had been due to beating by her husband. The Village Munsif went to the nearest Police Station and gave a report incorporating this information. The result of the police investigation was reported to the Sub-Magistrate to the effect that the complaint was not true and that the death was due to natural causes and the Sub-Magistrate passed orders treating the case in this light and directing its removal from the police file. Then Samiah Kodumburan, the husband of the deceased woman, filed a private complaint before the Sub-Magistrate against the village Munsif and also against his informant, accusing them of having given false information to the police with a view to prosecute him on a charge of murder. The complaint was taken on file by the Sub-Magistrate under S. 182, I. P. C., and he held an inquiry under S. 202, Criminal P. C. At the conclusion of the inquiry the Magistrate filed the case, no longer under S. 182 but under S. 211, I. P. C. When the trial of the case was about to begin the Village Munsif, one of the accused, took a preliminary objection that on the facts of the case the complaint disclosed an offence under S. 182 and that under S. 195, Criminal P. C., no complaint could be entertained by the Magistrate of an offence under S. 182 except upon the written complaint of the Sub-Inspector of Police. The Magistrate overruled this objection but the learned Sessions Judge is of opinion that it is a valid one and has submitted the case for the orders of the High Court.

There is no doubt that in this case both S. 182 and S. 211 can be applied to the facts alleged in the complaint. The learned Sessions Judge considers that he is bound by the ruling in 55 Mad 343.[1] That is a case in which a private person made a complaint of forgery and a conviction was had under Ss. 467 and 109, I. P. C. But it was found that on the facts of the complaint the intention of the person who abetted the forgery was clearly that the forged document should be used in a judicial proceeding and therefore what he did constituted also an offence under S. 193. It was held by the learned Judges who decided that case that the provisions of S. 195, Criminal P. C., could not be evaded by ignoring those elements of the offence which brought it under S. 193 and by the Court confining its attention to the other elements of the offence which alone were necessary to prove the applicability of S. 467. It will be seen therefore on a careful analysis of this case that the principle

1. *In re* Ravanappa Reddi, A I R 1932 Mad 253 = 1932 Cr C 182 = 136 I C 779 = 33 Cr L J 361 = 55 Mad 343 = 62 M L J 735.

involved is this: that when a complaint is made there must be no splitting up of the facts, and the Court is not entitled to disregard some of the facts and try or convict an accused person for an offence which the remaining facts disclose, but the Court must consider the facts as a whole and if these facts disclose an offence for which a special complaint is necessary under the provisions of S. 195, a Court cannot take cognizance of the case at all unless that special complaint has been filed.

It will now be clear that when the present case is examined, what the learned Sessions Judge recommends should be done is the exact opposite of this procedure. There is no doubt that S. 182, which is a general section relating to false information of a general kind given with the intention of making a public servant do what he would not otherwise have done or cause injury to any other person, can be made to apply to the facts of this case. But if all the facts are considered, it is quite clear that the motive of the Village Munsif and the co-accused was to induce the public servant not merely to do what he would not otherwise have done but to take the specific action of investigating the offence and prosecuting the person complained against. It is therefore clear that if the whole of the facts in this case are examined the only section which is appropriate and which must be applied is S. 211, and it would be obviously anomalous and in every respect undesirable if the law were that simply because an offence under S. 182 was also disclosed and because for the trial of such an offence a written complaint from a public servant is necessary, the Court should be debarred from inquiring into the real nature of the offence which comes within S. 211. In the present case it is quite clear that a complaint under S. 211 can be made by a private person. If we therefore follow the principle of 55 Mad 343[1] it leads us to this position: that in this case the Court must regard this complaint as being one under S. 211, primarily, and, as I have just said, it cannot be prevented from trying the case under S. 211, because the Sub-Inspector has not filed a written complaint of the minor offence under S. 182. I am accordingly of opinion that the order of the learned Magistrate refusing to accept the preliminary objection of the Village Munsif in this case was right. The records will be returned to him and he is directed to proceed with the trial of the case under S. 211, I. P. C., and dispose of it according to law.

C.R.K./B.D. *Order accordingly.*

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* A. I. R. 1937 Madras 9

VARADACHARIAR, J.

(*Madrakkata Valiamatathil*) *Narayana Kanakapille* and *another*—Petitioners.

v.

(*Madrakkata Valiamatathil*) *Savitri Amma* and *others*—Opposite Parties.

Civil Revn. No. 386 of 1934, Decided on 4th September 1936, from order of Sub-Judge, South Kanara, D/- 13th February 1934.

*** Arbitration—Award — Order of supersession should be made only at expiry of time fixed for filing award—Day fixed for award and order passed providing in anticipation that if award not filed by fixed day trial must proceed—Award not filed—Defendant declared ex parte—Order declaring defendant ex parte was illegal.**

Para. 8, Sch. 2, Civil P.C. contemplates that the Court must be in a position as and when occasion arises for sufficient cause to allow further time for the making of the award. The legislature did not contemplate that the Court should, by an order made once for all at the time of reference, deprive itself of the power to exercise this discretion in accordance with circumstances that may arise in due course. Whether the order of supersession be formal or informal, it should be made only at the expiry of the time fixed for the filing of award and not at the stage of reference itself. [P 10 C 2]

A suit was partly heard and was referred to the arbitration of certain persons. At the time of making reference to arbitration, the Court fixed the day for award and passed an order providing in anticipation that if award was not filed by the fixed day, the trial must go on on that day. Award was not filed on the fixed day and the Court on the absence of defendant on that day declared him ex parte :

Held : that order made at the time of reference was not one in accordance with law and order declaring defendants ex parte was illegal : *A I R 1923 Pat 115, Rel. on; 21 I C 558, Expl.* [P 10 C 1]

P. Govinda Menon—for Petitioners.

K. Kuttikrishna Menon and *K. Narayana Marar*—for Opposite Parties.

Order.—This Revision Petition arises out of what purported to be an application under O. 9, R. 13, Civil Pro. Code. If the matter were really one falling under that rule, I should not have thought fit to interfere in this case, but as there is scarcely any dispute as to the facts, and I am satisfied that the order of the District Munsif declaring the defendants ex parte has not got to be set aside under O. 9, R. 13 but

is to be held illegal for other reasons, which I shall presently state, I regret that I have no alternative but to set aside that order, though I very much sympathise with the attitude which the District Munsif felt impelled to take when he thought that the defendants were not acting bona fide. The suit had been partly heard, when on 20th January 1933, it was referred on the application of both parties to the arbitration of certain persons. It appears from the B Diary, and it is also stated by the District Munsif in his later judgment, that at the time of making the reference to arbitration, he wished to make it clear that if the arbitrators did not or could not file their award by 31st January 1933, the date to which he adjourned the suit, the trial must go on. For reasons which I need not state in detail, the arbitrators did not or could not act. It appears that when the papers were taken to their house by a process server, they were not at home and the papers were brought back. The result was that on 31st January 1933 the District Munsif took up the suit for trial and as the defendants were absent and their vakil reported no instructions, they were declared ex parte and a decree was passed in favour of the plaintiff on the evidence adduced on the plaintiffs' side.

An application was filed on 9th February 1933, to set aside the ex parte decree. As I have already said, I should not have been prepared to interfere with the lower Court's order on grounds other than illegality or absence of jurisdiction. I am however of opinion that as held by Das, J. in A I R 1923 Pat 115,[1] the order passed on 20th January 1933 providing in anticipation that if the award is not filed by 31st January the trial must go on on that day, is not one in accordance with law. There has been some contest before me as to whether in the circumstances this case falls under R. 5 or R. 8 of Sch. 2 to the Civil P. C. I do not propose to express any opinion on that question. Assuming for the sake of argument that R. 8 is applicable, and that is the view most favourable to the respondents, the question arises as to the effect of the last part of that rule read in the light of the provision in Cl. 2 of R. 3 that where a matter has been referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit. Learned counsel for the respondent drew my attention to the decision, 1913 M W N 863,[2] where it was held that when on the expiry of the time fixed for the filing of the award the Court, without objection by the parties, adjourns the suit for trial to another date, such act must be taken in effect to amount to a supersession of the arbitration and that the absence of a formal order of supersession was immaterial. It does not appear to me that that decision in any way conflicts with the proposition enunciated by Das, J. in the Patna case.

Rule 8 of Sch. 2 to the Code contemplates that the Court must be in a position as and when occasion arises for sufficient cause to allow further time for the making of the award. I do not think the legislature contemplated that the Court should by an order made once for all at the time of the reference deprive itself of the power to exercise this discretion in accordance with circumstances that may arise in due course. Whether the order of supersession be formal or informal, it is contemplated that it should be made only at the expiry of the time fixed for the filing of the award and not at the stage of the reference itself. In this view I do not think that the District Munsif had jurisdiction to deal with the suit on 1st January 1933. Learned counsel for the respondents rightly points out that this is not the basis on which the defendants applied to the lower Court nor was any appeal to the lower appellate Court competent in this view. The application should strictly have been made under S. 151, Civil P. C., bringing it to the notice of the lower Court that its procedure was unauthorized. But now that the facts are before me, I do not think the error in the procedure followed by the petitioners should stand in the way of my setting the matter right. Nor do I feel pressed by the fact that this Revision Petition has been filed against the order of the lower appellate Court and not against the order of the District Munsif. The result is that the orders of both the lower Courts will be set aside and the District Munsif will be directed to restore the suit to file and deal with it in accord-

1. Maharaj Bhagat v. Hari Har, A I R 1923 Pat 115=65 I C 144=3 P L T 346.

2. Chokkappa Mudaliar v. Ahmedullah, (1913) M W N 863=21 I C 558.

ance with law. In the circumstances and in view of the erroneous procedure adopted by the petitioners, I direct that the parties shall bear their costs both here and in the Courts below, so far as they are incidental to the application to set aside the ex parte decree.

C.R.K./P.R. *Order set aside.*

A. I. R. 1937 Madras 11

VARADACHARIAR AND MOCKETT, JJ.

Sarvothama Pai and *another*—Applts.

v.

Govinda Pai and *others*—Respondents.

Appeal No. 183 of 1931, Decided on 2nd September 1936, against decree of Sub-Judge, South Kanara, D/- 10th March 1930.

Hindu Law—Partition—Claim for accounts during pendency of suit—Division in status is effected from date of presentation of plaint—Parties are entitled to share of income on accounts from date of plaint to the date when defendant gave up possession.

In a suit for partition the division of status between the parties must be held to take effect as from the date of the institution of suit. [P 11 C 2]

Where a suit in forma pauperis for partition was filed and a claim for an account for profits during pendency was made :

Held : division in status should be held from the presentation of pauper petition and the parties would be entitled to the share of income on accounts from the date of petition to the date when the defendant gave up possession because the parties had become tenants-in-common on the date of presentation of petition : *A I R 1927 Mad 801, Rel. on.* [P 11 C 2]

K. Y. Adiga—for Appellants.

B. Sitarama Rao and *T. Krishna Rao*—for Respondents.

Varadachariar, J. — This is an appeal by plaintiffs 2 and 3 represented by their mother as next friend. They, with their elder brother plaintiff 1, sued for partition and in the plaint they included (1) a claim for past mesne profits from 7th September 1923 up to date of suit and (2) a claim for a small amount as representing the value of their share of moveable properties belonging to the family. So far as the right to partition was concerned, defendant 1 who was the Ejman did not care to insist on any objection founded on the fact of the appellants' minority. A partition has therefore been directed by consent of parties. As regards the share of the moveables claimed, the learned Subordinate Judge has held that the claim was not proved. In dealing with the claim for mesne profits, he found that the plaintiffs had not been excluded as alleged in the plaint, but on the other hand were being maintained by defendant 1 till shortly before suit. He also refers to the fact that under an order of that Court the plaintiffs were being paid Rs. 30 a month during the pendency of the suit, for their maintenance. On these findings he refused to direct any account in respect of profits.

In this appeal the plaintiffs have reiterated their claim for past mesne profits, for 3/8th share of the moveables and for an account of the income during the pendency of the suit. On the first two questions we see no sufficient reason for differing from the conclusion of the lower Court. (Their Lordships then discussed the evidence as to alleged exclusion of plaintiff with regard to claim for mesne profits and moveables and proceeded.) As regards the third head of the claim, viz. an account of the profits from the date of suit, the position seems to us however to be different. It is true that under an order of Court a sum of Rs. 30 per mensem was provisionally paid by defendant 1 to the plaintiffs but we are informed that this was done only from about January 1928. This will no doubt have to be taken into account in determining the amount which the plaintiffs may be entitled to on the taking of accounts, but by the very terms of the order it cannot be taken as wholly satisfying their claim or depriving them of their right to an account. Under the decision in 50 Mad 866[1] the division of status between the parties must be held to take effect as from the date of the institution of the suit. In this case it will be the date of the presentation of the pauper petition, i. e. 16th April 1926. The appellants will be entitled to whatever may be found to represent their share of the income on accounts being taken as from the date of the petition to the date when defendant 1 gave up possession, accounts being taken on the footing that on 16th April 1926 the parties had become tenants-in-common.

The case will be sent back to the lower Court for the appointment of a commissioner or for other appropriate steps being taken to take this account and for passing a final decree in respect of this part of the claim so far as the appellants are concerned. As their claim for past mesne

1. Sri Ranga Thathachariar v. Sreenivasa Thathachariar, A I R 1927 Mad 801=104 I C 472=50 Mad 866=53 M L J 189.

profits and moveables has failed, the appellants will themselves pay the court-fee due to Government on the memorandum of appeal. As the respondents' counsel have reported no instructions, there will be no other order as to costs in the appeal.

C.R.K./P.R. *Order accordingly.*

A. I. R. 1937 Madras 12

PANDRANG ROW, J.

Eliyangattail 4th Sree Kanda Rajah —Appellant.

v.

Kununi Tharayil Ammu and *another* —Respondents.

Appeal No. 67 of 1933, Decided on 20th March 1936, against appellate order of Dist. Court, Malabar, D/- 20th October 1932.

Malabar Law — Kanom lease — Separate tenancies—Execution of rent deed jointly by husband and wife — Husband afterwards mortgaging property—Fiction of implied surrender cannot be imported in such cases and mere execution of rent deed jointly does not affect title to the property mortgaged.

The fiction of an implied surrender whenever a fresh lease is granted is not a part of the law of this country and there is no justification for importation of the fiction in case where parties could never have intended to put an end to original tenancies by merely executing a rent deed, jointly in favour of the jenmi in respect of tenancies, properties including original tenancies. Where the landlord is not willing to accept separate rent deeds from tenants who have acquired individual rights to separate plots in the holding, they have no option but to execute a joint rent deed and such execution does not necessarily lead to inference that parties who executed the joint deed intended to put an end to their separate rights : *A I R 1925 Mad 1277, Expl.* [P 12 C 2]

Gopala Menon—for Appellant.

K. Kuttikrishna Menon — for Respondents.

Judgment.—This is an appeal from the order of the District Judge of South Malabar dated 20th October 1932, in A. S. No. 507 of 1931 allowing the appeal with costs. The appeal was preferred by one Ammu from the order of the District Munsif of Ponnani dated 18th June 1931, in E. A. No. 1658 of 1930 in O. S. No. 50 of 1927. Ammu was the mortgagee from the original kanom tenant Moidu and he instituted a suit on the mortgage (O. S. No. 50 of 1927), and brought the mortgaged property to sale and purchased it himself. Delivery was obstructed by several persons and one of them is the appellant here. The present appeal relates to a portion of the mortgaged property. The appellant obtained his title from one Gopala Menon who in turn got it in Court sale of the rights of one Karunakara Menon who had obtained an assignment from the widow of Moidu acting on her own behalf and also as guardian of her minor children under Ex. E. The District Munsif dismissed the petition of Ammu, that is respondent 1, on the ground that, after the execution of a rent deed jointly by Moidu and his wife Dayamma, the original separate holdings came to an end and a new joint holding came into existence, and that therefore Moidu had no complete title of the property mortgaged by him to Ammu. This view was dissented from by the District Judge who found that the execution of the joint rent deed did not have this necessary result in law and that the circumstances of the case showed that no such change in the nature of the original tenancies was intended to be effected.

It is contended in this appeal that the view of the learned District Judge is wrong and reliance is placed on certain observations in 48 Mad 815,[1] but these observations do not really support the contention. The fiction of an implied surrender whenever a fresh lease is granted is not part of the law of this country and there is no justification for the importation of the fiction in a case of this kind where it is clear that the parties could never have intended to put an end to the original tenancies by merely executing a rent deed jointly in favour of the jenmi in respect of the properties included in both the original tenancies. As observed by the learned District Judge, where the landlord is not willing to accept separate rent deeds from tenants who have acquired individual rights to separate plots in the holding, they have no option but to execute a joint rent deed and such execution of a joint rent deed does not necessarily, and should not necessarily, lead to the inference that the parties who executed the joint rent deed intended to put an end to their separate rights. The appeal therefore fails on the main ground urged.

It is however contended that the amount of the compensation for improvements to which the appellant is entitled should have been ascertained and such compensation awarded to him before the obstruction was ordered to be removed. It is seen

1. Manavedan Thirumalapad v. Parry & Co., A I R 1925 Mad 1277=90 I C 729 = 48 Mad 815=49 M L J 390.

from the Munsif's judgment that what was sold in execution of the decree to Ammu was only the right of the executant Moidu and it was definitely stated before the sale that the improvements belonging to his assignees cannot now be sold in the absence of any allegation in the plaint that such improvements are also liable as accretions to the mortgaged property. It is clear therefore that there was no decision either in the judgment in O. S. No. 50 of 1927 or in the proceedings in execution of that decree that the improvement, if any, made by the appellant who is one of the assignees of a portion of the property was an accretion to the mortgaged property and as such liable for the claim in O. S. No. 50 of 1927. As there was no decision in the affirmative in favour of the plaintiff in that suit, it must be held that these improvements, if any, are not liable for the claim in that suit. There must therefore be an enquiry by the first Court as to the value of the improvements, if any, made subsequent to the date of Ex. E, in the portion of the property assigned under that document (i. e., the property in the A schedule) and the value of such improvements, if any, must be paid by respondent 1 to the appellant before the obstruction is actually removed.

As the appeal fails for the most part and the claim for compensation for improvements is a comparatively minor matter the appellant will not have his costs of this appeal.

C.R.K./P.R. *Appeal partly dismissed.*

A. I. R. 1937 Madras 13

BURN AND LAKSHMANA RAO, JJ.

Chanahalu Siva Reddi and *another*—Appellants.

v.

Official Receiver, Bellary and *others*—Respondents.

Appeal No. 148 of 1934, Decided on 25th August 1936, against order of Dist. Court, Bellary, D/- 20th December 1933.

Provincial Insolvency Act (1920), S. 6—Firm of three brothers as partners—Eldest brother having full control over the conduct of business—Act of insolvency committed by eldest brother and he adjudged insolvent and subsequently two brothers also adjudged on same act—Two brothers partners held rightly adjudged insolvent as eldest brother partner became agent of two brothers who became principals under S. 6, Expl.

Three brothers formed a partnership firm. The eldest brother was in complete charge of and had the full and exclusive control over the business of the firm. The eldest brother was adjudged insolvent and subsequently along with him the remaining two brothers were also adjudged as insolvents:

Held: the eldest brother became the agent of his two brother-partners who became his principals within the meaning of S. 6, Expl. The acts in insolvency committed by the eldest brother (agent) must, therefore, be deemed to be the acts of the two remaining brothers (principals) and they were rightly adjudged insolvents along with him: *23 Cal 26, Rel. on.* [P 14 C 1, 2]

V. S. Narasimhachar and *N. Appu Rao*—for Appellants.

C. Sambasiva Rao and *S. Narasimha Iyengar*—for Respondents.

Burn, J.—The appellants are two out of three brothers who have been adjudicated insolvents in I. P. No. 43 of 1931, on the file of the District Judge, Bellary. The learned District Judge has found that all the three brothers were in partnership and that the firm of which they were members was liable to be adjudicated insolvent. The eldest brother who has not appealed put up a case that the business in which the debts due to the petitioning creditors were contracted belonged to him alone and that his two younger brothers (the present appellants) had nothing to do with it. The appellants also supported that case. They pleaded that they had effected a partition from their elder brother 4 or 5 years before the insolvency petition was filed. The eldest brother Ayyanna Gowd was adjudicated on his own admission and the appellants were adjudicated subsequently by the District Judge. It is contended on behalf of the appellants that there was no sufficient evidence to prove any partnership between these three brothers and further that even if the partnership were found to have been proved, the acts of the insolvency alleged were committed only by the eldest brother Ayyanna Gowd and that they could not suffice to support the adjudication in insolvency of the other two brothers. With regard to the question of partnership, we have no hesitation in upholding the finding of the learned District Judge. The documents (Exs. D and D-1) and the account books (Exs. G and H-O) are quite sufficient by themselves to show that the three brothers were jointly engaged in the trade. They are members of a joint family and they state in Exs. D and D-1 that the trade, which was being carried on under the name of the eldest brother Ayyanna Gowd, was a trade which was being conducted for the benefit of the joint family (vide Ex. D). In Ex. D-1 they said "we

are trading in partnership under the name of Ayyanna Gowd."

The only difficulty is whether the act or acts of insolvency committed by the first counter-petitioner only (the eldest brother) can support the adjudication of the other two brothers. We have been referred to a number of cases. The learned District Judge has held that the eldest brother Ayyanna Gowd secluded himself and evaded his creditors and also gave notice to his creditors that he had suspended payment. He has also held that these acts of Ayyanna Gowd must be considered as the acts of the other members of the firm, viz., the two present appellants. In other words the first counter-petitioner according to the learned Judge acted as the agent of the other two brothers who are in partnership with him. Under the explanation to S. 6, Provl. Insol. Act, which defines an act of insolvency, it is laid down that for the purposes of this section the act of an agent may be the act of the principal. The law is summarised in para. 136, p. 103 of Mulla's Treatise on Insolvency in the following words:

> It will be seen from what is stated above that there is a distinction between an ordinary agent and an agent who has exclusive control of the business and occupies such a position that the principal must stand or fall by his acts. In the former case the act of insolvency committed by the agent is not the act of the principal. In the latter case the act of insolvency committed by the agent will be the act of the principal.

In so far as the question of seclusion is concerned, we are of opinion that the seclusion of himself by Ayyanna Gowd was not an act which could be attributed to his brothers. As regards suspension of payment it was clearly proved that he gave notice to the petitioning creditors that he was unable to pay their debts. His own words are quoted by one witness as follows: "I cannot pay your debts. You can do what you like." This is in our opinion as emphatic a notice as he could give that he was not going to pay his debts. If this notice was given by Ayyanna Gowd as agent of his brothers it could only support their adjudication as insolvents if Ayyanna Gowd were found to be in sole charge or exclusive control of the joint business. This we are satisfied is the truth from the evidence that has been recorded in this case. As we have already noticed, it was the case of Ayyanna Gowd himself and also of both the appellants that Ayyanna Gowd was the only person who had anything whatever to do with the business. It is quite true that the petitioning creditors let in some oral evidence to the effect that these appellants had been seen sitting in the shop and actually engaged in business. And Mr. Narasimhachari who appears for the appellants would like us to accept this as showing that Ayyanna Gowd was not in sole or exclusive control and to reject the statements of his own clients and the statement of Ayyanna Gowd himself on this point. It is not shown that the appellants have incurred any debt on behalf of the partnership or ever put their names to any document executed on behalf of the partnership. We think the case of the appellants and of Ayyanna Gowd with regard to the management of the business is true. It seems clear that Ayyanna Gowd alone conducted this business and that he was in exclusive control of everything that was done in pursuance of the objects of the partnership. On that finding Ayyanna Gowd's notice of suspension of payment is one by which his partners (the appellants) must also stand or fall, in the words of their Lordships of the Privy Council in 23 Cal 26.[1] For these reasons we hold that the acts of insolvency committed by Ayyanna Gowd must be deemed to be the acts of the appellants also and that their adjudication as insolvents is correct. This appeal is accordingly dismissed with costs of the Official Receiver and the opposing creditors (two sets) to be paid out of the estate.

C.R.K./M.D. *Appeal dismissed.*

1. Kasturchand Rai Bahadur v. Dhanpat Singh Bahadur, (1896) 23 Cal 26=22 I A 162=6 Sar 617 (P C).

A. I. R. 1937 Madras 14

LAKSHMANA RAO AND MENON, JJ.

In re *H. B. Babington.*

Criminal Revn. No. 943 and Petn. No. 872 of 1935, Decided on 25th September 1936, from order of Sessions Court, Coorg Division, in Cr. A. No. 5 of 1935.

(a) Revision—Proceeding in revision before High Court on conviction by trial Court or appellate Court is subsequent stage of case.

If a person, who is convicted by a trial Court or an appellate Court, brings the fact of such conviction to the notice of the High Court, and the High Court exercises its revisional jurisdiction in that matter, orders passed in revision by the High Court are orders in the original case itself, and they are no doubt orders passed at a stage subsequent to the trial stage and the appellate stage of the case. It is the records of the original

case that have to be amended in pursuance of the orders of the High Court in revision, and not of any other totally independent proceedings. This proposition is true even though a person who is convicted has no right to invoke the revisional jurisdiction of the High Court when such jurisdiction is exercised by the High Court: *A I R 1924 Mad 373* **and** *12 Bom 561, Rel. on; A I R 1920 All 351* **and** *A I R 1933 Cal 240, Dissent.*

[P 15 C 2; P 16 C 1]

(b) Criminal P. C. (1898), S. 4 (j)—Words 'proceedings against European British subject' mean proceedings against persons who had claimed to be dealt with as European British subjects—Revisional jurisdiction of Presidency High Court cannot be invoked by European British subject unless there is something on record to show that he claimed to be tried as such.

The words "proceedings against European British subject" in S. 4 (j) of Criminal P. C., mean proceedings against person who had claimed to be dealt with as European British subject, otherwise the effect of the substantive provisions in S. 528 (b) would be nullified by the definition in S. 4 (j). The revisional jurisdiction of the Presidency High Court cannot be invoked merely because the accused is, in fact, a European British subject unless there is something on record to show that the proceedings are really against a European British subject : *12 Bom 561* and *A I R 1924 Mad 373, Rel. on.* [P 16 C 2]

M. A. T. Coelho and *J. S. Athanasius*—for Petitioner.

A. Narasimha Iyer—for the Crown.

Menon, J.—This is an application to revise the order of the Sessions Judge, Coorg, confirming the order of the District Magistrate of Coorg, convicting the petitioner under Ss. 408, 477-A, I. P. C., and sentencing him to imprisonment till the rising of the Court and to pay a fine of Rs. 100; in default of payment of fine, simple imprisonment for one month. The learned Public Prosecutor raised a preliminary objection that it is the Court of the Judicial Commissioner of Coorg that has revisional jurisdiction over the matter. Mr. Coelho for the petitioner answers that, as the petitioner is a European British subject, this Court alone is the revisional authority by reason of the provisions of S. 4(j), Criminal P. C., and S. 16 of the Coorg Code. It is not disputed that, if the petitioner had asserted his right as a European British subject, his case is one to which the provisions of Ch. 33 and 44-A, Criminal P. C., would apply. But the petitioner never claimed to be dealt with as a European British subject either in the trial Court or in the appellate Court, and in view of the provisions of S. 528-B, Criminal P. C., he must be deemed to have relinquished his right to be dealt with as such and he shall not assert it in any subsequent stage of the case. The learned Public Prosecutor contends that the proceedings in revision in this Court must be deemed to be a subsequent stage of the case and that therefore the petitioner is not entitled to assert his right now as European British subject. The contention of the petitioner, on the other hand, is that proceedings in revision cannot be treated as a subsequent stage of the case. On this question there has been a conflict of decisions. In 45 M L J 800,[1] this Court, Krishnan, J., held that proceedings in revision must be treated as a subsequent stage of the case. This is in accordance with the view of the Bombay High Court, vide 12 Bom 561;[2] on the other hand, a contrary view has been taken by the Allahabad and Calcutta High Courts. In 17 A L J 896,[3] Walsh, J. held that an application in revision is not a subsequent stage of the same case. The learned Judge observes:

> It is a totally independent matter giving a right to apply to a superior Court independently of any proceedings necessarily subsequent or consequent upon the hearing of the original case.

This view was accepted in preference to that of this Court and of the Bombay High Court by a Division Bench of the Calcutta High Court, 60 Cal 676.[4] The reason given for adopting the view taken by the Allahabad High Court is that as S. 439, Criminal P. C., confers no rights on a person convicted either by a trial Court or a lower appellate Court to invoke the revisional jurisdiction of the High Court and as that jurisdiction is often exercised without an application having been made to it and is discretionary, the hearing in revision cannot be properly described as a subsequent stage of the case. With all respect, we are unable to agree with the view of the Allahabad or of the Calcutta High Court in this matter. If a person who is convicted by a trial Court or an appellate Court brings the fact of such conviction to the notice of the High Court, and the High Court exercises its revisional jurisdiction in that matter, orders passed in revision by the High Court are orders in the original case itself, and there

1. Jeremiah v. Johnson, A I R 1924 Mad 373=76 I C 695=25 Cr L J 231=45 M L J 800.
2. Queen Empress v. Grant, (1888) 12 Bom 561.
3. Harris v. Peal, A I R 1920 All 351=58 I C 351=21 Cr L J 767=17 A L J 896.
4. H. C. Bolton v. Emperor, A I R 1933 Cal 240 =1933 Cr C 325=143 IC 892=34 Cr L J 671 =60 Cal 676.

can be no doubt that they are orders passed at a stage subsequent to the trial stage and the appellate stage of the case. It cannot at all be said that such orders are passed independently of any proceedings consequent on the hearing of the original case. It is the records of the original case that have to be amended in pursuance of the orders of the High Court in revision, and not of any other totally independent proceedings. And even though a person who is convicted has no right to invoke the revisional jurisdiction of the High Court, still if such jurisdiction is exercised by the High Court, it cannot at all be said that the orders made by the High Court in revision are not orders in the case.

In other words, whether the orders passed in revision are to be deemed to be orders passed in the case itself or not, does not depend on whether the person who is affected by the order has a right to invoke the jurisdiction, by the exercise of which such orders were passed. It follows therefore that proceeding in revision before the High Court on a conviction by a trial Court or an appellate Court is a subsequent stage of the same case. This does not, however, dispose of the difficulty in this case, for Mr. Coelho contends that even though his client is precluded from asserting his right as a European British subject, and thus invoke the jurisdiction of this Court in revision, still by virtue of the definition in S. 4 (j), Criminal P. C., it is this Court and this Court alone that has jurisdiction in this matter, as the petitioner is a European British subject. The contention of the learned Public Prosecutor on the other hand is that it is only in cases where the right to be dealt with as a European British subject has been claimed that this Court becomes a Court of revision and that, in all other cases, whether the person be a European British subject or not, it will be the highest Court of criminal appeal for the local area that will have revisional jurisdiction. The question therefore is whether the words 'proceedings against European British subjects' in S. 4 (j) really mean proceedings against European British subjects whether they had claimed to be dealt with as such or not, or only against those who had actually claimed to be dealt with as such.

This question was dealt with at length by a Division Bench of the Bombay High Court (Birdwood and Parsons, JJ.) in 12 Bom 561[3] and also by this Court (Krishnan, J.) in 45 M L J 800[1] already referred to, and both the Courts held that the words "European British subject" in S. 4 (j), Criminal P. C., meant European British subjects who had claimed to be dealt with as such. As we generally agree with the reasons given by the learned Judges in those cases and with the conclusion arrived at, we do not think it is necessary to repeat what has already been stated in those decisions, but shall only add a few observations. Ordinarily, a Court is not expected to know whether the accused in any proceeding before it is a European British subject or not. If no claim is made to be dealt with as such, the case would be tried in the ordinary manner without reference to the special provisions in Chs. 33 and 44-A, Criminal P. C. In such a case there will be nothing on the record for the High Court to know that the proceedings are really against a European British subject, unless the accused brings the fact to the notice of the High Court by asserting his status as such. This, we have already held, he is precluded from doing by reason of the provisions of S. 528-B, Criminal P. C.

Unless there is something on record to show that the proceedings are really against a European British subject, the revisional jurisdiction of the Presidency High Courts cannot be invoked by reason of the definition in S. 4 (j), Criminal P. C., merely because the accused is, in fact, a European British subject. We therefore think that the words "proceedings against European British subject," in S. 4 (j), mean proceedings against persons who had claimed to be dealt with as European British subjects, and that that was the intention of the legislature, for otherwise the result would be that the definition in S. 4 (j) would nullify the effect of the substantive provision in S. 528-B. The same meaning must be given to the same words occurring in S. 16 of the Coorg Code as reference is made therein to the Criminal P. C. It follows that it is the Court of the Judicial Commissioner, Coorg, and not this Court that has jurisdiction in this matter. The preliminary objection is therefore upheld. The petition is dismissed.

C.R.K./K.B. *Petition dismissed.*

A. I. R. 1937 Madras 17

PANDRANG ROW, J.

Alla Satyam and *another*— Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Cases Nos. 309 and 310 and Petitions Nos. 285 and 286 of 1936, Decided on 1st September 1936, from order of Court of Session, East Godavary Division, in Civil Appeals Nos. 16 and 17 of 1936.

Criminal Trial — Jurisdiction — Appeal — Sub-divisional Magistrate also exercising powers as Assistant Agent in Agency Tract— District Magistrate also acting as Government Agent — District Magistrate transferring cases (offence in one of them in Agency) for trial to Sub-divisional Magistrate — Both cases decided by him in capacity of Sub-divisional Magistrate—Appeal lies to Sessions Judge and not to Government Agent—Order of Sessions Judge declining to hear appeals as having no jurisdiction on report made after judgment by Sub-divisional Magistrate, stating that the cases were decided by him as Assistant Agent is wrong — Report made after judgment cannot be used to contradict or vary what is contained in judgment.

The Magistrate who exercises authority in two capacities must indicate in what capacity he acted in deciding the case and must also indicate the same in the proceedings. Though it is the same officer who exercises jurisdiction in two capacities, they are quite different not only as regards the territorial but in other respects as well. A report, therefore, made by a Magistrate after pronouncing judgment, stating in what capacity he decided the case, cannot be used to contradict or vary what is contained in the judgment.

[P 17 C 2; P 18 C 1]

Where the District Magistrate transferred cases in one of which offence was committed in Agency Tract, for trial to Sub-Divisional Magistrate, who exercised jurisdiction in two capacities (as Sub-divisional Magistrate in the plains and as Assistant Agent in Agency Tract), and the cases were decided by him but there was nothing on record to show that the cases were dealt with by him either in the capacity of Sub-divisional Magistrate or Assistant Agent, but the judgments appealed from purported to be judgments of the Sub-divisional Magistrate, and the Sessions Judge declined to hear the appeals as having no jurisdiction in him, on the basis of the report made to him by the Sub-divisional Magistrate stating that the cases were decided by him as Assistant Agent:

Held: that the order of the Sessions Judge in declining to hear appeals as having no jurisdiction in him, on account of the report made, was wrong as appeal from judgment delivered by the Magistrate in his capacity of Sub-divisional Magistrate admittedly lay to the Sessions Judge: *23 M L J 670, Rel. on.* [P 19 C 1]

K. S. Jayarama Ayyar and *G. Gopalaswami*—for Petitioners.

Public Prosecutor—for the Crown.

Order.—These cases arise out of the sinking of a motor launch in the rapids of the Godavari near Manturu village on 21st July 1935 which resulted in the loss of six lives and property worth about Rs. 3,000. The clerk in charge of the launch and two others who have been discharged as well as the owner of the launch were charged by the police before the Joint Magistrate of Rajahmundry. The cases were transferred by the District Magistrate of East Godavari to the Sub-divisional Magistrate of Peddapur for disposal apparently because the Joint Magistrate of Rajahmundry had made an investigation of the occurrence. The clerk as well as the owner were convicted by the Sub-divisional Magistrate of Peddapur in C. C. Nos. 68 and 69 of 1935 and both of them appealed from their convictions and sentences to the Sessions Judge of East Godavari. Before the Sessions Judge a preliminary objection was raised by the Public Prosecutor of East Godavari to the effect that the Sessions Judge of East Godavari had no jurisdiction to entertain the appeals and that the appellate authority was the Court of Session for the Agency District of East Godavari, that is to say, the Government Agent of East Godavari. Throughout in these proceedings there was no mention made of any of the Magistrates before whom the case was pending that they were acting in the capacity of Agency Officers or Agency Magistrates and not as Sub-divisional Magistrates administering criminal justice in the plains.

The cases were also transferred not by the Government Agent but by the District Magistrate of East Godavari. The transfer was made to the Sub-divisional Magistrate of Peddapur and not to the Assistant Agent of Peddapur. In one of the cases the alleged offence took place at Rajahmundry itself and of that offence only the Magistrate in the plains could take cognizance. It is not alleged that it is open to the District Magistrate as such to transfer a case from the plains to an Agency Court or vice versa. Though it is the same officer who exercises jurisdiction in the two capacities of District Magistrate and Government Agent, the capacities are quite different not only as regards the territorial limits within which the authority is to be exercised but in other respects as well. There is nothing in the record to show that these cases were dealt with at any time either by the Government Agent as such or by any Agency Magistrate as such. The judg-

ments that were appealed from purport to be judgments of the Sub-divisional Magistrate of Peddapur and not of the Agency Magistrate. When the record was so clear and unambiguous it is difficult to understand on what grounds the Public Prosecutor of East Godavari raised the preliminary objection on the score of want of jurisdiction in the Sessions Court of East Godavari or why the learned Sessions Judge before whom such an objection was made thought it fit to call for a report on the subject from the Subdivisional Magistrate from whose judgments the appeals were preferred. Any report made by a Magistrate after pronouncing judgment cannot be used to contradict or vary what is contained in the judgments themselves. Apparently the Subdivisional Magistrate was asked to report in what capacity he tried the cases. Instead of giving a categorical answer the learned Magistrate made a report which reads like a special plea in support of the objection to jurisdiction raised by the Public Prosecutor. Some of the statements of fact in the report are not borne out by the record. For instance it is stated in the report : "The cases were transferred to the Assistant Agent, Peddapuram." The order of transfer does not support this statement, for the transfer is made by the order to the Subdivisional Magistrate, Peddapur and not to the Assistant Agent. The report then goes on to state that there was some mistake :

> But owing to a mistake the various officers described themselves as Subdivisional Magistrates and District Magistrates.

Whether there was such a mistake or not, it was certainly not open to the Subdivisional Magistrate to state that there was a mistake in description even by the District Magistrate. It might have been open to him to confess his own mistake, but I do not think he was entitled to attribute a mistake, which in all probability has no foundation in fact, to the District Magistrate. Then follows the expression of opinion to the effect that the mistake of description does not affect the validity of the trial because the Subdivisional Magistrate, Peddapuram, is also an Assistant Agent. The report then goes on to deal with the practice in the Courts according to which the parties select the appellate Court according as the place of offence is in the Agency or Plains. Finally the Subdivisional Magistrate stated in his report that he had no need to particularly notice the fact that he was describing himself as Subdivisional Magistrate and that this point was not brought to his notice or to the notice of his predecessor by anyone and concluded with the observation that so long as the offence took place in the Agency and he was an Assistant Agent, the appeal lay to the Governor's Agent at Cocanada, forgetting at the same time to take notice of the fact that in one of the two cases the occurrence took place at Rajahmundry itself which is admittedly not in the Agency. The calling for a report was itself unnecessary, and, as the sequel shows, undesirable. The view that the learned Sessions Judge took of the report was even more questionable. The learned Sessions Judge says :

> I have no option but to accept the report of the Subdivisional Magistrate of Peddapur as correct and hold that the cases were tried by him in his capacity as Assistant Agent, Peddapur.

In other words the learned Sessions Judge thought that the question whether he had jurisdiction or not to entertain the appeals was practically to be decided not by himself, but by the very Magistrate from whose judgments the appeals were preferred, a proposition which has only to be stated to be rejected. The learned Sessions Judge had not only the right to decide the question of jurisdiction himself, but it was his duty also to decide it himself, and he was certainly wrong in thinking that he had no option but to accept without question the report of the Subdivisional Magistrate even where the record spoke differently. There has been in this case no real attempt by the learned Sessions Judge to apply his own mind to the question of jurisdiction which was raised before him, and what has happened is in effect a decision of that question by the Magistrate from whose judgments the appeals were preferred. The learned Public Prosecutor who appears in this Court is unable to state what useful purpose was intended to be served by raising the preliminary objection to jurisdiction in these cases. Even if there was any useful purpose behind the objection put before the Sessions Judge, I have no doubt that the objection is without foundation so far as these cases are concerned. These cases were throughout dealt with by the Subdivisional Magistrate as such and not as Assistant Agent as is now sought to be made out. The fact that the Subdivisional

Magistrate is also an Assistant Agent does not affect the question because in cases decided by him in his capacity as Subdivisional Magistrate, appeals would admittedly lie only to the Sessions Judge of East Godavari.

It is strange to find that, in spite of what was said in 23 M L J 670,[1] the Magistrate who exercises authority both as Subdivisional Magistrate in the Plains and as Assistant Agent in the Agency Tract did not take the trouble to bear in mind in these cases the particular capacity in which he was acting and to indicate the same in his proceedings. Any laxity in this respect is not to be encouraged, and it would be a definite encouragement if the Magistrate is permitted to rectify the omission later on by making a special report after the cases had been disposed of by him. The order of the learned Sessions Judge declining jurisdiction is wrong because he had jurisdiction to hear the appeals in these cases. His order returning the memoranda of appeal for presentation to the proper Court is set aside and he is directed to get back the memoranda of appeal from the appellants or from the Court in which they were filed and dispose of them according to law.

C.R.K./P.R. *Order accordingly.*

1. Public Prosecutor v. Sadanand Patnaik, (1912) 23 M L J 670=17 I C 786=13 Cr L J 850.

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* A. I. R. 1937 Madras 19

HORWILL, J.

Palaparthi Ramamurthi—Appellant.

v.

Palaparthi Subba Rao and *others*—Respondents.

Second Appeal No. 1097 of 1933, Decided on 28th August 1936, against decree of Sub-Judge, Bapatla, in A. S. No. 33 of 1932.

*** (a) Evidence Act (1872), Ss. 21, 32 (2) and (3)—Letter to wife making reference to settlement and to tell uncle about executing mortgage in uncle's favour is admissible under S. 21 as it is statement admissible under S. 32 (2), though not under S. 32 (3).**

A letter written by a party to his wife making reference to a settlement and asking her to do certain acts to forward the settlement, such as by telling his uncle that he would execute a mortgage deed in his favour, was filed to prove family settlement:

Held: that, though the statement contained admissions of liability, yet such admissions were only parts of a large statement asserting a settlement; hence S. 32 (3) did not apply. S. 32 (2) would however apply as it was made to his wife in the ordinary course of business. Hence the statement would be admissible under S. 21. [P 20 C 1, 2]

*** (b) Evidence Act (1872), S. 32 (2)—"In the course of business" means in a way that business is conducted and not a series of acts of business.**

"In the course of business" means in the way that business (which may be of a purely private or even trivial nature) is conducted. It has no connexion with a course of business which suggests a series of acts of business: *23 Bom 63, Not foll.*; *1 I C 376* and *11 I C 854, Foll.* [P 20 C 2]

V. Govindarajachariar and *K. Krishnamurthi*—for Appellant.

P. Satyanarayana—for Respondents.

Judgment.—The questions arising in this second appeal are whether Ex. 7 is a relevant document rightly admitted in evidence by the lower Courts and whether the lower appellate Court was right in admitting Ex. 14 series to show that Ex. 7 was a genuine document. The trial Court, because the wording of Ex. 7 did not accord very well with its other findings and because it did not bear the postal seal of the Nizam's State from which it purported to have been sent, declared it to be a spurious document. The reasons given by the District Munsif for declaring it spurious were very inadequate and on the face of the document it bears its own proof of genuineness. The lower appellate Court would therefore have failed in its duty if it had not admitted other letters issued from the Nizam's State to show that such letters do not necessarily bear the Hyderabad State seal. The defendants had no reason to believe that the genuineness of Ex. 7 would be doubted and they could not therefore have been expected to come to the Court armed with a number of other letters from the Hyderabad State to meet some objections of the Court which they could not possibly have foreseen. It is further objected that the lower appellate Court should have given the present appellant an opportunity of adducing counter evidence. In the nature of the case there could hardly be any counter evidence on the point; but there is nothing on the record to show that any request was made to the appellate Court to permit the plaintiff to adduce counter evidence; and I have no doubt that the Court would have given an opportunity to adduce further evidence had the request been made.

The main point in issue in the Courts below was whether there was a family settlement which was binding on the plaintiff. Ex. 7 is a letter written by

defendant 1 to his wife making reference to a settlement and asking her to do certain acts to forward the settlement, such as by telling his uncle that he would execute a mortgage deed in his favour. It is argued on behalf of the defendants that such a document would be admissible under Ss. 11, 13 and 21, Evidence Act. S. 11 merely explains that certain kinds of evidence are relevant although they do not bear directly on the facts in issue. There can be no doubt of the relevancy of the fact in relation to which the statement in Ex. 7 was made; but that does not in itself make the statement relevant; for the admissibility of statements by parties (defined as admissions) is governed by S. 21. Nor can the statement be admissible under S. 13, which relates to an assertion of a right or custom. A recital in a friendly letter is neither of these. The statement would be admissible under S. 21 only if it is a statement that would be admissible by a dead person under S. 32 (2) or S. 32 (3). Although the statement contains certain admissions of liability, yet such admissions are only parts of a larger statement asserting a settlement. Reading the document as a whole, the statement is not a mere admission of liability but an assertion of the existence of a settlement such as is made by the defendants in this case. I do not consider therefore that S. 32 (3) applies. The point more difficult to decide is whether S. 32 (2) will make the statement admissible. Woodroffe and Ameer Ali and Nrisinhadas Basu in their books on Evidence, in discussing the meaning of the words "course of business" in S. 32 (2) repeat word for word the expressions used by Candy, J. in 23 Bom 63:[1]

> This exception to the general rule against hearsay extends only to statements made during the course not of any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged.

They consider it to be such business as would be conducted by a man of business, i. e., by a man habitually engaged in mercantile transactions or trade. The document was held to be admissible under S. 32 (3); and in any case it is difficult to see how a recital in a mortgage deed of the mortgagor's right was one made in the ordinary course of business. It is unnecessary therefore for Candy, J. to go so far; and the cases to which I have been referred by the learned counsel for the appellant do not go anything like as far as this. "In the course of business," as I understand it, means in the way that business (which may be of a purely private or even trivial nature) is conducted. It has no connexion with a course of business, which suggests a series of acts of business. Although 23 Bom 63[1] has not been expressly dissented from, it was held in 11 I C 854[2] that this section would apply to an act or acts of a simple and private nature. In that case a man wrote a letter to his wife in which he told her that a certain person had asked for a loan, and the learned Judges, while declaring the letter inadmissible, nevertheless were of opinion that if he had succeeded in proving that he was in the habit of consulting his wife before he made such loans, such a letter would have been written in the ordinary course of business. In that particular case there was no reason to think that the statement was anything more than a mere piece of information, and no evidence existed that he had ever acquainted his wife with such matters before. It could not therefore be said that the information was given in the ordinary course of business. In 1 I C 376,[3] some entries were made in a register but those entries were not entries required by statute and were mere jottings by the person who made them of some particulars that came under his notice. It was held that even so they were entries made in the ordinary course of business.

Applying these principles to the present case I do think that this letter (Ex. 7) was written by defendant 1 to his wife in the ordinary course of business. He was residing in the Hyderabad State and he had entered into a settlement which had to be implemented. He therefore wrote to his wife requesting her to do certain acts in pursuance of that settlement. We do not know whether the defendant wrote similar letters because in neither Court was the admissibility of this letter questioned. Nor was defendant 1 questioned on this point. Although it does not affect the admissibility of Ex. 7, it may be noted that there is no possibility that this was an attempt to manufacture evidence. As will be seen from a perusal of Ex. 7, it

1. Ningawa v. Bharmappa, (1899) 23 Bom 63.

2. Abdulla v. Na E Kin, (1911) 11 I C 854=4 Bur L T 185.

3. Sheonandan Singh v. Jeonandan Dusadh, (1909) 1 I C 376=13 C W N 71.

was not a mere self-serving statement. It was an admission of liability as well as a claim, and it was not made as a mere assertion but as a request to his wife to do certain things for him. At that time, as the lower Court has found, the most cordial relationship existed between the parties. In the result the appeal is dismissed with costs. Leave to appeal is refused.

C.R.K./K.B. *Appeal dismissed.*

A. I. R. 1937 Madras 21

HORWILL, J.

T. Syed Pitchai Rowther and *others*—Appellants.

v.

K. Devaji Rao and *others*—Respondents.

Second Appeal No. 255 of 1934, Decided on 31st August 1936, against decree of Sub-Judge, Dindigul, in A. S. No. 116 of 1930.

Specific Relief Act (1877), S. 54—A person is entitled to enjoy his own property as he pleases provided he does not create nuisance or interfere with rights of others—No injunction can be granted when there is no nuisance or interference with rights or apprehension thereof.

An owner cannot be restrained from enjoying his own property when it is not impossible for him and others to enjoy their rights. A person is entitled to enjoy his own property in any way he pleases provided that he does not create a nuisance or interfere with the rights of others. No injunction can be granted when there is no nuisance or interference with rights or apprehension thereof: *2 N W P H C R 182, Foll.* [P 22 C 1]

B. Sitarama Rao and *P. N. Appuswami Ayyar*—for Appellants.

S. Srinivasa Ayyangar and *S. Nagaraja Iyer*—for Respondents.

Judgment. — From time immemorial there has existed a temple known as the Muthalamman temple on the village site of Ganguvaripatti in Periakulam Taluk and in comparatively recent years the Mahomedans of the village have erected a mosque a short distance away. In order to avoid friction between the two communities certain executive orders have been passed; but apparently there has been no trouble. The temple is situated in an unoccupied part of the village site and the worshippers of the temple have always congregated there on festival days for worship. Adjoining the mosque to the east is a pound, which was granted to the Mahomedans on the express understanding that they should not build over it and to the east of the pound is a plot that once belonged to one Venkatachalam Chetti, who sold it in 1914 to the mosque. The Hindus now seek to restrain the Mahomedans from interfering with the worship and in particular from opening doors on the southern side of the plot recently purchased by them and from doing any other act which would offend the susceptibilities of the Hindus. The District Munsif gave an injunction permanently restraining the Mahomedans from interfering with the worship at festivals on the above site by passing along the same or by any user of their site, north of the above site, or of any structure on it, in a way obnoxious or interfering with the rights of such worship by the Hindus, during the period of their worship or festivals on the suit site. The learned Subordinate Judge of Dindigul, in appeal, went even further and issued an injunction restraining the Mahomedans from opening any doors to the south of their plot.

It is contended in this Court that one of the shops is erected on the site of the pound, in regard to which the Mahomedans had given an undertaking; but the plaintiffs did not allege this in their plaint and a perusal of the sale deed would indicate that in fact the defendants have not done so. The Mahomedans have at no time denied the rights of the Hindus to worship on the site and to congregate there at times of festivals. They state, however, that from time immemorial they have been accustomed to walking across the natham and there is evidence that some sort of path does exist; and such usage is recognised in the survey plan. Mr. S. Srinivasa Ayyangar would put the rights of the Hindus to worship and congregate on a higher level than the right of a pedestrian to cross the natham on the ground that no person can acquire an easementary right to walk across the village site, whereas the Hindus have acquired a right with which even the Government cannot now interfere, even though the site is grama natham and therefore poramboke. Although the Mahomedans do not deny that the Hindus have always worshipped there and have a right to do so, there is no finding that the rights of the Hindus to congregate there stands any higher than the rights of the villagers to walk across the site or to stand there and certainly the Mahomedans have not conceded this. D. W. 1 states in his evi-

dence that Mahomedans do stand on the site at times of festivals and there is no objection to their doing so. There is nothing in the evidence to indicate that it is impossible for both sides to enjoy the rights. This being so it is difficult to see how the Mahomedans can be restrained from enjoying their own property which they have legally purchased for good consideration. I need not quote authorities which lay down the elementary proposition that a person is entitled to enjoy his own property in any way he pleases provided that he does not create a nuisance or interfere with the rights of others. This was well put in 2 N W P H C R 182[1]:

> Parties are at liberty to build what structure they please upon their own land; but if they interfere with the free enjoyment of their neighbour's property, they may become liable in damages for the injury that they do.

The simple question therefore is whether in fact the Mahomedans have interfered or have given any cause for apprehension that they will interfere with any of the rights of the Hindus. As far as can be seen from the evidence, the only right that the Hindus have is to congregate there and to kill fowls, goats, and other animals, and there is no reason at all to think that the Mahomedans would object to this or that they have ever attempted to obstruct the Hindus in the exercise of these practices. I do not see how the opening of doors on the southern side can in any way interfere with these rights. A few customers may go to the shop while the festival is on; but it cannot be contended that customers come in such large numbers that the Hindus would be prevented from carrying out their worship or that they would be in any way inconvenienced thereby. Another argument put forward which seemed to gain favour with the lower Courts was that if the Mahomedans chose to sell mutton in their shops the Hindus might object. It would, however, appear that this festival is largely attended by Pallans and other men of low caste. Animals are slaughtered there and certain persons have of course mirasi rights in those animals so that animals are sold by persons connected with the temple for food. It seems most unlikely that such persons as would attend these festivals would object in any way to the sale of mutton in stalls at the site; but even if there were any objection to the sale of any particular commodities in the shops, I would still be of opinion that the Hindus would have no right to restrain the Mahomedans from the sale of such. The lower Courts have also given a declaration that the Hindus of the suit village have a right to assemble and worship. Although no strong objection has been raised to this injunction, nevertheless, in view of the fact that the Mahomedans have never denied that the Hindus have such a right, I think that such a declaration was improper. Similarly no purpose is served in restraining the Mahomedans from interfering with the worship at festivals when they have never done so and when there is no likelihood of their interfering. All that they desire is a free use of the site which they have bought from their Hindu predecessor, and this they are entitled to do.

It is contended that as the site belongs to the Government the defendants have no right of access to it from the south; but that point was not raised in either of the lower Courts, and as the Government is not a party there is no necessity to go into that question now. In order to avoid a misunderstanding I would make it clear that nothing in this judgment is intended to decide any question as to the rights of either the plaintiffs or the defendants with regard to this site as against the Government. I allow the appeal with costs throughout and dismiss the suit. (No leave.)

C.R.K./S.C. *Appeal allowed.*

1. Kasim Ali Khan v. Birj Kishore, (1870) 2 N W P H C R 182.

A. I. R. 1937 Madras 22

HORWILL, J.

M. R. M. Ramaswami Chettiar—Appellant.

v.

M. T. T. K. R. S. V. Muthiah Chettiar and *others*—Respondents.

Second Appeal No. 262 of 1932, Decided on 19th August 1936, against decree of Sub-Judge (Addl.), Devakottai, in A. S. No. 8 of 1931.

Deed—Construction—Sale—Deed purporting to convey property—Agreement to execute another document if vendee deemed it necessary—Deed held purported to convey property—Agreement not separable from actual sale—Agreement about sale of land is governed by law where land is situated.

Where on the face of the document property was conveyed for a consideration paid on a hundi and the document contained further agreement

that if the vendee requires any document or power etc. therefor, the vendor should without delay have the same completed whenever required at the cost of the vendee, the question was whether the document was a mere agreement to sell or whether it was not rather a record of what the parties considered to be a sale, with a promise that a regular sale deed should be executed in due course:

Held: the recitals made it clear that the parties thought that a sale had actually taken place and that a document was only to be executed in the future if the vendee should require it. Therefore the document purported to bring about an actual conveyance of property : *A I R 1922 P C 266* and *A I R 1930 PC 76, Ref.* [P 24 C 2]

The promise to execute the regular deed if required cannot be separated from the rest of the transaction. If the land was not sold then the vendee could not insist on the execution of the document. Contracts with regard to land usually form part of an instrument which is meant to convey or alienate land or an interest in land, but the form of such an instrument is admittedly determined by the law of the country where the land is situate. The question, therefore, whether a contract with regard to an immoveable property is or is not, as to its form, governed by the *lex situs*, can arise only when the contract is not intended to be a conveyance or alienation of the land. So that even if this promise to execute a document could be enforced in spite of the failure to convey the property, the contract would have to be interpreted according to the *lex situs*.

[P 24 C 2]

M. Patanjali Sastry and *C. S. Rama Rao Sahib*—for Appellant.

K. Subramania Ayyar and *A. C. Sampath Ayyangar*—for Respondents.

Judgment.—The facts as found by the lower appellate Court were that the father of the plaintiff and the plaintiff after him have been in possession of the suit property since the date of the agreement, Ex. D, under which on the face of the document, the suit property was conveyed to the plaintiff's father for a consideration of Rs. 2,000 paid on a hundi. That part of Ex. D which deals with this property contains a further agreement that if Muthu Veeran, the father of the plaintiff, requires any document or power, etc., therefor, the defendants' grandfather should without delay have the same completed whenever required at the cost of the plaintiff's father. The learned Subordinate Judge found, in agreement with the trial Court, that this agreement in Ex. D ought not to be specifically performed, because of the laches of the plaintiff and his father, who have taken no steps during the course of 21 years to get this document executed, because of the changes in the possession of the parties and the passing of property to third parties, and also because, according to the law of Ceylon, Ex. D construed as an agreement to sell would not be enforceable as it was not executed in the presence of a Notary Public. If Ex. D can be read as an agreement to sell which has been to a great extent executed by the payment of consideration and the giving of possession, I do not think that there are any very strong reasons why specific performance should not be granted. As the purchasers had possession of the property, then as long as they were allowed to remain in peaceful possession and their title was not challenged, there was little reason why they should require a formal title deed. I cannot see that the fact that Ex. D would have no legal effect in Ceylon affords any reason for not ordering specific performance. The agreement was executed in British India by British Indians, and one would naturally expect such persons to contemplate the execution of a document which conformed with the law of the land in which the document was executed and of which they were subjects.

The main question however is whether Ex. D is a mere agreement to sell or whether it is not rather a record of what the parties considered to be a sale, with a promise that a regular sale deed should be executed in due course. I have been referred to three cases in which a preliminary document likened to Ex. D has been executed and in which it has been held that the agreement was merely one to execute another document. The first of these is 46 Mad 373.[1] Here the parties were divided in status and executed a document which was described as a yadast or a memo which recorded a partition and stated that that document would remain effective until a regular partition deed had been executed. Their Lordships held that from a reading of the document as a whole and from the name it bore, i. e., a memo, it was not intended to convey any right or title in immoveable property. The second case is 58 M L J 453,[2] also a Privy Council case. Cl. 1 of the agreement was that the advances to be made by the plaintiff to the mill were to be up to the limit of the stock in trade under hypothe-

1. Rajangam Ayyar v. Rajangam Ayyar, A I R 1922 P C 266=69 I C 123=50 I A 134=46 Mad 373=44 M L J 745 (P C).
2. Sir Hukumchand Kasliwal v. Radha Kishen Moti Lal, A I R 1930 P C 76=123 I C 157=58 M L J 453 (P C).

cation to the plaintiffs and in their custody. Later it is agreed "that all stock in trade . . . . shall be under hypothecation to the Banians (plaintiffs) . . . ." Finally, in para. 7 of the agreement, the defendant mill requires that as soon as possible after the execution of the agreement a regular deed of mortgage of the land, etc., should be made to the plaintiffs to meet any deficit that may be due to the plaintiffs for the advances made by them after availing of the stock under hypothecation as aforesaid. From the relevant words in the document, the Privy Council held that this document was merely an agreement to execute a proper and regular conveyance in due course. The question however had not to be decided in that case for, as their Lordships pointed out, the plaintiffs were on the horns of a dilemma; for the suit in question was between the plaintiffs who had lent money to this mill and certain mortgagees to whom the mill property had been mortgaged subsequently to this agreement. If the agreement in question purported to mortgage the mill property, then the transaction was void because the agreement had not been registered; if, on the other hand, it was not a mortgage then the plaintiffs failed because in the meantime the other mortgages had come into being; so that the plaintiffs had to fail in any case. The third judgment quoted is one of Bardswell, J. in a criminal matter. I do not think it is safe to place too much weight on this decision; because in a criminal case a Judge naturally construes a document with a bias towards the innocence of the accused.

Turning now to the actual document we have to construe, we do not find only general words suggesting a conveyance and a definite agreement that another document will be executed but recitals to the effect that the suit property was sold "this day" and that the hundi for Rs. 2,000 which was the consideration for the sale was payable with interest "from this day." Then come the usual recitals upon which perhaps too much reliance ought not to be placed, viz., that as the firm has received the amount the property shall be held and enjoyed as long as the sun and the moon last by the plaintiff's father as he likes with powers of alienation by way of gift, exchange and sale. Then comes an important clause :

> If Muthu V. M. (plaintiff's father) requires any document or power, etc. therefor, Muthu K. R. S. V. firm (grandfather of defendants 1 to 5), shall, without any delay have the same completed whenever required at the cost of Muthu V. M.

Although I would like so to construe this document drawn up by a layman, as to make it conformable with the provisions of the law, I do not see in view of the words just set out how it can be taken as a mere agreement to sell or as a document of which the main purport was the execution of another document. The recitals make it clear that the parties thought that a sale had actually taken place that day and that a document was only to be executed in the future if the plaintiff's father should require it. I therefore agree with the lower Courts that Ex. D purported to bring about an actual conveyance of property. Ex. D, not being registered, did not bring about any conveyance and the transaction had therefore no legal effect. Under the circumstances therefore we cannot separate the promise to execute the regular deed if the plaintiff's father required it from the rest of the transaction. If the land was not sold then the plaintiff's father could not insist on the execution of a document. Moreover, as has been further pointed in Dicey's "Conflict of Laws" at p. 545, Edn. 4:

> Contracts with regard to land usually form part of an instrument which is meant to convey or alienate land or an interest in land, but the form of such an instrument is admittedly determined by the law of the country where the land is situate (*lex situs*). The question, therefore, whether a contract with regard to an immoveable is or is not, as to its form, governed by the *lex situs*, can arise only when the contract is not intended to be a conveyance of alienation of the land.

So that even if this promise to execute a document could be enforced in spite of the failure of Ex. D to convey the property, the contract would have to be interpreted according to the *lex situs*, which admittedly would invalidate Ex. D. In any event therefore the plaintiff is not entitled to enforce specific performance of the agreement in Ex. D. The Second Appeal therefore fails and is dismissed with costs of the contesting respondents.

C.R.K./B.D. *Appeal dismissed.*

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* A. I. R. 1937 Madras 24

HORWILL, J.

A. P. S. Muhammad Ibrahim—Petitioner.

v.

Allapichai Rowther—Respondent.

Civil Revn. Petn. No. 55 of 1936, Decided on 10th August 1936.

*** Commission — Application to examine defendant (resident of Penang)—Defendant present within jurisdiction of Court for long time before application to examine on commission—Ground that defendant could have approached Court and asked it to record his evidence before he left is not sufficient to refuse issue of commission.**

Where the agent of defendant made an application for issue of commission to examine defendant (resident of Penang), the trial Court rejected the application on the ground that defendant was present within the jurisdiction of the Court for a long time before the presentation of application for issue of commission and before leaving for Penang he could have approached the Court and asked it to record the evidence :

Held : that this was not sufficient ground to refuse an issue of commission to examine defendant : *23 Bom 626, Disting.*; *A I R 1924 Mad 541* and *A I R 1934 Mad 399, Rel. on.*

[P 26 C 1]

T. G. Raghavachariar—for Petitioner.

D. Ramaswami Iyengar—for Respondent.

Order.—An ex parte decree was passed against the defendant in Penang and the decree was transferred to the present plaintiff, a resident of British India. The transferee decree-holder brought a suit to enforce that decree and that suit was decreed ex parte. The defendant who was in India to celebrate his daughter's marriage, discovered that an ex parte decree had been passed; and he applied to the Court to set it aside. This the Court did. The defendant thereupon left the jurisdiction of the Court almost immediately, presumably for Penang. A written statement was filed by his power-of-attorney agent and an application made by him to examine the defendant and two witnesses on commission. The learned District Munsif permitted the examination of the witnesses on commission but not the defendant, the reason given being that the defendant was present at the time of the hearing of the petition to set aside the ex parte decree and he could easily have approached the Court and got it to record his evidence before he left for Penang. Against that order refusing to issue a commission to examine the defendant this Revision Petition has been filed.

It is argued (1) that the defendant is a permanent resident of Penang and (2) that the reason given by the District Munsif was in any case insufficient. With regard to the first point it is clear that the learned District Munsif himself did not have any doubt about the residence of the defendant in Penang and most of the documents that I have seen here refer to his residence at Penang. A number of cases have been cited, for example, 46 M L J 131,[1] 57 Mad 705[2] and a number of English cases, in which it has been held that a defendant should ordinarily be examined on commission and that it is important that a distinction should be made between the position of a plaintiff who chooses his forum, and the defendant who does not. The only ground on which the present case can be distinguished is that the defendant was within the jurisdiction of the Court rather more than a month before the presentation of the application to examine on commission. He could no doubt have approached the Court and asked it to record his evidence before he left; but I do not think that one would ordinarily expect a defendant to think of doing so. Whether there was any special urgency or not for his return it may be difficult to say; but there is no reason to doubt that he lived in Penang and there is therefore no reason why he should be compelled to remain in India until such time as the suit comes up for hearing. He had left even before the written statement was filed and he could hardly have been examined within two or three months of his having given evidence in the interlocutory proceeding. That is a long time for a business man to remain away from his home. In a Bombay case relied on by respondent, 23 Bom 626,[3] in which an application for a examination on commission had been rejected, the defendant was within the jurisdiction of the Court on the previous Sunday night and his witnesses admittedly returned frequently in the course of their business. The defendant cannot be punished for leaving the jurisdiction of the Court without the Court's permission by compelling him to come back for examination.

There is no sufficient reason to believe, and it does not appear that the learned District Munsif believed, that the defendant was attempting to escape cross-examination by going back to Penang. All the earlier proceedings were in Penang and the present suit could not have been filed in India had not the decree-holder

1. Viswanathan Chetty v. Somasundaram Chetty, A I R 1924 Mad 541=78 I C 407=46 M L J 131.
2. Rajagopala Pillai v. Kasi Viswanathan Chettiar, A I R 1934 Mad 399=150 I C 63=67 M L J 95=57 Mad 705.
3. Mowji v. Nemchand, (1899) 23 Bom 626=1 Bom L R 384.

transferred the decree to a resident of British India. Under these circumstances, I do not consider that there is sufficient reason for a departure from the ordinary rule that a defendant residing abroad should be permitted to be examined on commission; and the learned Munsif's refusal to do so calls for interference from this Court. The petition is therefore allowed and the District Munsif ordered to issue a commission for the examination of the defendant. Costs to be costs in the cause.

C.R.K./P.R. *Petition allowed.*

A. I. R. 1937 Madras 26

VARADACHARIAR AND MOCKETT, JJ.

Saripella Lakshmi Narasamma — Appellant.

v.

Saripella Ammanna Sidhanti and *others*—Respondents.

Appeal No. 330 of 1932, Decided on 11th February 1936, against decree of Sub-Judge, Amalapuram, in O. S. No. 32 of 1930.

(a) Will — No particular formality is required for revocation — Inference of revocation can be drawn if testator's conduct showed direction of mind that the will was not to remain in force.

No particular formality is necessary under the law in the mofussil for showing an intention to revoke a will, but when an inference in favour of revocation is asked to be drawn from the conduct of the testator, the conduct must be such as to show that his mind was directed to the question whether the will was to remain in force or not and his conduct proceeded on the footing that the will was no longer to be in force. [P 26 C 2]

(b) Will — Gift of life estate and of remainder—Failure of life estate during testator's life-time cannot affect clause relating to remainder.

In a case where there is gift of a life estate and of a remainder, the mere failure of the life estate by reason of the death of legatee during the testator's lifetime cannot affect the clause relating to remainder. [P 27 C 1]

P. C. Parthasarathy—for Appellant.

P. Somasundaram—for Respondents.

Varadachariar, J. — This is an unfortunate case but we see no way of upholding the principal contentions of the appellant before us. She sued for possession of her husband's properties on the footing that her husband had died intestate. The defendants pleaded that the plaintiff's husband had executed a will, Ex. 2, on 27th August 1910 whereby the properties referred to in the will had been given to one Subadrama, the then living wife of the deceased for her lifetime and after her death to the contesting defendants. The plaintiff questioned the genuineness of the will but the lower Court has rightly held that the evidence in its favour is such as to place its genuineness beyond doubt. This finding has not been seriously attacked before us.

It was next suggested that as the testator lived for nearly 20 years after the date of Ex. 2, lost his first wife in the meanwhile, married another wife, viz., the plaintiff and acquired properties subsequent to the date of the will, the Court must draw the inference that the will of 1910 must have been revoked. It is true that no particular formality is necessary under the law in the mofussil for showing an intention to revoke a will, but when an inference in favour of revocation is asked to be drawn from the conduct of the testator the conduct must be such as to show that his mind was directed to the question whether the will was to remain in force or not and his conduct proceeded on the footing that the will was no longer to be in force. We find no basis for any such inference in this case. Even as a matter of surmise, the utmost that can be suggested is that the testator never afterwards thought about Ex. 2 or perhaps forgot about it. The defendants have attempted to lead positive evidence to the effect that the deceased wanted that the will should remain in force, but, putting that evidence aside there is nothing to support the inference of an intention that the will should cease to have operation. It was next argued that, as a matter of construction of the language of Ex. 2, the bequest in favour of the testator's wife was not limited to Subadrama, the then wife of the testator, and that the language was sufficient to cover any wife including the plaintiff. Reference was made in this connexion to the discussion of some of the relevant authorities in 70 M L J 128,[1] to which one of us was a party. But in that case the gift was not to the wife by name. No expression of opinion in that case can therefore help the plaintiff in the present case.

Our attention has also been drawn to the evidence of D. W. 1, a vakil, who drafted the will under the instructions of

1. Neelama v. Mareppa, A I R 1936 Mad 388=163 I C 471=70 M L J 128.

the deceased. He has said that the testator instructed him to draw up a will with a bequest for life in his wife's favour and with a remainder in favour of his brothers and nephews. On this statement of the witness, it was argued that the testator meant a bequest in favour of his wife generally and that the reference to Subadramma which was put in by the witness himself without instructions from the testator must be disregarded. We do not think this is a proper way of interpreting a written document. The testator has undoubtedly signed the document presumably with knowledge of its contents. We very much doubt whether in the particular answer elicited from D. W. 1 it was at all brought home to his mind when the question was put to him to which that answer was given that counsel was going to draw a distinction between reference to wife generally and reference to the then existing wife. But even independently of this consideration, when a document which is signed by the testator makes a reference to Subadramma, there is no reason to ignore that reference as though it did not form part of the will, merely because in speaking about instructions given to the vakil for drafting the will that reference is not repeated. We are therefore unable to read the gift as one enuring to the benefit of the present plaintiff.

It was next argued that as the gift over to the brothers and nephews of the deceased is to take effect after the life estate in favour of Subadramma and as that life estate lapsed by reason of her death during the lifetime of the testator, the gift over in favour of the brothers and nephews must also be taken to have failed. We are unable to accept this contention. In a case where there is a gift of a life estate and of a remainder, the mere failure of the life estate by reason of the death of the legatee during the testator's lifetime cannot affect the operation of the clause relating to the remainder. The decision of Madhavan Nair, J., in A I R 1935 Mad 119[2] proceeded not on any general principle of the kind put forward on behalf of the appellant but upon the express language of the document before the learned Judge. The document there provided that should the first legatee die after the testator's death, the property should go over to somebody else. This clause was construed by the learned Judge as indicating a clear intention within the meaning of S. 130, Succession Act, that it is only in that particular contingency that the property should go to the second taker. The last contention urged on behalf of the appellant relates to the operation of the will on the after-acquired properties. It is not disputed that the properties specified in Schs. B and C are after-acquired properties.

As regards the property in Sch. C, there is a dispute between the parties whether the whole of it must be treated as the property of Viswanathan or only a fourth share therein. On the question of construction we agree with the contention on behalf of the appellant that there are no general words of devise in Ex. 2 sufficient to pass the after-acquired properties. So far as the immoveable properties are concerned, the bequest is limited to the properties which the testator got under partition and thus remained in his possession. In this view the plaintiff will be entitled to Sch. B properties and so much of Sch. C house as belonged to her husband. On this last question, as to the ownership of Sch. C house, we have been taken through the evidence. (After discussing the evidence the judgment proceeded.) The decree of the lower Court will be varied only to the extent of the awarding to the plaintiff possession of the whole of Sch. B properties and a fourth share in Sch. C property. The lower Court will take the necessary steps and pass a final decree for partition, possession and mesne profits in respect of the plaintiff's share above decreed. In the circumstances there will be no order as to the costs of this appeal. The plaintiff-appellant must however pay the court-fee payable to Government on the memorandum of appeal which will be a charge on the properties decreed to her.

Mockett, J.—I entirely agree.

C.R.K./K.B. *Appeal partly allowed.*

2. Subramanya Padayachi v. Pakkiri Padayachi, A I R 1935 Mad 119=154 I C 85=40 M L W 869.

A. I. R. 1937 Madras 27

PANDRANG ROW AND MENON, JJ.

Vijiathammal—Appellant.

v.

M. Kadir Sultan and *another*—Respondents.

Letters Patent Appeal No. 68 of 1935, Decided on 11th August 1936, from decree of Varadachariar, J., in S. A. No. 482 of 1931, as reported in *A I R 1935 Mad 599*.

Power-of-attorney—Construction — Power must be strictly construed—Power to borrow or to receive deposits must be express or must be necessarily implied.

A power-of-attorney is to be construed strictly. Where a particular act is alleged to have been done under a power-of-attorney and that allegation is challenged and it is contended that the act was in excess of the authority given by the power-of-attorney, it is necessary to show that on a fair construction of the entire instrument the authority in question has to be found within the four corners of the instrument either in express terms or by necessary implication. Power to purchase goods may include power to pay for them but does not include general power to borrow. Even if there was general power to borrow it would not necessarily imply a power to receive deposits and to carry on a banking business: *Bryant Powis and Bryant* v. *La Banque Du Peuple*, (*1893*) *A C 170, Foll.* [P 28 C 2 ; P 29 C 1]

K. R. Rama Ayyar—for Appellant.

T. S. Venkatesa Ayyar — for Respondents.

Pandrang Row, J. — This is a Letters Patent appeal from the judgment of Varadachariar, J. dated 12th March 1935, in S. A. No. 482 of 1931.* The plaintiff who is the appellant sued to recover a sum of Rs. 1,000 with interest thereon and her case was that that amount was deposited by her with the firm of defendants 1 and 2 at Negapatam on 21st November 1924, the actual payment having been made to defendant 3 who was then the local agent of the firm of defendants 1 and 2. Defendants 1 and 2 denied that the firm was bound by the transaction which the agent had no power to enter into on their behalf and it was also contended that the transaction was not entered in the books of the firm and the firm did not get the benefit of the money in question. In other words they disclaimed their liability altogether. The plaintiff had asked for a decree in the alternative against defendant 3 in case she was not able to establish the liability of defendants 1 and 2. In the trial Court there was a decree against defendants 1 and 2 as well as against defendant 3, but in appeal the Subordinate Judge of Negapatam dismissed the suit as against defendants 1 and 2. From that judgment the second appeal was preferred and it was dismissed with costs. The main question in the second appeal was whether as a matter of fact the power-of-attorney granted by defendants 1 and 2 to defendant 3 gave defendant 3 authority to borrow on behalf of his principals.

On this point the opinion of Varadachariar, J. was that the power-of-attorney did not authorize defendant 3 to borrow money for or on behalf of his principals. The authorities which bear on this point have been discussed by our learned brother in his judgment and it is unnecessary to embark on a further discussion, because to our minds the point is very simple and scarcely leaves room for any doubt. The authorities do not seem to be of much use in deciding the effect or purport of the particular power-of-attorney which we have to deal with in this case. The authorities deal with documents worded differently. As to the general principle applicable to cases of this kind there is no dispute, viz., that a power-of-attorney is to be construed strictly, that is to say, where a particular act is alleged to have been done under a power-of-attorney and that allegation is challenged and it is contended that the act was in excess of the authority given by the power-of-attorney, it is necessary to show that on a fair construction of the entire instrument the authority in question has to be found within the four corners of the instrument either in express terms or by necessary implication. The principle has been laid down almost in exactly these words in (1893) A C 170[1] by Lord Macnaughten at p. 177. Bearing this principle in mind we have examined the power-of-attorney and we are unable to find any reason for differing from the opinion expressed by the learned Judge who heard the second appeal. There is no doubt authority given to purchase goods, the principals being merchants carrying on trade in the shape of export and import of goods.

It is contended that a power to purchase goods includes power to borrow. This contention we are unable to accept. The conclusion may perhaps be different if the question arises whether a power to purchase goods implied power to pay for them. That is not the case here. It is not the plaintiff's case that the money was borrowed from her for the purpose of paying for any goods which defendant 3 was authorized to purchase on behalf of his principals. On the other hand her own case in the plaint is that she made a deposit of the money. In other words what she did was consistent only with her belief

* Reported in A I R 1935 Mad 599.

1. Bryant Powis and Bryant v. La Banque Du Peuple, (1893) A C 170=62 L J P C 68=1 R 336=68 L T 546=41 W R 600.

that the principals (defendants 1 and 2) were carrying on a business which involved also the receipt of deposits from others. There is no instance brought to our notice in the evidence of any such deposit having been received on behalf of defendants 1 and 2 at any time ; nor is there anything to show that receiving deposits and paying interest thereon was part of their business. One might even go to the extent of saying that even if there was power to borrow, it would not necessarily imply a power to receive deposits and carry on a banking business of this kind. In this case however we are satisfied that the power-of-attorney does not at all include a general authority to borrow on behalf of the principals, and certainly there is no authority whatever to receive deposits of this kind referred to in the plaint. Neither the power-of-attorney nor the course of business carried on justifies the inference that the plaintiff believed in good faith that the deposit was made with the principals and not with defendant 3 personally.

It is common knowledge that traders in goods do not make it part of their business to receive deposits of this kind, and it is going too far to suggest that in this particular case there was sufficient ground for believing that defendant 3 was acting on behalf of his principals when he received the deposit in question. As a matter of fact the plaint itself rests on the allegation that defendants 1 and 2 carried on as a part of their business the business of receiving moneys as deposits and repaying the same with interest. This allegation is undoubtedly untrue and devoid of foundation. No attempt has been made to substantiate it. The accounts of the firm do not show any such transactions. The allegation in the plaint, unfounded as it was, shows that the plaintiff had realised that it was not possible to bring home liability to defendants 1 and 2 unless it was established that her money had been received by defendant 3 as part of the business carried on by him on behalf of his principals. As observed already, there is no foundation for this allegation and there can be no doubt that defendants 1 and 2 never received deposits as part of their business either themselves or through their agent at any time. In particular the plaintiff's money never went into the firm's accounts and it is not shown that the firm had any benefit therefrom. Thus even on the ground of benefit received the plaintiff has no cause of action because no such benefit has been established. Her cause of action is entirely limited to defendant 3 and she has got a decree against him. The claim to recover the money from defendants 1 and 2 is baseless, and it was rightly rejected by the lower appellate Court and in our opinion the judgment of our brother Varadachariar, J. dismissing the second appeal is perfectly right. The Letters Patent appeal is therefore dismissed with costs.

C.R.K./S.C. *Appeal dismissed.*

A. I. R. 1937 Madras 29

VENKATARAMANA RAO, J.

Pragada Krishnamurthi—Appellant.

v.

Pragada Seetama and *others*—Respondents.

Second Appeal No. 566 of 1931, Decided on 25th February 1936, against decree of Dist. Court, Ganjam, in A. S. No. 431 of 1928.

(a) Hindu Law—Joint family property — Ancestral nucleus is not necessary—Property acquired jointly by members of joint family —In absence of any indication to contrary it will be presumed to be joint family property—Male issue of acquirers acquires right in it by birth.

In order to constitute joint family property it is not necessary to have any ancestral nucleus. It is open to the members of the joint family to acquire property either by joint labour or by any other means and enjoy the same as joint family property, and in the absence of an indication to the contrary it will be presumed to be joint family property. Once the character of property as joint family property is established, no matter how acquired, it follows that the male issue of the acquirers will get a right in it by birth : *32 Bom 479, Rel. on.* [P 30 C 2 ; P 31 C 1]

(b) Hindu Law—Joint family property — Property originally self-acquired — Subsequent conduct and treatment of parties can make it joint family property.

Even assuming that the property in its inception is the self-acquired property of the parties, the parties, by their conduct and treatment, can impress it with the character of joint family property : *A I R 1927 Mad 830, Rel. on.* [P 31 C 1]

T. R. Venkatarama Sastry, A. Ramachandra Ayyar, A. Sundaresan and *Kasturi Seshagiri Row*—for Appellant.

G. Lakshmanna, G. Chandrasekhara Sastri and *K. L. Narasimha Row*—for Respondents.

Judgment.—The suit out of which this second appeal arises was instituted by the plaintiff for a partition of the properties specified in the plaint on the ground that

they are joint family properties wherein he and his father, defendant 9, are interested, for delivery of a half share therein and for setting aside certain alienations alleged to have been made by his father of portions of the suit property. His case is that his grandfather was one Appanna who died leaving him surviving two sons, plaintiff's father, defendant 9, and his brother Pattabhiramayya, that all the three constituted members of an undivided family, that Pattabhiramayya died in 1911, that thereafter the plaintiff and his father continued to be joint and undivided, that without any legal necessity defendant 9 alienated items 2, 3 and 4 of the plaint in favour of defendants 6, 7 and 8 respectively and therefore the alienations are not binding upon his half share. Defendant 4 is the mother of defendant 9 and the grandmother of the plaintiff. Defendant 5 is the widow of Pattabhiramayya. Defendant 3 is the son-in-law of defendant 4, defendants 1 and 2 are his sons; they were added as parties to the suit on the ground that they were in possession of the suit properties, but in the written statement filed by them they denied that they were in possession. It may be stated that the plaint contains 8 items. The main defence is that items 1 to 6 of the plaint belonged to Priya Ramachandrudu, the father of defendant 4 and the maternal grandfather of defendant 9 and Pattabhiramayya, that the said Ramchandrudu died 30 years before suit and that before his death he gifted the properties to them, that they were their separate properties and that the plaintiff could not acquire any right by birth in the suit properties and that he had no right to impeach the alienations made by defendant 9.

The Subordinate Judge who tried the suit was of opinion that there was no gift by Ramachandrudu, that the property must be deemed to have been inherited after the death of Ramachandrudu by defendant 4, that the plaintiff had no right in any of the properties left by him and that the only joint family properties were items 7 and 8 of the plaint and therefore he passed a preliminary decree for partition only of items 7 and 8 and disallowed the plaintiff's claim in regard to the rest of the items. In so far as the alienations are concerned, he was inclined to the view that the alienations in favour of defendant 6 were binding on the plaintiff and that the alienations in favour of defendants 7 and 8 would not be binding on him in case the properties are held to be joint family properties. On appeal the learned District Judge held that the gift in favour of defendant 9 and Pattabhiramayya was true, but that the property must be deemed to have been taken by them not as ancestral property and that therefore the plaintiff did not acquire a right by birth and had no right to impeach the alienations made by his father. Against this decision this second appeal has been preferred by the plaintiff. The gift alleged is oral and hence no title could vest in defendant 9 and his brother Pattabhiramayya by virtue of the said gift. It is therefore unnecessary to consider the character of the estate taken by both the brothers under the said gift. But it has been found by both the Courts that ever since the death of Ramachandrudu the properties had been enjoyed by both defendant 9 and Pattabhiramayya jointly and dealt with by them as their own and that defendant 4, the mother, disclaimed all interest in the said property. In the written statement filed by her in this suit she admitted that the said property was enjoyed by defendant 9 and Pattabhiramayya ever since the death of Ramachandrudu. Defendant 5, the widow of Pattabhiramayya, also does not claim any interest as the heir of Pattabhiramayya in any of the properties acquired by Ramachandrudu.

Therefore from the evidence it is clear that though in the absence of a deed of gift the properties must be deemed to have devolved on defendant 4 by right of inheritance, yet they were enjoyed by defendant 9 and Pattabhiramayya in their own right and were treated and enjoyed jointly by them who formed members of a joint Hindu family. Their enjoyment therefore was adverse to the rights of defendant 4 and they must be deemed to have acquired title to the property by prescription. There is therefore an acquisition of property by both the brothers who formed members of a joint Hindu family. In order to constitute joint family property it is not necessary to have any ancestral nucleus. As observed by Beaman, J., in 32 Bom 479[1] at p. 492 :

> Because it is true that there can be no joint ancestral family property without a previous nucleus of joint family property, it is not true that there

1. Karson Das Dharamsey v. Gangabai, (1908) 32 Bom 479=10 Bom L R 184.

cannot be joint family property without a pre-existing nucleus.

It is open to the members of a joint family to acquire property either by joint labour or by any other means and enjoy the same as joint family property. So far as this Court is concerned, it is well established that if members of a joint family acquire property together by joint labour, in the absence of an indication to the contrary it will be presumed to be joint family property in which the male issue of the acquirers would acquire a right by birth. The same principle must in my opinion be applied to the case of any property acquired jointly by the members of a joint family. Once the character of property as joint family property is established, no matter how acquired, it follows that the male issue of the acquirers will get a right by birth. There is no evidence in this case that the property was meant to be treated by them as separate property. On the other hand, there is distinct evidence that in the consciousness of the family it was joint family property in the sense that every member of the family would have an interest in it. Ex. 3, sale deed which evidences the alienation in favour of defendant 6 of item 2 was executed by defendant 9 for himself and as guardian of the plaintiff and in it 'there is a clear recital that the said property was got from Priya Ramachandrudu and it has been in their enjoyment and possession, meaning thereby the enjoyment and possesssion of defendant 9 and the plaintiff. Even assuming that the property in its inception was the self-acquired property of the two brothers, by their conduct and treatment they have impressed it with the character of joint family property : A I R 1927 Mad 830.[2]

The plaintiff must therefore be deemed to have acquired a right by birth in items 1 to 6 of the plaint excepting two survey Nos. 298 and 299 in item 1. The plaintiff is therefore entitled to have a partition of all the items in suit excepting the two survey numbers above referred to. It must also be declared that the alienations in favour of defendants 7 and 8 are not binding on the plaintiff's half share. The alienation in favour of defendant 6 under Ex. 3 will stand. But the Court, in effecting a partition, will so adjust the equities, if possible, as to allot items 3 and 4 to the share of defendant 9, therefore to the several alienees. As the mother of the plaintiff was not made a party to this appeal, I directed her to be made party respondent and she is now represented by Mr. K. L. Narasimha Rao. In effecting a partition the Court will also provide for the maintenance of the female members of the family, respondents 4, 5 and 9, having regard to the income of the properties which have been declared by me herein as joint family properties and the liabilities of the family. I therefore reverse the decree of the learned District Judge and direct a partition in the light of the above observations. I direct the costs of all parties to come out of the estate. This order will not affect the order as to costs whereby defendants 7 and 8 were made to pay proportionate costs of suits to the plaintiff. Plaintiff will be entitled to mesne profits in regard to the share decreed from this date from the persons in possession, and the provision of maintenance to the female members of the family will be made from this date. Leave refused.

C.R.K./M.D. *Decree reversed.*

2. Avobalachariar v. Thulasiammal, A I R 1927 Mad 830=103 I C 281.

A. I. R. 1937 Madras 31

CORNISH, J.

Co-operative Credit Society, Arungunam —Appellant.

v.

Chinnaswami Udayan—Respondent.

Appeal No. 74 of 1934, Decided on 22nd September 1936, against appellate order of Dist. Court, Chingleput, D/- 10th October 1933.

Limitation Act (1908), Art. 181 — Applicability—Application under R. 14 (5) (b) framed under Co-operative Societies Act, to enforce award made by Registrar, Co-operative Societies — Application filed three years after the date of award—On application to civil Court, award is enforceable like decree of civil Court — Application to enforce award in effect puts in motion the machinery of Civil Procedure Code and it being beyond period of limitation prescribed by Art. 181, Lim. Act, is time-barred.

Where an application to enforce the award was made more than three years from the date of award by the Registrar, Co-operative Societies, in accordance with the procedure laid down by R. 14 (5) (b) framed under the Co-operative Societies Act :

Held : that the application to enforce award on being presented to the civil Court having jurisdiction over the subject-matter of the award put in motion the machinery of the Code for execution of decrees, the award being enforceable like a decree of the civil Court. The application to enforce the award being therefore an application under

the Civil Procedure Code was governed by Article 181, Lim. Act, and was therefore time barred : *31 Mad 24, Rel. on ; 7 Bom 213 ; 32 Bom 1* and *A I R 1933 P C 63, Disting.* [P 32 C 1, 2]

K. E. Rajagopalachari—for Appellant.

C. Krishnamachariar—for Respondent.

Judgment. — The appellant is the Co-operative Credit Society of Arungunam. It obtained an award under the provisions of the Co-operative Societies Act against the respondent for a sum of money. The award was made on 30th January 1928. The application to enforce the award was made by the Registrar of Co-operative Societies to the Court on 15th January 1932. The only question in this appeal is whether the application is time-barred. Admittedly it is if Art. 181, Lim. Act, governs it. But the argument is that the application not being one under the Civil Procedure Code, the Limitation Act has no application. The application to enforce the award was made in accordance with the procedure laid down by R. 14 (5) of the Statutory Rules which have been framed under the Co-operative Societies Act. The particular course taken by the Registrar in the present case was under R. 14 (5) (b), which says :

> On application to the civil Court having jurisdiction over the subject-matter of the decision or award, that Court shall enforce the decision or award as if it were a decree of the Court.

It is clear that the application is made to the Court to exercise its functions as a Court. But the argument is that admitting that the application is made to the Court, it is not an application made to the Court under the Civil Procedure Code, but is an application made under the provisions of the Co-operative Societies Act. There is no doubt upon the case law that Art. 181, Lim. Act, only relates to applications under the Code. But if these cases are examined it will be found that they refer to applications to the Court to order something which the Court has no power to order or to do under the Civil Procedure Code, e. g. an application for probate to the Court under the Probate and Administration Act : 7 Bom 213;[1] or for an order under the special rules of the High Court for recovery of costs by a solicitor : 32 Bom 1;[2] or an application by a liquidator under S. 186, Companies Act, for an order upon contributories of the company to pay debts: 64 M L J 403.[3] In each of these instances the remedy given by a particular Act is enforceable in the manner provided by that Act and not by the machinery of the Civil Procedure Code.

In the present case the application is to the Court to exercise its execution jurisdiction as if the award was a decree ; I think that means that it is to be executed in the same manner as decrees are executed under the Code. In fact, a Court has no other power than that which is conferred upon it by the Code to put its execution machinery in motion. In my judgment this case is hardly distinguishable from 31 Mad 24.[4] There an application was made in pursuance of S. 40, Revenue Recovery Act, which provides that on production of a sale certificate by the purchaser, the Court shall cause a proper process to be issued for the purpose of putting such purchaser in possession in the same manner as if the purchased lands had been decreed to him by a decree of the Court. The same argument was raised there as here that the application was not one made under the Civil Procedure Code. But it was held that inasmuch as the application to the Court was to put in motion the machinery of the Code, it was an application under the Code. This reasoning seems to be decisive of the present appeal. The appeal accordingly fails and is dismissed with costs.

C.R.K./S.C. *Appeal dismissed.*

1. Bai Manick Bai v. Manekji Kavanji, (1883) 7 Bom 213.
2. Wadia Gandhy & Co. v. Purshotam, (1908) 32 Bom 1=9 Bom L R 508.
3. Hansraj Gupta v. Official Liquidators, Dehra Dun, Mussorie E. T. C. Co. Ltd., A I R 1933 P C 63=142 I C 7=60 I A 13=54 All 1067=64 M L J 403 (P C).
4. Sambasiva Mudaliar v. Panchanadha Pillai, (1908) 31 Mad 24=17 M L J 441.

✻ A. I. R. 1937 Madras 32

PANDRANG ROW, J.

Karutha Syed Muhammad Rowthar — Appellant.

v.

Official Receiver, Coimbatore, and *another*—Respondents.

Appeal No. 77 of 1935, Decided on 14th April 1936, against appellate order of Dist. Court, Coimbatore, D/- 13th March 1935.

✻ (a) Provincial Insolvency Act (1920), Ss. 4, 53 and 54—Jurisdiction—Scope—Question of title—Insolvency Court can try question of claim to or title of an insolvent—Ss. 53 and 54 do not limit or restrict the jurisdiction conferred by S. 4 — Insolvency Court has

power also to decide if registration is valid or not.

Section 4 confers wide powers on the Insolvency Court and it can under S. 4 try the question whether the insolvent is entitled to certain property or not when there is a dispute about the title to it. [P 34 C 1]

Express powers given to annul certain transfers by Ss. 53 and 54 of the Act do not limit or restrict the jurisdiction conferred upon the Insolvency Court by S. 4. The Insolvency Court has also power and jurisdiction to decide whether registration is valid or not where neither party intends that certain items included in the deeds of transfer should really pass from one to the other and the inclusion of the items is only meant to enable the document to be registered by the Sub-Registrar of a particular place: *A I R 1929 All 105*; *A I R 1933 Mad 527* and *A I R 1926 Mad 363, Foll.* [P 33 C 2; P 34 C 2]

(b) Registration—Fraud — Collusion — Neither vendor nor purchaser intending to buy particular item of property included in the transfer deed—Inclusion of it made to evade provisions of Registration Act and get the deed registered at a particular place—Registration is invalid.

Where the vendor neither intends to sell nor the purchaser intends to buy any particular item of property included in the deed of transfer and the inclusion of such property in the deed of transfer is a mere device to evade the provisions of the Registration Act and get the deed registerd at a particular place, there can be no effective registration of the deed of transfer at all. *A I R 1936 P C 91, Foll.* [P 34 C 1]

C. Padmanabha Iyengar—for Appellant.

T. V. Ramanatha Iyer—for Respondents.

Judgment.—This is an appeal from the decree of the District Judge of Coimbatore dated 13th March 1935, reversing on appeal, the order of the Additional Subordinate Judge of Coimbatore, dated 28th April 1934, on an application made under Ss. 53 and 4, Provincial Insolvency Act, 5 of 1920. That application was made by the Official Receiver of Coimbatore in respect of the insolvency of E. M. Muhammad Ismail Saheb alias Mudali who was adjudicated an insolvent on 8th December 1927 on a petition for adjudication made by one of his creditors who was his own brother on 24th August 1927. The present application related to two transfers of immoveable property made by the insolvent on 17th July 1926: one was a sale deed for Rs. 22,000 and the other was a usufructuary mortgage for Rs. 4,000, in favour of one Karutha Syed Muhammad Rowther, the appellant in the present appeal, and who is the son-in-law's sister's husband of the insolvent. It was alleged that these transfers were without consideration and were made in bad faith with the object of cheating the creditors of the insolvent. It was also alleged that even otherwise the transfers did not take effect actually as the deeds of transfer had not been validly registered under the Registration Act, the Official Receiver accordingly prayed that the deeds in question should be declared void and annulled.

The Subordinate Judge after hearing the evidence came to the conclusion that the transfers had been made bona fide and for valuable consideration. As regards the other question of the validity of the registration of the deeds of transfer, he was of opinion that if the Insolvency Court could decide the question, then the registration was not invalid under the law relating to registration of documents. The application was accordingly dismissed with costs. The Official Receiver appealed to the District Judge and in appeal it would appear that the question whether the transfers were made for valuable consideration and in good faith was not actually argued and the only point argued before the District Judge was whether the learned Subordinate Judge's interpretation of the law regarding the jurisdiction of the Insolvency Court and the validity of the registration of the deeds in question was correct. On these points the learned District Judge differed from the Subordinate Judge and he was of the opinion that the Insolvency Court has jurisdiction to decide the matter and that under the latest decision of the Judicial Committee reported in 56 All 468[1] the registration must be held to be invalid as neither party intended that certain items included in the deeds of transfer should really pass from one to the other and the inclusion of those items was only to enable the documents to be registered by the Sub-Registrar of Aravakkurichi instead of by the Sub-Registrar at Erode who would otherwise have had the jurisdiction to register them.

In this appeal by the transferee, one main question has been argued and that is the question of jurisdiction. If as a matter of fact the Insolvency Court has jurisdiction to decide the validity or otherwise of the registration of these deeds, then it is not seriously attempted to be argued that the finding of the learned District Judge is not right, for apart from the decision of

1. Collector of Gorakhpur v. Ram Sundar Mal, A I R 1934 P C 157=150 I C 545=61 I A 286=56 All 463 (P C).

the Judicial Committee relied upon by the learned District Judge, there is a subsequent decision of the Judicial Committee reported in 70 M L J 378,[2] in which the previous decisions on the validity of registration have been reviewed and it has been clearly laid down that where the vendor neither intends to sell nor the purchaser intends to buy any particular item of property included in the deed of transfer and the inclusion of such property in the deed of transfer is a mere device to evade the provisions of the Registration Act, there can be no effective registration of the deed of transfer at all. The question of jurisdiction mainly turns on the correct interpretation of S. 4, Provincial Insolvency Act. It is argued by the learned advocate for the appellant that the jurisdiction conferred by this section on the Insolvency Court so far as the annulling of deeds of transfer is concerned is limited to cases which are provided by Ss. 53 and 54 of the Act, and that a general power of annulling transfers not falling within Ss. 53 and 54 of the Act cannot be exercised by the Insolvency Court under S. 4 of the Act.

No doubt this view has some arguments to support it and it found favour with Sen, J. in 51 All 550,[3] but he was in a minority, and the view of the majority of the Bench was otherwise, namely that S. 53, Provincial Insolvency Act, does not limit or restrict the jurisdiction conferred upon the Insolvency Court by S. 4 to decide all questions of title which arise in cases of insolvency. The majority view has been followed in 64 M L J 397[4] and it was assumed in a previous case, namely 49 Mad 762,[5] that it is open to the Insolvency Court under S. 4, Provincial Insolvency Act to try the question whether the insolvent is entitled to certain property or not when there is a dispute about the title to it. The language employed in S. 4 is very wide, and though there is the proviso that the powers given by that section are subject to the provisions of the Act, there is no reason to suppose that where the Act does not expressly limit those powers, the very wide powers given by that section were intended by the legislature to be cut down by mere implication, that is to say, that because express powers are given to annul certain transfers by Ss. 53 and 54, the power to annul all other transfers must be deemed to be withheld from the Court, in spite of the wide powers conferred by S. 4, which says that the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency which the Insolvency Court might deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in such a case.

In this particular case certain very valuable items of property which belonged to the insolvent till July 1926 were transferred to the appellant and the question which the Insolvency Court was asked to decide was whether these properties were still the properties of the insolvent and could be made available for the benefit of the creditors. It was certainly within the competence of the Court to decide this question as that question had to be decided for making a complete distribution of the insolvent's property in the insolvency proceedings. In fact it would appear as if the bulk of the property of the insolvent was the subject matter of the application before the Insolvency Court, and I am of opinion that the Insolvency Court exercised its discretion properly in deciding the matter itself instead of referring the Official Receiver to the ordinary civil Court. The question of jurisdiction being thus decided against the appellant, there is really nothing more left in the appellant's case. For, the question as to what was the intention of the parties in including certain items of property in the deeds of transfer is a question of fact, and the finding of the lower appellate Court on this question of fact is final. There is certainly sufficient evidence to support that finding. As regards the question whether particular items were not the property of the transferor at the time, the findings of the Courts below are concurrent, and the correctness of these concurrent findings has not been questioned

2. Venkatarama Rao v. Sobhanadri Appa Rao Bahadur, A I R 1936 P C 91=161 I C 29=63 I A 169=59 Mad 539=70 M L J 378 (P C).
3. Anwar Khan v. Muhammadkhan, A I R 1929 All 105=113 I C 819=51 All 550=1929 A L J 155 (F B).
4. The Official Receiver, West Godavari, Ellore v. Sagiraju Subbayya, A I R 1933 Mad 527=146 I C 530=64 M L J 397.
5. Chittamal v. Ponnusami Naicker, A I R 1926 Mad 363=92 I C 573=49 Mad 762=50 M L J 180.

before me. The appellant set up a case of oral transfer of these items to the insolvent sometime before the deeds were executed, but this story was not believed by either the trial Judge or by the lower appellate Court. The inclusion of these items in the deeds of transfer was thus a mere cloak or device, the object of which must have been only to evade registration of the deeds at Erode, where but for the inclusion of those items they must have been registered. It was only by including them that it was possible to get the deeds registered at Aravakkurichi. The case therefore comes directly within the ambit of the latest decision of the Judicial Committee in 70 M L J 378[2] and therefore the finding of the learned District Judge that the registration was inoperative must be upheld. The appeal therefore fails and is dismissed with costs of the Official Receiver. Leave to appeal is refused.

C.R.K./S.C. *Appeal dismissed.*

A. I. R. 1937 Madras 35

PANDRANG ROW AND MENON, JJ.

Puliyeri Kunhukuttan—Appellant.

v.

Imbichikuttam and *others*—Respondents.

Letters Patent Appeal No. 75 of 1935, Decided on 4th September 1936, against judgment of Varadachariar, J., in S. A. No. 3 of 1931.

Malabar Law—Surrender of unexpired portion of term by kanomdar to stanomdar and re-grant of same—Stanomdar is not bound but can accept it unless there is fraud or circumstances violating transaction—Stanomdar has power to lease property for customary period, provided terms of such kanom demises are not onerous and detrimental to stanom—New demise may be granted to same person or stranger on same day or afterwards.

In the case of renewal to take effect at once, there is an implied surrender and a grant of fresh demise. It is certainly open to a tenant, a kanomdar, to surrender the unexpired portion of his term. The landlord or the stanom-holder is no doubt not bound to accept such a surrender. But there is nothing in law to prevent him from accepting it, provided of course there is no fraud or other circumstances vitiating the transaction. Once the surrender is accepted, the stanom-holder has, in the ordinary course of management of stanom properties, the right to lease the property for the customary period or demise it on nominal kanom for the usual period of 12 years, provided the terms of such leases or kanom demises are not onerous or otherwise to the detriment of the stanom. It is immaterial whether the new demise is granted to same person or stranger or whether the new demise is granted the same day or a few days or months hence: *C. M. A. No. 406 of 1928, Foll; AIR 1919 Mad 250, Not foll.*

[P 35 C 2; P 36 C 1]

K. P. Ramakrishna Iyer—for Appellant.

K. Kuttikrishna Menon and *I. N. Kumaran*—for Respondents.

Judgment—This is an appeal against the judgment of Varadachariar, J. in S. A. No. 3 of 1931. The facts are all set out in para. 1 of that judgment and it is unnecessary to repeat them. The only question for decision is whether Ex. 3, a renewal of the kanom demise Ex. A, four years before the expiry of the period under the latter, but to take effect on the date of the renewal itself, executed by a predecessor of the 4th defendant, who was the then stanom-holder to the father of defendants 1 and 2, in respect of properties appertaining to the stanom, is valid and binding on the stanom, in the absence of proof of a valid necessity for such a renewal. Our learned brother, preferring to follow the trend of recent decisions of this Court, the last of which is C. M. A. No. 406 of 1923, to that reported in 36 M L J 630[1] held that it was valid. Mr. K. P. Ramakrishna Iyer for the appellant, relying on the decision in 36 M L J 630[1] contends that considerations which arise in deciding the question of the validity of such renewals are the same whether such a renewal is to take effect at once or on the expiry of the period under the prior demise. In this we are unable to agree with him. This question was gone into elaborately by the learned Judges who decided C. M. A. No. 406 of 1928 and they came to the conclusion that the two sets of cases are governed by entirely different considerations. As we agree with the conclusions arrived at in that case and generally with the reasons, it is unnecessary to enter into a lengthy discussion here. In the case of a renewal to take effect at once, there is an implied surrender and a grant of a fresh demise. It is certainly open to a tenant, a kanomdar, to surrender the unexpired portion of his term. The landlord or the stanom-holder is no doubt not bound to accept such a surrender. But there is nothing in law to prevent him from accepting it, provided of course there is no fraud or other circumstances vitiating the transaction.

Once the surrender is accepted, the stanom-holder has, in the ordinary course of management of stanom properties, the

1. Raman Nair v. Kuopasan Menon, A I R 1919 Mad 250=51 I C 740=36 M L J 630.

right to lease the property for the customary period or demise it on nominal kanom for the usual period of 12 years, provided the terms of such leases or kanom demises are not onerous or otherwise to the detriment of the stanom. It is immaterial whether the new demise is granted to the same person or a stranger or whether it is granted the same day or a few days or months hence. In this case the amount of kanom in Ex. 3 is the same as in Ex. A and is only nominal being only Rs. 10 and the rent reserved in the renewed demise is the same as in Ex. A. The renewal cannot therefore be said to be less beneficial to the stanom. But Mr. K. P. Ramakrishna Iyer contends that, as the income from the stanom properties including the renewal fees is the absolute property of the stanom-holder for the time being, the grant of renewal by one stanom-holder before the expiry of the term under the prior demise would be prejudicial to the person who will happen to be the holder of the stanom at the time the prior period expires, inasmuch as he will be deprived of the renewal fees and that the principle of the decision in C. M. A. No. 406 of 1928 does not apply to dealings in respect of stanom properties by a stanom-holder. But once it is granted it is within the ordinary powers of management for a stanom-holder to grant leases for 12 years and to demise on nominal kanom for 12 years and not merely to enure during the lifetime of the stanom-holder, this argument loses all its force, and it is not disputed before us that he has such powers. There is no reason, therefore, for not applying the principle of the decision in C. M. A. No. 406 of 1928 to cases of renewals by stanom-holders of demises in respect of stanom properties as well, which take effect from the dates of such renewals. The appeal is therefore dismissed with costs.

K.B./V.V. *Appeal dismissed.*

A. I. R. 1937 Madras 36

VARADACHARIAR AND MOCKETT, JJ.

C. V. Chelapathi Rao Naidu—Applt.

v.

Board of Commissioners for Hindu Religious Endowments, Madras—Respondent.

Appeal No. 26 and Civil Revn. Petn. No. 97 of 1931, Decided on 3rd August 1936, against order of Dist. Court, Bellary, D/- 21st November 1929.

(a) Madras Hindu Religious Endowments Act (1 of 1925), S. 80 (2) — Order of District Judge under S. 80 (2) on application to set aside decision of Board is not appealable.

The Madras Hindu Religious Endowments Act has by its own scheme clearly indicated a distinction between cases in which questions arising under it are to be dealt with by a civil Court as in a suit and cases in which questions are to be dealt with in a civil Court as on an application. In the latter case under the scheme of Code no appeal would lie unless specially provided for. [P 37 C 2]

An order passed by the District Judge under S. 80 (2) on application made to set aside the decision of the Hindu Religious Endowments Board is not appealable to High Court as it is not decree under Civil P. C., S. 2 (2): *A I R 1934 Mad 103, Rel. on*; *A I R 1934 P C 81* and *A I R 1916 P C 21, Ref.* and *Explained.* [P 36 C 2; P 37 C 2]

(b) Revision—District Judge, misinterpreting definition of 'excepted temple' in S. 9 (5), Hindu Religious Endowments Act or holding wrongly that succession not hereditary — Such grounds are not sufficient for revision to High Court.

Misinterpretation of the definition of an "excepted temple" in S. 9 (5), Hindu Religious Endowments Act or error in holding that the succession in certain case has not been hereditary is not sufficient ground to bring the case under the revisional jurisdiction of High Court. [P 37 C 2]

(c) Madras Hindu Religious Endowments Act (1 of 1925), S. 9 (5) — Expression "has been" in amendment of 1930 and expression "is hereditary" have same meaning—To find whether temple is excepted or not, Court should consider de facto exercise of hereditary right and not of presumptive right.

The expression "has been" in the amendment introduced in 1930 has the same meaning as the expression "is hereditary" in S. 9 (5) (b) of the Act (1925). Both refer to cases in which succession has in fact been devolving hereditarily from the founder. For finding whether a certain temple is an excepted temple or not Court should consider de facto exercise of hereditary right since the days of original founder and not of presumptive right: *A I R 1935 Mad 921, Rel. on.* [P 38 C 1, 2]

P. R. Ganapathi Ayyar—for Appellant.

P. V. Rajamannar—for Respondent.

Varadachariar, J. — This appeal and the connected revision petition arise out of an application under S. 80 (2), Madras Hindu Religious Endowments Act, 1 of 1925, in respect of the temple of Sri Ranganadhaswami at Hospet. In the first instance, it was claimed both before the Board and before the District Court that the temple was a private one, but that part of the claim has not been pressed and the only point remaining to be determined is whether or not it falls within the definition of "an excepted temple" in S. 9 (5) of the Act.

The learned District Judge has referred to one or two errors into which the Board had fallen when passing its order dated 21st April 1926. As the learned District Judge has dealt with the matter fully, I do not see that anything turns upon the errors found in the Board's order. The learned District Judge has held that though the petitioner's grandfather, one Mr. Chelapathi Rao Naidu, was the founder (wholly or at least in part) of the temple about the year 1870 it is not possible to say that the right to succession to the office of trustee in this case is hereditary, as required by S. 9, Cl. 5 (b) (as it stood prior to the amendment in 1930). This conclusion is based on his finding that after the death of the original Chelapathi Rao Naidu, the management has not been in the hands of his heirs but of some persons related to him by marriage. The evidence shows that the management has for a long time been in the hands of some agents, namely P. W. 5 and his father and uncle. In some of the documents reference is made to one or another of Chelapathi Rao Naidu's relations, but beyond that it is difficult to find any indication of the part that they took in the management. As regards the petitioner, it is not possible to say from the evidence that he took any part in the management till disputes arose between the agent and the local temple committee.

In the ordinary course, I should have followed the judgment of the Full Bench in 57 Mad 271[1] and held that no appeal lay. But Mr. Ganapathi Ayyar contended that that judgment required reconsideration, in the light of the decision of the Privy Council in 12 Rang 194.[2] It is true that the decision in the Rangoon case was pronounced after the judgment of the Full Bench, but I do not find in it the enunciation of any new principle not present to the minds of the learned Judges who pronounced the Full Bench decision. In the recent case, their Lordships only reaffirmed the principle of their earlier decision in 39 Mad 617,[3] and that judgment has been considered at great length in the Full Bench judgments. Mr. Ganapathi Ayyar suggested that two at least of the learned Judges who took part in the Full Bench case have proceeded on the footing that 39 Mad 617[3] turned upon the language of the definition of "decree" found in the Code of 1882, and therefore afforded no guidance under the Code of 1908 ; and he asked us to say that the decision in 12 Rang 194[2] shows that that assumption is not right. Whatever may be said against some of the observations in the Full Bench case, I do not understand the basis of the Full Bench decision to be as assumed by Mr. Ganapathi Ayyar. It seems to me to proceed on the footing that the Religious Endowments Act has by its own scheme clearly indicated a distinction between cases in which questions arising under it are to be dealt with by a civil Court as in a 'suit,' and cases in which questions are to be dealt with in a civil Court as on an 'application.' In the latter case it cannot be denied that under the scheme of the Code no appeal will lie unless specially provided for. I therefore see no reason for not following the Full Bench ruling and accordingly hold that the appeal is incompetent.

Dealing with the matter as one coming up in revision, there can be no question as to the jurisdiction of the lower Court and I find nothing in the way of material irregularity alleged against the proceedings in the lower Court. At best, all that could be said is that the learned Judge has either misinterpreted the definition of "an excepted temple" or erred in holding that the succession in this case has not been hereditary. It seems to me very doubtful if either of these grounds will suffice to bring the case under the revisional jurisdiction of this Court. So far as the finding of fact is concerned, I see no reason to differ from it, even if I could.

On the point of law, Mr. Ganapathi Ayyar relied upon the decision of the Privy Council in 17 Cal 3[4] and contended that once the Court holds that the temple was founded by a private founder it must follow as a matter of law that succession to it is hereditary unless the deed of endowment or the usage of the institution proves the contrary ; and there being nothing to the contrary in this case, he

1. Rajagopala Chettiar v. Hindu Religious Endowments Board, Madras, A I R 1934 Mad 103=147 I C 614=57 Mad 271=66 M L J 43 (F B).
2. Maung Ba Thaw v. Ma Pin, A I R 1934 P C 81 = 148 I C 1 = 61 I A 158 = 12 Rang 194 (P C).
3. Secy. of State v. Chellikani Rama Rao, A I R 1916 P C 21=35 I C 902=43 I A 192=39 Mad 617 (P C).
4. Gossami Sri Gridhariji v. Romanlalji Gossami, (1890) 17 Cal 3=16 I A 137=5 Sar 350 (P C).

argued that the learned Judge should have held that the case falls within the definition of "an excepted temple" even if succession has not in fact been hereditary since the days of the original founder. This point was dealt with by me as a single Judge in 69 M L J 384=59 Mad 245.[5] Having carefully listened to the arguments of Mr. Ganapathi Ayyar I have not been persuaded that the view there expressed is not correct, so far as the scheme of the Religious Endowments Act is concerned. A distinction was attempted to be made on the ground that in this case the petitioner has become manager and therefore his management should be held to be in his hereditary right. I am not by any means satisfied on the evidence that he has really entered upon the management in any effective sense. But even if a different conclusion should be possible on the facts, I do not see that it affects the legal position because he has not succeeded as the heir of the last trustee nor was the last trustee in office as the heir of his predecessor. In 69 M L J 384[5] stress was no doubt laid upon the use of the expression "has been" in the amendment introduced in 1930, but it does not appear to me that the expression "is hereditary" in S. 9, Cl. 5 (b) means anything different. Both of them seem to me to refer to cases in which succession has in fact been devolving hereditarily from the founder. Both the appeal and the Civil Revision Petition therefore fail and are dismissed with costs in the appeal only.

Mockett, J.—I agree. I desire to add a few words with regard to two arguments of Mr. Ganapathi Ayyar. He argued that the authority of the Full Bench decision in 57 Mad 271[1] was shaken by the subsequent decision of the Judicial Committee reported in 12 Rang 194.[2] It will be seen that the Board in that case referred to its own decision in 43 I A 192,[3] a Madras case, and it does not seem to me that the decision in 12 Rang 194[2] has in any way altered the position as it stood at the date of the decision of the Full Bench. The case in 43 I A 192[3] was fully considered by the Full Bench and the actual decision in 12 Rang 194[2] has been the subject of discussion in a later decision by a Bench of this High Court reported in 59 Mad 554.[6] In that case Madhavan Nair, J. expresses the view that nothing that he had read in the Rangoon case affects the opinion expressed by him in the Full Bench case. These matters are therein fully considered and I agree with my learned brother that there is no material before us on which we can hold that we are not bound by the Full Bench decision.

Mr. Ganapathi Ayyar argued further an interesting point. He points out that it is settled law according to the decision of the Judicial Committee in 17 Cal 3,[4] that the right of the claimant to the trusteeship of a temple is presumed in his favour if it can be shown that the temple had been founded by the claimant's ancestors and no proof of any usage at variance with this presumption is forthcoming. That rule of Hindu law, says Mr. Ganapathi Ayyar, affects the meaning of S. 9, Cl. 5, Madras Hindu Religious Endowments Act. That very point has been dealt with by my learned brother in the case reported in 69 M L J 384.[5] I desire to express my complete agreement with that decision and in particular for the reasons given at p. 387. It seems too that whether the words are "is" or "has been" the effect is the same. As my learned brother points out, that fact that many years ago this temple was founded is not surely what is contemplated by the Act but what is contemplated is a consideration of the de facto exercise of the hereditary right and not a mere presumptive right not exercised for several generations. I agree that this appeal and the Civil Revision Petition must be dismissed for the reasons given.

C.R.K./P.R. *Appeal and revision dismissed.*

5. Kallepalle Krishnamurthi v. The Madras Hindu Religious Endowments Board, A I R 1935 Mad 921=158 I C 733=69 M L J 384=59 Mad 245.

6. Krishnamoorthi Ayyar v. Special Deputy Collector of Land Acquisition, Kumbakonam, A I R 1936 Mad 514=165 I C 405=59 Mad 554=71 M L J 76.

* A. I. R. 1937 Madras 38

VENKATARAMANA RAO, J.

(*Annayya*) *Janakirama Bhagavathar* and *another*—Appellants.

v.

(*Annayya*) *Narasimha Bhagavathar* and *others*—Respondents.

Second Appeal No. 1353 of 1931, Decided on 17th February 1936, against decree of Sub-Judge, Vellore, in A. S. No. 68 of 1930.

*** (a) Limitation — Acknowledgment of a right to account— Document executed by parties (partners) on dissolution of partnership to settle pending accounts by decision of three arbitrators, on accounts being examined by them—Such document is an unconditional acknowledgment of liability so as to be sufficient acknowledgment within the meaning of S. 19, Lim. Act.**

On dissolution of a partnership, the parties executed a document agreeing that there was a right to pending account between them and each had got a claim to recover the balance which might be found due on taking accounts and each agreed to pay the balance found due, and to settle the accounts by a decision arrived at by three arbitrators on examination of accounts by them:

Held : that the document so executed was an acknowledgment of right to account and amounted to an unconditional admission of liability and it was therefore a sufficient acknowledgment to save limitation within the meaning of S. 19, Lim. Act. [P 40 C 1]

Held further : that the agreement between the parties being one for consideration could be enforced at law and a suit on the basis of such agreement within two years of the date of agreement was proper: *A I R 1919 Mad 838* and *A I R 1917 Mad 892, Disting.* [P 40 C 2]

(b) Limitation Act (1908), S. 19—Accounts suit—Distinction between acknowledgment of right to account and acknowledgment of debt.

There is a distinction between an acknowledgment of a right to account and acknowledgment of a debt. For an acknowledgment of a right to account there need not be an acknowledgment that a debt or even a specified amount thereof is actually due. It is enough if there is an acknowledgment that an account is pending. There need not be an express statement that the balance will be paid. The words "settle the accounts" indicate that parties agree to pay whatever is found to be due on accounts being looked into : *Prance* v. *Sympson Kay, (1855) 1 Kay 677, Rel. on.* [P 39 C 2; P 40 C 1]

M. Patanjali Sastri—for Appellants.

R. Somasundaram Iyer—for Respondents.

Judgment.—This second appeal raises a question of limitation. The suit is one for an account of moneys due in respect of the business which was carried on in partnership between plaintiff 1 and defendant 1. The case of the plaintiffs is that plaintiff 1, defendant 1 and one Hanumantha Bhagavathar carried on business in partnership till 1919, that Hanumantha Bhagavathar left the business and thereafter the business was continued by plaintiff 1 and defendant 1, that the business terminated about three years before the suit was filed on 1st December 1927, and that even if the partnership was dissolved more than three years before suit, there was an acknowledgment of liability under Ex. A which was an agreement to have certain matters settled by panchayatdars executed by plaintiff 1 and defendant 1. The plaint is not very happily worded. It recites the partnership and also the agreement under Ex. A, and the prayer in the plaint is that the Court should direct the defendants to pay plaintiff 1 the amount due to him as mentioned in paragraph 11 after looking into the accounts of the suit partnership. I understand that paragraph to mean that the plaintiff desired an account of the partnership business in accordance with the arrangement that they entered into and was embodied in Ex. A. The District Munsif gave a decree in favour of the plaintiffs and the learned Subordinate Judge dismissed the suit on the ground that it was barred by limitation and that Ex. A did not operate as an acknowledgment. Ex. A is as follows :

> Re. the account of partnership business carried on by us: Annayya Janakirama Bhagavathar and Narayanaswami Bhagavathar of us admitted before you to the effect that interest should be charged for the capital invested by them and for their drawings and that they should have no right to the profits or loss of the said business. Accordingly we have appointed you three as panchayatdars to look into the accounts of the said Janakirama Bhagavathar and Narayanaswami Bhagavathar from the said business accounts and to settle accounts by charging interest on them and for their drawings at Re. 1 per cent per mensem. So, if you look into those accounts, charge interest as aforesaid and settle the accounts, we three agree to abide by your decision; and so we have given full powers to you three in connexion therewith. Agreeing to this effect we have executed this agreement.

The view of the lower Court is that Ex. A operates only as a conditional acknowledgment and that therefore it cannot save bar of the limitation. This view is untenable. The learned Judge has not appreciated the distinction between an acknowledgment of a right to an account and an acknowledgment of a debt. For an acknowledgment of a right to an account there need not be an acknowledgment that a debt or even a specified amount thereof is actually due. As I understand Ex. A, what the parties in effect state is this :

> There is a right to a pending account between us and each has got a claim to recover the balance which may be found due upon the taking of the accounts and each agrees to pay the other the balance so found due.

This will amount to an unconditional admission of liability. As observed by Wood V.C. in (1855) 1 Kay 677[1] at p. 681 :

1. Prance v. Sympson Kay, (1855) 1 Kay 677 = 18 Jur 929.

It is not necessary for the purpose of a suit for an account to have an acknowledgment that a debt is actually due; but it is enough that there is an acknowledgment that an account is pending, and that the defendant promises to pay the balance if any due from him upon such account; because it may be that the precise result of the account and on which side the balance will be, cannot be known beforehand.

There need not be an express statement that the balance would be paid; the words "settle the accounts" indicate that the parties agree to pay whatever is found to be due on the accounts being looked into. In this case it will be seen that in Ex. A the parties state that in taking the partnership account they give up the right to take a profit and loss account but agree that only the capital and the drawings and interest thereon should be taken into consideration and the capital should be set off against the drawings and the balance arrived at. Having come to this agreement they approach the mediators and request them to carry it out by looking into the accounts and determining what the figure will be as per the agreement arrived at between them. In my opinion therefore this will be a sufficient acknowledgment within the meaning of S. 19, Lim. Act. The cases relied on by Mr. Somasundaram are distinguishable. The case in 37 M L J 353[2] is a decision by a Division Bench of this Court wherein parties submitted their differences to arbitrators and agreed to pay whatever was found due by them, and the arbitration failed. It was held that the agreement to refer to arbitration would not prevent the plaintiff's claim from being barred by limitation. The case is, I think, explainable on the principle that a mere reference to arbitration with an agreement to pay whatever the arbitrators decide would only be a conditional acknowledgment. The case in 40 Mad 701[3] also proceeds upon the same basis. But the document in the present suit is not a mere reference to arbitration; the arbitrators are not asked to decide upon the conflicting rights of the parties and it is not a mere agreement to pay whatever the arbitrators decide. What each party is to pay has already been decided upon between the parties.

2. Narayanaswamy Mudali v. Gangadhara Mudali, A I R 1919 Mad 838=48 I C 89=37 M L J 353.
3. Bulapragada Ramamurthy v. Thammana Gopayya, A I R 1917 Mad 892=35 I C 575=40 Mad 701=31 M L J 231.

There is another basis on which I think the suit may be sustained. According to the plaint and as also found by the learned District Munsif, the partnership which subsisted between plaintiff 1 and defendant 1 was dissolved in or about 1924. Within a year thereafter the parties met and agreed to have an account of partnership taken in a particular manner, namely the manner embodied in Ex. A. It will be an agreement between the parties for consideration which can itself be enforced and the suit claim is referable to that agreement as evidenced by the prayer in para. 19 of the plaint. If the suit claim is viewed from this standpoint, there can be no question of the bar of limitation because it was admittedly brought within two years from the date of the said agreement. In fact the learned District Munsif has given a decree to the plaintiffs only on that basis. I therefore reverse the decree of the Subordinate Judge and restore the decree of the District Munsif with costs in all the Courts. Leave to appeal is refused.

C.R.K./A.L. *Appeal allowed.*

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VENKATASUBBA RAO, OFFG. C. J. AND HORWILL, J.

Agha Mirza Nasarali Khoyee & Co.—Appellant.

v.

Gordon Woodroffe & Co., (Madras), Ltd.—Respondents.

O. S. A. No. 1 of 1936, Decided on 6th August 1936, from judgment of Mockett, J., D/- 30th October 1935.

*** (a) Sale of Goods Act (1930), S. 16—Stipulation that goods are to be of fair quality of description and to be passed by Messrs. G. W. and Co—Mere superadding of provision as to inspection, does not reduce importance of independent undertaking as to quality—Both conditions must be satisfied.**

The question whether, in a contract of sale by description governed by S. 16, there was in addition to the provision for inspection and approval an absolute warranting of quality to guard against defects which inspection could not discover, is ultimately one of construction. If it could be gathered from the contract that the articles were to be supplied to the satisfaction of the buyer or their agents, so that they were to be the sole judges whether the articles answered the description or not, such an undertaking would be inconsistent with the absolute condition implied by law. The Court has to ascertain and give effect to the intention of the parties as evidenced by the agreement. [P 42 C 1; 2]

Where the stipulation in a contract of sale was that the articles were "to be of fair average

quality of description and to be passed by Messrs. G. W. & Co., as such'':

Held: that the superadding of the provision as to inspection did not reduce the importance of the independent undertaking as to quality and that both the conditions were to be satisfied; the word 'and' was the decisive word: *Bigge* v. *Parkinson*, (*1862*) *7 H & N 955*; *Bird* v. *Smith*, (*1848*) *Q B 786* and *Stadhard* v. *Lee*, (*1862*) *3 B & S 364*, *Rel. on*; *M'Cleland* v. *Stewart*, (*1883*) *12 L R Ir 125*, *Disting.* [P 41 C 2; P 42 C 1]

(b) Deed—Construction—Document plain and unambiguous — Intention of parties should be gathered from language of document itself.

In the case of a document which is plain and unambiguous, the intention of the parties should be gathered from the language of the document itself without any reference to the surrounding circumstances. [P 42 C 2]

*** (c) Sale of Goods Act (1930), S. 16 (2)—Term 'merchantable' is relative — Test is, whether goods are merchantable or not under particular description in contract—Goods are of merchantable quality when they do not differ from normal quality of described goods.**

The term 'merchantable,' as used in the Sale of Goods Act, is relative, the test being, are the goods merchantable or not under the particular description in the contract? It is not sufficient that the goods are marketable or saleable. The term, that the goods shall be of merchantable quality, is fulfilled when they do not differ from the normal quality of the described goods, including under the term 'quality' the state of condition as required by the contract: *English cases Rel. on.* [P 42 C 2; P 43 C 1]

*** (d) Sale of Goods Act (1930), Ss. 16 and 17—Defects contemplated in S. 16 are those apparent on reasonable examination within meaning of S. 17—Implied warranty will be excluded in case of patent defects—Merchant possessing ordinary skill using due care and diligence, not discovering defect—It is latent and not patent defect.**

The defects contemplated in S. 16 are those apparent on reasonable examination within the meaning of S. 17. [P 43 C 2]

The implied warranty will be excluded as regards any defects which a buyer of ordinary diligence and experience would have detected by "due diligence in the use of all ordinary and usual means"—what is due diligence, depending upon the circumstances. If merchants possessed of ordinary skill, using due care and diligence, would not have thought of the existence of a particular defect which gives rise to the action, such a defect would be a latent or hidden one as distinguished from a patent defect. The principle applies irrespective of the fact, whether the inspection is of bulk or of sample: *Drummond* v. *Van Ingen*, (*1887*) *12 A C 284* and *Grant* v. *Australian Knitting Mills*, (*1936*) *A C 85*, *Rel. on.* [P 43 C 1,2]

(e) Sale of Goods Act (1930), Ss. 16 (2), 16 proviso — Effect of Cl. (2) and proviso to S. 16 is that implied condition extends to merchantability less patent defect.

The combined effect of Cl. (2) to S. 16 and the Proviso to S. 16 is that the implied condition extends to merchantability less patent defects, and where the defects in the goods are not patent or discoverable, the seller, who under S. 16 is answerable for latent defects, remains liable. [P 44 C 1]

*** (f) Sale of Goods Act (1930), Ss. 16 (2) and 59—Express condition as to quality of goods—It is unnecessary to invoke S. 16 (2)—Buyer can treat condition as warranty and can sue for damages for its breach.**

Where, there is an express condition in the contract of sale as to the quality of the goods, it is unnecessary to invoke S. 16 (2). The express condition gives the purchaser a higher right than he would possess under a contract where the term would be merely implied in law. The buyer might treat the condition as a warranty, a breach of which would give rise to a claim for damages, although he would be precluded from rejecting the goods. [P 44 C 1]

(g) Costs — Appeal—Powers of appellate Court—Question is not what appellate Court considers right but whether there are grounds justifying interference with lower Court's discretion.

In deciding the question of costs, the question is not what the appellate Court considers right but whether there are grounds justifying its interference with the lower Court's discretion. [P 44 C 2]

V. Radhakrishnayya—for Appellant.

S. Doraiswami Iyer—for Respondents.

Venkatasubba Rao, Offg. C. J.—On the important questions of law relating to the sale of goods which this appeal raises, able arguments have been addressed to us by the Counsel on both sides. The suit has been brought for the price of certain skins sold and the defendants have counterclaimed for damages on the ground that the goods supplied do not fulfil the description in the contract. The plaintiff, against whom damages have been awarded by the learned trial Judge, has filed this appeal. The contract is obviously not for sale of specific goods and this has been conceded by Mr. Radhakrishnayya for the appellant. We must therefore proceed upon the footing that the sale was by description and that the contract is governed by S. 16, Sale of Goods Act. The first question that arises is what is the effect of the stipulation in the contract, that runs thus:

To be fair average quality of description and to be passed by Messrs. Gordon Woodroffe & Co., Ltd., Madras, as such.

In other words, does it, upon a true construction, mean that if the goods are passed by Messrs. Gordon Woodroffe & Co., there is an end to the matter, or, does the clause impose a further condition, namely, that the goods should in addition be of the quality mentioned? The case which both sides have strongly relied upon is (1848)

12 Q B 786=116 E R 1065.[1] The contract there was for sale of iron rails

to be inspected and certified as then agreed upon between the parties and to be equal in quality to any rails made in Staffordshire.

It was urged there, as here, that the goods have been inspected before delivery and thereupon approved and accepted in performance of the agreement. It was held that this was a bad plea, as being no complete answer to the declaration. Lord Denman, C. J., who delivered the judgment of the Court, declares that there were two stipulations, each being in its terms distinct; in other words, that in addition to the provision for inspection and approval, there was an absolute warranty for quality to guard against defects which inspection could not discover. The position in the present contract is very similar; indeed, the only difference is, that the order of the two terms is reversed. Here the first term related to the quality, the second to the inspection; whereas in the case cited, after the stipulation for inspection and approval, came the undertaking as to the quality. The question is ultimately one of construction and as observed in (1862) 7 H & N 955=158 E R 758[2] if it could be gathered from the contract, that the articles were to be supplied to the satisfaction of the buyers or their agents, so that they were to be the sole judges whether the articles answered the description or not, such an undertaking would be inconsistent with the absolute condition implied by the law. On the facts of that case the contention by the defendant, that the express condition in the contract excluded any implied condition, was overruled. (1883) 12 L R Ir 125,[3] strongly relied upon by Mr. Radhakrishnayya, is distinguishable and does not contravene the principle enunciated in (1862) 7 H & N 955.[2] Turning to the clause in question: to construe it reasonably, we must give effect to what must be regarded the decisive word, 'and' occurring in it; the superadding of the provision as to inspection does not reduce the importance of the independent undertaking as to the quality. In support of the contention that the goods having been passed by the buyers, they could no longer rely upon any defect, later discovered in regard to the quality, another argument is put forward, namely that the clause should not be so construed as to cast too heavy a burden on the vendor. The argument is put thus: the contract of sale being conditional on the goods being approved by the buyers, they are constituted, as it were, judges in their own cause; that is onerous enough; why should the Court further so construe the contract as to superadd to this term, the absolute condition as to quality? But as observed by Cockburn, C. J. in (1862) 3 B & S 364[4]:

The duty of the Court in such cases is to ascertain and give effect to the intention of the parties as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet if the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not: Benjamin on Sale, Edn. 7, p. 605.

Mr. Radhakrishnayya next contends that this contract should be considered with reference to the surrounding circumstances. But in the case of a document which is plain and unambiguous, the intention of the parties should be gathered from the language of the document itself. Then comes the question as to the quality of the goods supplied, which must be considered in two aspects. First, if S. 16 (2) applies and there is an implied condition that the goods shall be of merchantable quality, was that condition complied with? Secondly, if the express provision in the contract "to be fair average quality" should prevail, did the goods answer that description? On the evidence on the record our finding on this point must be against the plaintiff, the vendor. There has been some dispute as to the meaning of the word 'merchantable' occurring in the Sale of Goods Act. It is not sufficient that the goods are marketable or saleable (that is no doubt the dictionary meaning of the word) for, in the statutory sense the significance of the word 'merchantable' is relative, the test being, are the goods merchantable or not under the particular description in the contract? The same idea may be expressed differently by stating, that the term, that the goods shall be of merchantable quality is fulfilled, when they do not differ from the normal quality of the described goods, including under the

1. Bird v. Smith, (1848) 12 Q B 786=116 E R 1065=17 L J Q B 309=12 Jur 916.
2. Bigge v. Parkinson, (1862) 7 H & N 955=158 E R 758=31 L J Ex 301=10 W R 349=8 Jur (N S) 1014=7 L T 92.
3. M'Cleland v. Stewart, (1883) 12 L R Ir 125.
4. Stadhard v. Lee, (1862) 3 B & S 364=32 L J Q B 75=9 Jur (N S) 908=7 L T 850=11 W R 361.

term 'quality' the state or condition as required by the contract: see (1887) 12 A C 284[5] at pp. 287, 289 and 291; (1936) A C 85[6] at p. 100; (1910) 2 K B 831[7] (840-1); (1910) 2 K B 937[8] (945) and (1922) 1 K B 55.[9]

The appellant's counsel then contends that the defects, such as they were, were patent or discoverable defects and that the proviso to S. 16 (2) which, he urges, governs the contract, protects the seller. He relies upon certain passages in Mr. Cook's deposition and at first sight they seem to support him. But if his evidence is read as a whole and critically examined, it shows beyond doubt, that the true condition of the skins could not have been ascertained at Madras by such examination as dry salted skins are generally subjected to. There is one circumstance which places the matter beyond doubt. When the skins were first inspected at Northampton, Mr. Cook not only approved the goods but complimented Mr. Taylor on their excellent quality. (This incidentally disproves the theory that the skins became deteriorated after they had been taken delivery of at Madras and before they reached England.) What then emerges from the evidence of the various witnesses, through which we have been carefully taken? No reasonable examination of the skins in their dry salted state could have revealed the defects; only when the skins were 'put into work' i. e., 'put into water,' was their true condition discovered. On the question as to what are discoverable as distinguished from latent defects, the decision of the House of Lords in 12 A C 284,[5] already cited contains a valuable pronouncement. As Lord Herschell observes, the implied warranty will be excluded as regards any defects which a buyer of ordinary diligence and experience would have detected by "due diligence in the use of all ordinary and usual means"—what is due diligence, depending upon the circumstances (p. 294). If merchants, possessed of ordinary skill, using due care and diligence, would not have thought of the existence of the particular defect which gives rise to the action, such a defect would be a latent or hidden one as distinguished from a patent defect (see Lord Macnaghten, p. 297). Cl. 2, S. 16, and the proviso thereto run thus:

> Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

The language of this proviso may be usefully compared with S. 17 which deals with sale by sample. That enacts:

> In the case of a contract for sale by sample there is an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample: [S. 17, (2), (c).]

Though these two clauses are worded differently, there can be little doubt that they are intended to convey the same meaning; in other words, the defects contemplated in S. 16 are those 'apparent on reasonable examination' within the meaning of S. 17. In this connexion, we must observe that Lord Herschell, while dealing with the implied condition as to any defects, makes no distinction between inspection of bulk or of sample, although in the case under discussion the sale was by sample (see p. 294). Then again, in (1936) A C 85,[6] to which we have already referred, the sale was not by sample, but yet Lord Wright delivering the judgment of the Judicial Committee, in dealing with the question of patent defects, uses language, which more or less occurs in the section relating to sale by sample (see p. 100). On the question as to what are discoverable defects, these two decisions, one of the House of Lords and the other of the Judicial Committee, are of binding authority and it is unnecessary to enquire whether a different principle has been laid down in the cases relied on by Mr. Radhakrishnayya, namely (1919) 1 K B 486[10] and (1923) 1 K B 690.[11] This brings us to the question, what is the effect of S. 16 (2), read along with the proviso?

5. Drummond v. Van Ingen, (1887) 12 A C 284=56 L J Q B 563=57 L T 1=36 W R 20.
6. Grant v. Australian Knitting Mills, (1936) A C 85.
7. Bristol Tramways Co. v. Fiat Motors, (1910) 2 K B 831=79 L J K B 1107=103 L T 443=26 T L R 629.
8. Jackson v. Rotax Motor & Cycle Co., (1910) 2 K B 937=80 L J K B 38=103 L T 411.
9. Summer Permin & Co. v. Webb & Co., (1922) 1 K B 55=91 L J K B 228=126 L T 294=27 Com Cas 105=38 T L R 45.
10. Thornett and Fehr v. Beers & Son, (1919) 1 K B 486=88 L J K B 684=120 L T 570=24 Com Cas 133.
11. Pinnock Bros. v. Lewisand Peat Ltd., (1923) 1 K B 690=92 L J K B 695=129 L T 320=39 T L R 212=67 S J 501.

As Mr. Doraiswami Ayyar contends, the combined effect of the clause and the proviso is, that the implied condition extends to merchantability less patent defects. From our finding that the defects in the present case were not patent or discoverable, the conclusion follows that the seller, who under the section is answerable for latent defects, remains liable. Granting then that S. 16 (2) applies, we must hold that the defendants are bound to succeed. Mr. Doraiswami Iyer urges in the alternative (thereby taking a higher stand), relying on the clause extracted above, that here is an express condition as to quality and that being so, it is unnecessary to invoke S. 16 (2). In our opinion, this contention also is well founded. S. 16 (4) reads thus :

> An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Now, what is the express condition here that the goods shall be of 'fair average quality'? That clearly is inconsistent with the condition arising by implication, namely, that although the goods are warranted merchantable, discoverable defects are excluded. The position therefore comes to this : that the express condition gives the purchaser a higher right than he would possess under a contract where the term would be merely implied in law. The next step in the argument is, that the buyer might treat the condition as a warranty, a breach of which would give rise to a claim for damages, although he would be precluded from rejecting the goods. That is, Mr. Doraiswami Iyer urges, what has precisely happened here. The provisions of law relevant to this argument are Ss. 12, 13, 42 and 59, Sale of Goods Act. The quality warranted being part of the description of the goods, the term in question becomes a condition under S. 12. Next, it follows from S. 13, that when the buyer has accepted the goods, he can treat the breach of a condition only as a breach of warranty. In the present case the defendants accepted the goods within the meaning of S. 42, for, after the skins had been delivered to them, they 'put them into work', an act inconsistent with the ownership of the seller. Now comes S. 59, the last of the four sections to which we have referred. Where the buyer elects or is compelled, as here, to treat any breach of a condition as a breach of warranty though he is not entitled to reject the goods, he has a right to sue the seller for damages. It is this right which by the counterclaim the defendants are seeking to enforce. They are entitled to do so. On this ground also our judgment must be for the defendants.

As to the measure of damages : out of 18,000 skins supplied 3,920 were found tainted. 1,483 of these were perfectly worthless and no question arises. As to the balance, the only question is, were the defendants in the circumstances bound to sell them by auction for estimating the loss? When the skins were 'put into work', the salt would no longer be there to arrest the putrefaction. How could one reasonably expect that such skins would find a market? In the circumstances, though the evidence on the point is somewhat obscure and unsatisfactory, we are not prepared to differ from the learned trial Judge. As to the costs of the action, the question is not what we consider right, but whether there are grounds to justify our interfering with the learned Judge's discretion. There is something to be said, as the appellant's counsel urges, against the conduct of Messrs. Gordon Woodroffe & Co. It was their servant who, by agreement, was employed by the plaintiff to cure the skins. Again, the case is one of a string of contracts, and much of the trouble has arisen by reason of their having wrongly represented to their buyers that the skins were of their 'own cure'. In spite of these facts, we do not feel that we ought to disturb the trial Judge's order. In the result the appeal fails and is dismissed with costs. The memorandum of objections is not pressed and is likewise dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

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* A. I. R. 1937 Madras 44

HORWILL, J.

Dharapuram Janopakara Nidhi Ltd. —Appellant.

v.

K. Lakshminarayana Chettiar — Respondent.

Second Appeal No. 1163 of 1934, Decided on 2nd September 1936, against decree of Addl. Sub-Judge, Coimbatore, in A. S. No. 32 of 1934.

*** (a) Attachment—Adverse finding under O. 21, R. 63, Civil P. C. on claim petition—No suit filed within a year—Sale not completed and attachment subsequently raised—In subsequent proceedings claimant can raise contentions with regard to title and possession.**

When a sale is not completed and the attachment is subsequently raised, any adverse finding on the claim petition becomes inoperative, and the mere fact that a suit is not filed within a year cannot disentitle him to raise the same contentions with regard to title and possession in subsequent proceedings : *A I R 1925 Mad 1113*; *A I R 1931 Lah 74* and *40 C W N 146, Foll.* [P 45 C 2]

*** (b) Attachment—Attachment does not disturb possession—Continuance of attachment is not equivalent to extension of possession technically got by attaching creditor on objection being raised.**

Attachment does not operate as a disturbance from possession. The continuance of an attachment should not be considered as equivalent to an extension of possession technically supposed to be with the attaching creditor, owing to the objection to attachment being dismissed. [P 46 C 2]

(c) Adverse Possession—Fresh possession need not be taken where there is only legal break in possession.

Rejection of claim petition by person in adverse possession does not disentitle a person from relying on his possession from date of rejection order. He is not required to prove that he got into possession again after the rejection order. [P 46 C 2]

T. M. Krishnaswami Ayyar and *S. Ramachandra Ayyar*—for Appellant.

V. V. Srinivasasa Ayyangar and *V. V. Ramadurai*—for Respondent.

Judgment.—The finding of the lower Courts is that this property has been enjoyed adversely by the defendant from a time prior to 9th July 1917 and that he has therefore perfected a title to the property by adverse possession. In second appeal, it is contended that, by operation of law, possession was interrupted on 9th July 1917. The learned advocate for the appellant has emphasised that when a symbolical delivery is given or where a Boundary Officer determines a boundary and an application is not made to a civil Court within a year, adverse possession is deemed by law to have been broken. By analogy he contends that where a Court dismisses a claim petition it is not open to the defeated claimant to contend that he was in possession on the date of his claim petition. The effect of a symbolical delivery or a decision of a Survey Officer is clearly different from that resulting from a mere order of Court. In the case of a symbolical delivery, an amin actually goes to the disputed property and openly declares that a symbolical delivery is given, and the person in possession and other interested parties are informed by proclamation and otherwise that henceforth a certain person is entitled to the legal possession of that property. A somewhat similar procedure is adopted under the Surveys and Boundaries Act. The learned advocate for the appellant has referred me to 8 Mad 506[1] and 47 Mad 160,[2] in support of his contention. In 8 Mad 506,[1] there was an actual adjudication under O. 21, R. 60 or its equivalent under the old Code and the Judges held that as the aggrieved party had not filed a suit, it was not open to him to contend subsequently either that he had title to the property or had been in possession. This case was quoted with approval in 47 Mad 160,[2] where the question was however different, in that the application was dismissed under the proviso of O. 21, R. 58 because the application was unnecessarily delayed. There was therefore no adjudication on the question of possession, and it is difficult to follow why the claimant whose petition was dismissed had by implication an adverse finding on the question of possession. Although 8 Mad 506[1] was followed with approval, it was not discussed and the difference between the two cases was apparently not noticed.

Mr. V. V. Srinivasa Ayyangar on behalf of the respondent has two sound answers to the arguments adduced on behalf of the appellant which make it unnecessary for him to canvass the correctness of 8 Mad 506[1] and 47 Mad 160.[2] The first is that as the sale was not completed and the attachment was subsequently raised, any adverse finding on the claim petition became inoperative, and that the mere fact that a suit was not filed within a year did not disentitle him to raise the same contentions with regard to title and possession in subsequent proceedings. If the attachment had been raised within a year, then obviously no suit would have been necessary; for the unsuccessful claimant would have got what he wanted without the necessity of filing a suit. The question that arose in 48 M L J 616,[3] was whether the fact that the attachment was raised beyond a year made any difference. Ramesam, J. says :

The only difference that I can see between the two cases (the raising of the attachment within one year and the raising beyond one year) is that in the former case the unsuccessful claimant who waits, incurs no risk, as he knows for certain within one year that the attachment in execution of it has ceased to exist; and in the latter, he takes a risk by not suing, as he cannot be certain that the

1. Velayuthan v. Lakshmana, (1885) 8 Mad 506.
2. Aisamma v. Moidin, A I R 1924 Mad 111=77 I C 264=45 M L J 690=47 Mad 160.
3. Kumara Goundan v. Thevaraya Reddi, A I R 1925 Mad 1113=87 I C 635=48 M L J 616.

attachment will be raised. But I do not see why, when the event on which he takes his chance, viz., the cessation of the attachment by the payment of the decree, or for other reason, happens, he should not take advantage of it simply because he took risks in so waiting.

Two later cases A I R 1931 Lah 74[4] and 40 C W N 146[5] have also been cited. In the headnote to A I R 1931 Lah 74,[4] we find :

The order under O. 21, R. 63 is conclusive in the sense that it cannot be agitated again in the execution proceedings in which it was passed unless a suit is brought within one year of the date of the order, i. e., that it is conclusive as between the claimant and the decree-holder who is proceeding against the property. If however the decree-holder raises the attachment within a year, obviously there is no reason why the claimant should institute a suit to set aside the order as there is no attachment in force. It makes no difference if the attachment is raised after the termination of one year. It does mean that in those proceedings the claimant is running a risk and will be estopped from contesting the decree-holder's right to proceed against the property; but if the decree-holder does not sell the property and the decree is satisfied otherwise, the fact that the attachment was raised more than a year after the date of the order on the claim, does not make any difference.

Finally, in 40 C W N 146,[5] the headnote runs :

The conclusiveness of an order in a claim case contemplated by O. 21, R. 63, Civil P. C., is conditional on the continuance of the execution proceedings and the attachment issuing therefrom. Consequently, when the order is made on an application under O. 21, R. 58 dismissing a claim, but the sale itself held in the execution proceedings is set aside and the attachment *ipso facto* comes to an end, a subsequent suit brought beyond one year by the claimant for a declaration of his title is not barred under Art. 11, Sch. 1, Limitation Act, and that whether the execution proceedings come to an end within or beyond one year of the date of the order in the claim case.

It is thus seen that the attachment ceases to be effective after it is raised, even from the date of the attachment itself. And the defeated claimant has the same right to put forward his earlier claims as he had at the time of filing his claim petition. The second argument is that even if by operation of law there was technically a legal break in the adverse possession on 9th July 1917, the defendant has been in possession for 12 years beyond that date; for the attachment that is sought to be set aside in the present suit did not cease until 8th November 1919. It is however argued for the appellant that the defendant has to prove that he got into possession again after 9th July 1917 and that in any case it must be considered that the defendant was not in possession as long as the attachment continued. With regard to the first objection we have the finding of both the lower Courts that the defendant was actually in possession of this property adversely to the plaintiff even before 9th July 1917 and remained continuously in possession adversely to the plaintiff. The effect of the order on 9th July 1917, at the most, was to create a break. It did not in fact oust the defendant from possession; so that the defendant is entitled to rely on the fact that he was in possession adversely to the appellant from that date onwards. With regard to the second objection, attachment does not operate as a disturbance of possession; and there is no reason why therefore it should be considered that the continuance of an attachment after 9th July 1917 should be considered as equivalent to an extension of the possession which was held technically against the defendant on 9th July 1917. In any event therefore the appellant fails and his appeal is accordingly dismissed with costs. Leave to appeal granted.

C.R.K./K.B. *Appeal dismissed.*

4. Chet Singh v. Gujar Singh, A I R 1931 Lah 74=131 I C 225.
5. Bamapada v. Ramanath Mandal, (1936) 40 C W N 146=165 I C 84.

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VENKATASUBBA RAO, Offg. C. J. AND HORWILL, J.

In re *Kantheeswaram Ekanthalingaswami Koil*—Petitioner.

Civil Misc. Petn. No. 5722 of 1933, Decided on 31st August 1936, for isssue of certificate for the refund of the excess Court-fee paid in A. S. No. 211 of 1928.

(a) Court-fees Act (1870), S. 5—Section is defective—Decision of taxing officer is however unimpeachable even though wrong.

S. 5, like several other sections of the Court-fees Act, is undoubtedly defective as it makes no provision for the taxing officer being compelled to refer the question to the Judge of the Court, yet the decision of taxing officer as the law stands is final and unimpeachable even though it is wrong : *21 Mad 269; A I R 1927 Mad 940* and *A I R 1930 Mad 597, Ref.* [P 47 C 2; P 48 C 1]

(b) Mesne Profits—Claim for future mesne profits—Essential to pass preliminary decree—O. 7, R. 2, Civil P. C., is not applicable to future mesne profits—Court-fee to be paid only after passing of final decree.

As regards past mesne profits, the Court has the option either to pass a decree fixing the amount or to pass a preliminary decree directing an enquiry as to the quantum of the profits and postponing

the passing of the final decree till the enquiry is held. But as regards future mesne profits the Court has no such option, but is bound in the first instance to pass a preliminary decree directing an enquiry. O. 7, R. 2, Civil P.C., applies to past mesne profits alone, for it enacts that the amount of the claim shall be stated approximately and it is obvious that future mesne profits are incapable of being estimated, depending as they do, upon an uncertain element, namely, the period of time which would intervene between the institution of the suit and the recovery of possession. Hence in respect of a claim for future mesne profits no portion of the Court-fee is payable before the final decree is passed : *30 Mad 96 (F B), Expl.*; *A I R 1918 Mad 484*: *A I R 1918 All 412* and *A I R 1931 Cal 788, Ref.* [P 48 C 1, 2]

(c) Res judicata—Previous suit for past and future mesne profits—Decree for past mesne profits but no decision as to future profits—Subsequent suit for future profits is not barred.

The power of the Court to award mesne profits subsequent to suit is discretionary. Hence when in a suit for past and future mesne profits, the Court passes a decree for the past mesne profits and says nothing in regard to the future mesne profits, a fresh suit to recover such profits is not barred by res judicata : *A I R 1928 Mad 484*; *A I R 1918 All 412* ; *A I R 1929 Cal 566* and *A I R 1931 Cal 788, Rel. on.* [P 48 C 2; P 49 C 1]

T. R. Venkatarama Sastri for *K. R. Rama Ayyar*—for Petitioner.

Govt. Pleader and *N. Srinivasa Ayyangar*—for the Government.

Venkatasubba Rao, Offg. C. J.—The plaintiff omitted to claim in his plaint future mesne profits and subsequently applied for permission to amend his plaint by including a claim for such profits. The lower Court, which passed a decree in his favour for possession, rejected that application. Against the decree for possession, the defendants filed an appeal in this Court and in the memorandum of objections, which the plaintiff filed, a claim was again put forward here to future mesne profits. Two questions have been argued and they arise in this way: The plaintiff contended that on his memorandum of objections no court-fee was payable, and the claim which he preferred in appeal in this Court could not in principle differ from any claim he might have put forward in the Court of first instance. This contention was overruled by Mr. White, the then Taxing Officer, who held that an ad valorem court-fee was payable on the amount claimed. Two questions have been argued ; first, is the decision of the Taxing Officer revisable by the High Court; and secondly, is his decision on the merits right ?

On the first question we are constrained to hold that under S. 5, Court-fees Act, the decision of the Taxing Officer has for every purpose become final. It is unnecessary to deal with the cases cited by Mr. Venkatrama Sastri bearing on the other sections of the Act, such as S. 12. For instance, he strongly contended that in spite of the use of the word 'final' in S. 12, the High Court in the exercise of its revisional jurisdiction set aside, at the instance of the aggrieved plaintiffs, the orders of the lower Court regarding the Court-fee payable by them on their plaints (vide observations in 56 M L J 302,[1] 56 M L J 394[2] and 56 Mad 744[3]). The question here, however, turns on the specific wording of S. 5, which prescribes that when a particular procedure is followed, the decision given becomes final. In this case a difference arose between the plaintiffs' advocate and the Court-fee Examiner as to the necessity of paying a court-fee on the Memorandum of Objections. That difference was referred to the Taxing Officer, who held that an *ad valorem* fee was payable. The requirements of S. 5 are thus fulfilled and we must, giving the words of that provision their plain and natural meaning, hold that the decision of the Taxing Officer has become final and cannot be impeached before us. It will be observed that in the matter of the adjudication being final, the section makes no difference between the decision of the Taxing Officer and that of the Taxing Judge to whom he may refer the question. To be consistent, the plaintiff must go the length of contending that the decision of the Taxing Judge can be no more final under the section than that of the Taxing Officer; the anomaly of this position is obvious. Apart from my interpretation of the section, the settled practice of the Court has been, dating back to the years 1897 and 1898, to treat the adjudication of the Taxing Officer as final and on a matter of this sort it is desirable not to depart from the established practice: 20 Mad 398,[4] 21 Mad 269[5]; see also 53 M L J

1. Mubamad Elliyas v. Rahima Bee, A I R 1929 Mad 191=114 I C 842=56 M L J 302.
2. Kathiya Pillai v. Ramaswami Pillai, A I R 1929 Mad 396=119 I C 35=56 M L J 394.
3. Secy. of State v. Raghunathan, A I R 1933 Mad 506=144 I C 516=56 Mad 744=65 M L J 25.
4. Ranga Pai v. Baba, (1897) 20 Mad 398.
5. Kasturi Chetti v. Deputy Collector Bellary, (1898) 21 Mad 269.

457[6] and 53 Mad 540.[7] While on this subject, I may usefully point out that this section, like several other sections of the Court-fees Act, is undoubtedly defective, as it makes no provision for the Taxing Officer being compelled to refer the question to the Judge of the Court.

Although this conclusion should be sufficient to dispose of the matter, we have thought it proper to deal with the second contention, as the point raised is one of considerable importance. In dealing with this question, it is important to bear in mind the procedure prescribed by the Code of Civil Procedure in determining the amount of past and future mesne profits. As regards past mesne profits, the Court has the option either to pass a decree fixing the amount (that decree in a sense is "final," though the term is inappropriate, there being a single decree) or to pass a preliminary decree directing an enquiry as to the quantum of the profits and postponing the passing of the final decree till the enquiry is held. But as regards future mesne profits the Court has no such option, but is bound in the first instance to pass a preliminary decree directing an enquiry. Then turning to O. 7, R. 2, Civil P. C., there can be no question that in the very nature of things it applies to past mesne profits alone, for it enacts that the amount of the claim shall be stated approximately and it is obvious that future mesne profits are incapable of being estimated, depending, as they do, upon an uncertain element, namely, the period of time which would intervene between the institution of the suit and the recovery of possession. In the Court-fees Act there are two sections which are relevant for the present purpose. S. 7 (1) prescribes that in suits for money including suits for damages or compensation, the court-fee shall be computed according to the amount claimed. Mesne profits being in essence damages or compensation, this section applies to suits for mesne profits. Once again, this provision can have no reference to future mesne profits, which, as already stated, are incapable of being ascertained the plaintiff not being bound under O. 7, R. 2, Civil P. C., to state approximately the amount of such profits. S. 11, Court-fees Act, with the Madras amendment, provides for each of the cases under which O. 20, R. 12, Civil P. C., contemplates.

Whatever obscurity there was in the law previously, there seems to be no room for doubt under the present provisions. As already observed, in the matter of past mesne profits, a final decree may straightway be passed; in such a case para 1, S. 11, applies, which enacts that if the profits decreed are in excess of the profits claimed, the decree shall not be executed until the excess court-fee is paid. If however, in respect of past mesne profits the decree passed is preliminary and not final, Cl. 1, para 2, applies. It provides that where an enquiry into past mesne profits is directed and the amount ascertained on such enquiry exceeds the amount claimed, no final decree shall be passed till the excess fee is paid. In the first case (that which falls under S. 11, para 1) the decree that has already been passed shall not be executed; in the second case (that which falls under S. 11, para 2, Cl. 1) no final decree shall be passed. So much for mesne profits antecedent to the suit. Then as to subsequent profits, Cl. 2, para 2, provides that when a final decree is passed following upon a preliminary decree directing an enquiry (this is in strict accordance with O. 20, R. 12, Civil P. C.) the final decree shall not be executed until the requisite court-fee is paid. The point to note is, and that is very important, that in respect of future mesne profits, no portion of the court-fee is payable before the final decree is passed; even then, if the plaintiff does not seek to execute the decree which he has invited the Court to pass in his favour, he may altogether escape the payment of court-fee. This rule which may appear anomalous, is, however, based upon an intelligible principle. A claim to subsequent mesne profits is in respect of a cause of action not arising at the date of suit; nevertheless, the Court is empowered to grant them by way of an exception to the general rule that the reliefs claimed should be confined to causes of action which had already arisen; but as has been pointed out in 41 Mad 188[8] the power of the Court to award mesne profits subsequent to suit is discretionary.

6. Swaminatha Ayyar v. Suruswami Mudaliar, A I R 1927 Mad 940=105 I C 119=53 M L J 457.
7. Kandunni Nair v. Raman Nair, A I R 1930 Mad 597=127 I C 128=53 Mad 540=58 M L J 497.
8. Doraisami v. Subramania, A I R 1918 Mad 484=42 I C 929=33 M L J 699=41 Mad 188 (F B).

On this ground it has been held that when in a suit for past and future mesne profits, the Court passes a decree for the past mesne profits and says nothing in regard to the future mesne profits, a fresh suit to recover such profits is not barred by res judicata: 41 Mad 188,[9] 40 All 292,[9] 57 Cal 381,[10] 58 Cal 1040.[11] Thus the passing of a decree in respect of the subsequent profits being in the discretion of the Court (though except for special reasons the Court will not refuse to exercise the discretion in favour of the party), S. 11, Court-fees Act, has enacted that prior to the passing of such decree, no court-fee is payable. Is there any reason then why in principle this rule, which applies in terms to suits should be departed from in the case of appeals? It is contended by the learned Government Pleader that the body of the Act not having provided for appeals in the case of such claims, we must turn to the schedules to the Act, which contain several articles relating not only to plaints but also to memoranda of appeal. True, the value of an appeal is not always the value of the suit but the value of the relief granted by the decree, which the party seeks to get rid of; in that sense where the suit and the appeal are differently valued, the schedules to the Act may furnish the appropriate articles. In the matter in hand, there is no question of an amount being claimed in appeal in excess of what has been granted by the lower Court. On the other hand, the claim made here is identical with that made in the Court below, namely to have the right to subsequent profits adjudicated upon. The lower Court has held that in the circumstances of the case the plaintiff ought not to be allowed to claim in this suit future mesne profits. It is this conclusion that the plaintiff attacks in the appeal. This very case illustrates the good sense underlying S. 11, for we have held, confirming the decision of the lower Court, that the plaintiff ought not to be allowed to claim subsequent mesne profits by amending his plaint, and as I have shown, he is not precluded by the doctrine of res judicata from claiming these very profits in a fresh suit, paying a proper court-fee on his plaint. The contention of the Government Pleader involves the levying of a double court-fee which of course would be an obvious injustice. I am clearly of the opinion that the decision of the Taxing Officer is wrong; but we are constrained, owing to our decision on the first point to refuse to make an order granting a refund. We make no order as to costs.

Horwill, J.—I agree. The learned Government Pleader has put forward a somewhat novel argument that the main sections of the Court-fees Act do not apply to appeals, unless a section makes a specific mention of appeals, such as S. 7 (iv) (c) does and that the provisions which apply to appeals are to be found almost entirely in the schedules. If that were so then appeals would be governed almost wholly by the most general provisions, such as are found for example, in Sch. 1, Art. 1. None of the rulings quoted before us have gone anything like so far as this. The learned Government Pleader relies principally on the judgments of Sir Arnold White in 29 Mad 367[12] and in a Full Bench case, in 30 Mad 96,[13] in which he sat soon afterwards. The subject-matter of each of those suits was a mortgage which was sought to be redeemed. In 29 Mad 367[12] the dispute was confined in appeal to a sum of money which had to be paid before the mortgage could be redeemed, and the discussion turned on the question, now long settled, whether the 'subject-matter', which was to form the basis for the computation of ths court-fee, meant, in relation to appeals, the subject-matter of the appeal or the subject-matter of the original suit; and it was held that court-fee had to be paid in appeal on the subject-matter of the appeal. As the subject-matter of the appeal was a sum of money, clearly S. 7, sub-s. (ix), applicable to suits for redemption could not be applied to the appeals; and it was held that the only provision of the Court-fees Act applicable would be Art. 1, Sch. 1. This decision went no further. An examination of the wording of the various sections of the Court-fees Act shows that they are intended to apply to appeals also; for example S. 7 begins:

9. Muhammad Ishaq Khan v. Muhammad Rustam Ali Khan, A I R 1911 All 412=44 I C 88=40 All 292=16 A L J 182.
10. Bipulbihari Chakravarthi v. Nikhilchandra Chakravarthi, A I R 1929 Cal 566=124 I C 65=57 Cal 381=33 C W N 943.
11. Kalidas Rakshit v. Keshblal Majumdar, A I R 1931 Cal 788=134 I C 1042=58 Cal 1040.

12. Reference under Court-fees Act, 1870, (1906) 29 Mad 367=16 M L J 287.
13. Ramakrishna Reddi v. Kottakota Reddi, (1907) 30 Mad 96=16 M L J 458 (F B).

The amount of fee payable under this Act in the suits next hereinafter mentioned . . . . . .shall be computed as follows:

In S. 7 (iv) (f) we find the words "for accounts." Thus S. 7 (iv) (f), on the face of it, is applicable only to suits for accounts; yet we find for all the clauses of S. 7 (iv) that the method of computing the value of the suits is

according to the amount at which the relief sought is valued in the plaint in or memorandum of appeal . . . . .

Thus the whole of S. 7 (iv), although on the face of it applicable only to suits, yet gives the method of computing the value of appeals. The only reason why the word 'appeal' is found here is that reference is made to the plaint; and if no mention were made of the memorandum of appeal, appeals as well as suits would have to be valued according to the amount at which the relief sought is valued in the plaint. In the other clauses of S. 7 and in other sections no reference is made to memorandum of appeal except where there is some necessary difference in the method of valuing a suit and an appeal. There can be no doubt that all the High Courts have always taken it for granted that appeals are valued in the same way as suits. With regard to the question as to what mesne profits should be included in valuing an appeal, the cases quoted by the learned Government Pleader have been of defendants who have appealed against decrees for possession with mesne profits. It is however necessary to maintain a distinction between an appeal by a plaintiff, who has had his suit dismissed, and that of an unsuccessful defendant. The latter has to rid himself of the decree and therefore everything that has been granted to the plaintiff in the decree and against which he wishes to appeal must be the subject-matter of the appeal, even though more has been given in the decree (by way of interest of ascertained mesne profits, for example), than was due to the plaintiff at the time of filing his suit. But the plaintiff who has had his suit dismissed is in fact told that he had no cause of action against the defendant at the time of filing his suit, and it is against this adverse finding that he has to appeal. After having his suit dismissed he goes to the appellate Court in the same position as at the time of filing his suit. Even so long ago as 10 M L J 144,[14] this distinction between the positions of a defendant-appellant and plaintiff-appellant was considered so obvious as not to require discussion, and this distinction has always since been maintained.

The power of a Court to grant future mesne profits and future interest is an exception to the general rule that a plaintiff can only sue on such cause of action as has arisen on the date of filing his suit, and that the Court can give him no more. These provisions were clearly made to prevent the constant litigation that would be necessary if persons unlawfully kept out of possession of their lands had to file suits every three years for mesne profits that had accrued since the filing of the previous suit. Although therefore a plaintiff can ask in his plaint for future mesne profits, no cause of action for these mesne profits has arisen and no court-fee is payable on the part of his claim. If therefore the position of a defeated plaintiff is the same when he files his appeal as it was at the time of filing his plaint, he would not have to pay court-fee in appeal on mesne profits that had accrued after the filing of his plaint. The decided cases have in fact gone further and held that even a defendant-appellant has not to pay court-fee on mesne profits that have not been ascertained. It is true that in 50 Mad 488[15] at p. 493, Wallace, J. says :

. . . . . the applicant who seeks to be relieved from the payment of such mesne profits must pay court-fee on such mesne profits up to the date of his appeal memorandum;

but this case is now considered to be no longer good law. In 53 Mad 540,[7] for example, it was made clear that unless past mesne profits had been exactly ascertained no court-fee was payable on them. The Madras amendment to S. 11, Court-fees Act, has provided that the Court may direct an inquiry as to future mesne profits and that a decree cannot be executed until court-fee is paid on those mesne profits.

It would seem to follow from this that until a decree is sought to be executed no party is bound to pay court-fee on those profits. The present case is an example of the complications and injustice that result where a party is made to pay court-fee on future mesne profits at the time of the appeal. As the refusal of a Court to grant future mesne profits does not operate

14. Srinivasa Row v. Ramaswami Chetti, (1900) 10 M L J 144.

15. *In re* Punya Nahako, A I R 1927 Mad 360=100 I C 72=50 Mad 488=52 M L J 128.

as res judicata the defeated party can again claim future mesne profits ; and if he is compelled to pay court-fee in the first instance he would have to pay it again when he instituted a fresh suit. That is what has happened with the present petitioner, who has had his claim for future mesne profits negatived both in the trial Court and in this Court and who will be free to bring a fresh suit for these profits. Although we are of opinion that there was no need for the petitioner to have paid court-fee on his memo of cross-objections claiming mesne profits, we regret that we cannot order refund of the court-fee paid. Mr. Venkatarama Sastri has quoted to us many cases relating to S. 12, Court-fees Act, to show that even where the statute says that the decision of the appellate Court shall be final, all the High Courts have nevertheless been willing to reopen the question where they considered that the decision of a subordinate Court had been erroneous. It is unnecessary to refer to the cases quoted by Mr. Venkatarama Sastri because the learned Government Pleader does not deny that under S. 12 High Courts have been prepared to interfere ; but we cannot accept Mr. Venkatarama Sastri's argument that the word "final" used in Ss. 5 and 12 of the Act does not mean "final" in the ordinary sense of the word, as being conclusive between the parties, but as conferring a mere temporary finality to any contentions that parties may raise during the preliminary proceedings of getting the appeal filed.

We find no justification for this contention in any of the cases quoted to us and Mr. Venkatarama Sastri has not attempted to support this argument from any reported cases. His arguments seem to be that if a final decision under S. 12 can be interfered with by the High Court, it cannot really be final and that an explanation of the word "final" given by him is the only reasonable one. We would however explain the interference of the High Courts with orders passed under S. 12 as the exercise of the revisional jurisdiction given to the High Court to correct the errors of subordinate Courts—a power which has not been taken away by any provisions of the Court-fees Act. S. 5 however applies to proceedings in the High Court itself, where a question of revision would not arise. All Courts have an inherent right to correct mistakes made through inadvertence, but an error based upon an interpretation of the past practice of the Court and upon an interpretation of the law cannot be considered to be an inadvertence. There is no reason therefore why the natural interpretation of S. 5, viz., that the decision of the Taxing Officer shall be final except when in his opinion the matter is of such importance that it should be referred to the Chief Judge of the Court for his final decision, should not be accepted. That the decision of the Taxing Officer is final and binding on all parties was laid down in 20 Mad 398.[4] The matter was made clearer in 21 Mad 269,[5] where it was pointed out that if the word "final" in S. 5 is not final in the ordinary sense of the word, neither is the decision of the Judge to whom the matter is referred by the Taxing Officer, final ; and no finality can be reached at all. In 53 Mad 540[7] the question was precisely the same as in 21 Mad 269,[5] the earlier case being followed and approved. Neither in 21 Mad 269[5] nor in 53 Mad 540[7] was any doubt thrown upon the accuracy of the law laid down in 20 Mad 398,[4] that the decision of the Taxing Officer was final and binding not only on the party who had disputed the correctness of the taxation but also on the respondent who was no party to it. No case has been quoted to us in which this well-settled interpretation of S. 5 has been even doubted. We must therefore hold that although the decision of the Taxing Officer in this case was wrong it is nevertheless binding on the petitioner. The petition is therefore dismissed. There will be no order as to costs.

C.R.K./B.D. *Petition dismissed.*

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* A. I. R. 1937 Madras 51

VENKATASUBBA RAO, OFFG. C. J. AND VENKATARAMANA RAO, J.

Rajah of Vizianagaram—Petitioner.

v.

Secy. of State & others—Opp. Parties.

O. P. No. 174 of 1936, D/ 5-10-1936.

*** (a) Madras Court of Wards Act (1 of 1902), Ss. 9, 15 and 23—Court of Wards assuming under S. 15 superintendence of property and person of proprietor disqualified under S. 19—Disqualified proprietor's right of guardianship over his minor wards is not affected—Nor third party's rights of guardianship over such minor wards are taken away.**

The nature and extent of the disabilities of proprietor disqualified under S. 9 (d), Court of Wards Act, must be determined by the provisions of the Act. There is no warrant for reading into the Act more than it actually enacts and especially in

matters concerning the rights of a subject, it would be wrong to hold that valuable rights are taken away by implication. The primary purpose of the Act is to preserve and safeguard the property of certain proprietors and as ancillary to that main purpose, the Court of Wards is empowered to assume in some cases superintendence of their persons also. It would be contrary both to the scheme and the language of the Act to hold that the power of the disqualified proprietor over his children, has been in any way affected or curtailed, and there is not a single provision which enacts or from which it can be inferred, that the Court of Wards, by becoming the guardian of the disqualified proprietor, ipso facto becomes the guardian of his own wards. [P 55 C 2; P 56 C 2]

It follows therefore the disqualified proprietor continues to be the guardian of his minor wards. The same principle applies to a third party and his rights of guardianship over such minor wards are not taken away by the Court of Wards becoming the guardian of the disqualified proprietor. [P 56 C 2]

(b) Madras Court of Wards Act (1 of 1902), S. 23 (b), (c) — Scope and effect of — Cls. (b) and (c) confer upon Court of Wards simply a power and not a right — Exercise of such power by Court of Wards is compulsory and not discretionary — Even if exercise of such power is discretionary Court of Wards must act bona fide and reasonably — If it does not act so, its decision is reviewable.

Where public bodies have been entrusted with powers for the benefit of persons specifically indicated, it is imperative on those so authorized to exercise the power when the case arises, and its exercise is duly applied for by the party for whose benefit the power is reposed. The exercise of power in such cases is therefore compulsory and not discretionary. [P 57 C 2 ; P 58 C 1]

The purpose of Cls. (b) and (c) is merely to make that legal and possible, which otherwise the Court of Wards would have no right or authority to do ; it is empowered to incur charges or make disbursements, which it would have no right to incur or make, in the absence of that provision. But the power so conferred is for the benefit of the persons indicated in the section. This being so, it would be a perversion of the Act to call this power a right and to argue that in the exercise of that right the authority of the Court of Wards is absolute and unfettered. [P 58 C 1 ; P 59 C 1]

So what is conferred by Cls. (b) and (c) on the Court of Wards is a power the exercise of which is compulsory and not discretionary. But even assuming that the exercise of the power is discretionary the Court of Wards must act in good faith and reasonably in the sense that it has fairly endeavoured to ascertain what is necessary or expedient, clearing its mind from personal motives and personal feelings. Where the Court of Wards has not acted so, its decision is reviewable by the High Court : *Case law discussed.*

[P 59 C 2 ; P 60 C 1]

(c) Madras Court of Wards Act (1 of 1902), S. 50— Meaning of— Suit by male proprietor, not being minor or lunatic is not nullity even though he is not represented by manager as next friend but is mere irregularity—Ordinarily manager should represent proprietor but in suit between proprietor and Court of Wards manager cannot properly represent proprietor.

A proceeding instituted by a male proprietor, not being a minor or a lunatic, is not a nullity, and the fact that the manager does not appear on the record as his next friend, is a mere irregularity and is no ground for dismissing it. Ordinarily, the manager should represent him, and where that has not been done, the Court acting reasonably and on proper grounds being shown, ought to give the parties an opportunity to cure the defect. But when the proceeding is directed against the Court of Wards itself, to pursue the usual course would lead to an obvious absurdity, as it would be contrary to settled principles, to permit the same person to figure both as plaintiff and defendant. In a proceeding between proprietor and Court of Wards, it would be idle to pretend, that the servant of the Court of Wards can effectively represent the proprietor or adequately safeguard his interests. So a suit by a proprietor against Court of Wards in which the proprietor is not represented by manager is not barred by S. 50.

[P 62 C 2 ; P 63 C 1]

***(d) Jurisdiction—High Court—Jurisdiction of High Court in regard to infants is plenary —It can have jurisdiction over infant though not of British birth and though resident outside limits of Presidency Town — But even supposing that jurisdiction of Supreme Court was confined to British subject of British descent, every native of British India became British subject from assumption of control by Crown—Supreme Court (now High Court) could have jurisdiction over such natives.**

Under Cl. 32, Letters Patent of 1800, the jurisdiction of High Court in regard to infants is plenary and is not subject to limitations as to persons or place. So the High Court can have jurisdiction over an infant though not of British birth and though residing outside limits of Presidency Town. But supposing that the jurisdiction of the Supreme Court over infants was confined to British subjects of British descent, the moment direct control was assumed by the Crown, every native of British India became ipso facto a British subject and from that time onwards nothing could hinder the Supreme Court from exercising jurisdiction over native Indian infants in the mofussil: *Case law discussed.* [P 64 C 1 ; P 65 C 1, 2]

(e) Jurisdiction—High Court —"Inhabitant of Madras" — Person living outside Madras but owning house and keeping establishment at Madras which he often visits is "inhabitant of Madras" within Cl. 22 of the 1800 Charter.

Generally if a party has two or three establishments, every one of them may be called his residence, and not less so because he may not go there for some years. If he keeps up an establishment in it, the place is still his residence ; and thus he may be said to have his residence in two or three different countries. So where a person residing outside Madras owns a valuable and spacious house at Madras, for which he pays the rates, keeps up an establishment there and resides in it during his visits to the city at frequent intervals, he is an inhabitant of Madras within Cl. 22, Charter of 1800 : *Case law discussed.*

[P 65 C 1, 2 ; P 66 C 1]

(f) Letters Patent (Mad.) Cl. 17—Resident of Madras can invoke jurisdiction of High Court for protection of his parental rights irrespective of residence of his children.

Clause 17 does not impose as a condition the residence of the infant for the exercise of the jurisdiction thereunder. So a resident of Madras can invoke the jurisdiction of the High Court for the protection of his parental rights and it is immaterial where the children are residing so long as they are within the Presidency. [P 76 C 1, 2]

* **(g) Madras Court of Wards Act (1 of 1902), S. 23 (b) (c)—Scope—Court of Wards in exercise of its power under Cls. (b) and (c) is bound to conform to wishes of natural guardian—If natural guardian's rights are violated and if there is danger of minors being carried out of High Court's jurisdiction High Court will interfere.**

Per *Venkataramana Rao, J.* — S. 23 does not take away the powers of the natural guardians of the minors mentioned in Cl. (b) or (c). In the exercise of their powers, the Court of Wards is bound to conform to their wishes. If they choose to do anything in violation of their rights it will be illegal and the natural guardians are entitled to seek the aid of the Court for the protection of their rights. Therefore when the rights of the natural guardian are disputed on the ground that he cannot act, when there is no other legally constituted guardian, when there is danger of the minors being removed out of the jurisdiction of High Court and when such a course is not beneficial to the minors, it is absolutely necessary for High Court to interfere : *Case law discussed.* [P 79 C 1]

(h) Madras Court of Wards Act (1 of 1902), S. 67—Scope—It does not affect rights under general law (*Obiter*).

Obiter. — S. 67 declares that any one abetting his marriage commits an offence and is liable to be punished. This section leads to a strange anomaly and hardly fits in with the scheme of the Act or its other provisions, and abruptly occurring as it does in the chapter relating to penalties, cannot be treated as affecting the rights under the general law. [P 59 C 2]

(i) Court of Wards Act (1 of 1902), S. 23 — Decision come to after consulting relations of minor — Subsequent change of events—Court of Wards should not hesitate to revise its decision—Minor's welfare should be paramount consideration.

Even where the Court of Wards comes to a decision after consulting the relations of the minor, it ought not to hesitate to revise its decision if it is so required in the light of subsequent change of events and should not allow any question of prestige to stand in its way ; for, the paramount consideration is the welfare of the minor. [P 55 C 1]

Petitioner *in person.*

Advocate-General, K. Kuttikrishna Menon, N. Rajagopalan, K. R. Vepa and *T. R. Venkatarama Sastri*— for Opposite Parties.

Venkatasubba Rao, Offg. C. J.—By this petition the Raja of Vizianagaram applies that the High Court may, in the exercise of its powers under the Letters Patent and such other powers it possesses, make an order restraining the Court of Wards from sending his minor children to Great Britain and if necessary, appointing some suitable person as their guardian. The circumstances in which this application came to be made, will appear from our preliminary order dated 7th May 1936, but for the sake of easy reference I shall briefly recapitulate them. Under S. 15, Court of Wards Act, the Local Government made a declaration that the petitioner was a disqualified proprietor and directed the Court of Wards to assume superintendence both of his person and property. The Raja immediately filed a suit in the Court of the Subordinate Judge of Vizagapatam, impeaching the validity of the order made by the Government and praying for a declaration that it is ultra vires and unauthorised. The petitioner, then learning that the Court of Wards was intending to send his minor children to England on 9th May 1936, forthwith applied to the Subordinate Judge for the issue of an injunction restraining it from doing so. It was towards the end of April 1936 that this application was made, when the Court of the Subordinate Judge was about to close for the summer recess, and the Judge therefore made the following provisional order :

It is desirable that the children should not be sent away from India without intimation to the plaintiff, who is their natural father .... I therefore direct the defendant to inform the plaintiff 15 days in advance of their intended departure, so that if it is to happen in the summer recess of this Court, the plaintiff may move the High Court, if necessary, to grant an injunction ....

The petitioner accordingly sought the protection of the High Court and Lakshmana Rao, J. who heard the application, dismissed it, observing shortly that the suit itself prima facie appears to be incompetent and no petition in such a suit can lie. From this order the petitioner filed an appeal, which came up before us in May last, just before the long vacation. I must observe that one of the curious features of this case has been that the petitioner has argued his case in person with a view to demonstrate, I believe, that the imputation that he is mentally unsound, is wholly unfounded. Several questions were raised and strenuously argued and we found it necessary to adjourn the hearing to some date beyond the Court's recess. To this aspect we referred thus in our preliminary order already adverted to :

We suggested that the case might lie over and be disposed of by the Vacation Judges during the recess. But we are told that the minor's passage

has been booked and it is essential that they should be allowed to leave on the 9th. Consequently our suggestion that the Vacation Judges may dispose of the case cannot take effect . . . . Again, if the minors are to be sent out of the country as intended, they must, we understand, take train in an hour or two. The question therefore is, does the balance of convenience require that the minors should be permitted to sail at once or their departure, granting that eventually the Court of wards succeeds, should be postponed for the present ?

The arguments covered much ground and in view of certain questions of jurisdiction raised, the petitioner was allowed, in order to obviate any technical defect, to file a formal petition invoking our jurisdiction under the Letters Patent, and incidentally it may be observed if necessary, that this Bench was specially constituted to deal with this matter. After the re-opening, the Raja has accordingly filed a petition, described to be both under the Letters Patent and the Guardians and Wards Act. The Court of Wards challenges the Raja's right to file the petition, on the ground that under the Court of Wards Act, it has itself become the legal guardian of the minor children. It urges, in the alternative, that in regard to the four matters referred to in S. 23, Court of Wards Act, namely, " the custody, residence, education and marriage" of the minors, it is vested with a discretionary power, in the exercise of which it cannot be controlled by a Court of Law, unless it be shewn that it has acted mala fide, i. e., fraudulently, corruptly or maliciously. It is then maintained that the petition is barred in virtue of S. 50, Court of Wards Act. Finally, our jurisdiction is denied on the ground that the infants are residing at Vizagapatam, i. e., outside the local limits of the ordinary original civil jurisdiction of the High Court. With each of these matters I shall presently deal, but for the present it must be stated, that the Rajah vigorously contends that the proposed exercise of its discretion by the Court of Wards (granting that any such discretion is vested in it under the law) is capricious, unreasonable and oppressive. He maintains that he is an affectionate father, mentally quite sound, but that the action which the Court of Wards proposes to take is such as is likely to render a normal man insane. Referring to himself, he says that he was educated at Mayo College, Ajmere, and obtained the Chiefs' College Diploma, that he is a licensed air pilot, that he has extensively travelled throughout India and made short sojourns in England and on the Continent and that he has been permitted to possess modern firearms and ammunition and has obtained a motor car driving license. He says further that two competent doctors, one of whom belongs to the Indian Medical Service and is the Principal of the Medical College, Vizagapatam, have certified that he is free from any mental disorder. He goes on to say that his children are of tender age, the girls being 14 and 10 years old and the boys being of the ages of 12 and 9. He asserts with emphasis that the removal of the children will greatly imperil their well-being and what he urges in this respect is as follows :

> Of the children, the two boys are being educated at school in Vizagapatam and each of them has a whole-time Graduate tutor and the two girls are being taught by Roman Catholic European Nuns, and I am enhancing the knowledge of the four to the extent I can. I see no sense in the children being separated from their countrymen and in their having no manner of education in their language. India is not a barbaric country ; it has Schools and Colleges, some of which are as good as the best of them in England. Just as black bears cannot survive in the Artic regions and white bears can, my children may not be able to survive the severe cold of the winter in England, while English children are generally able to do so. The severeness of the English cold is such that a large number of English people leave England and go to the south of France in the winter. The percentage of Indians of British India going for school education as compared with those going for collegiate and post-school study, is almost nil.

I have thought fit to quote this passage at some length, as it has a bearing on the question of the exercise of discretion to which I shall advert later on. Stress is also laid on the fact that the threatened removal of the children out of the jurisdiction would in itself furnish sufficient ground for our interference. To avoid any misunderstanding, I wish to observe that whether the father has become unfit to be the guardian of his minor children under S. 19 (b), Guardians and Wards Act, is a matter, which would fall to be considered, if at all, at a later stage. For the present, therefore, I refrain from alluding to any allegations made against the petitioner, such as, that he is so erratic that the minors, if permitted to associate with him, are likely to be contaminated. There is one further matter I must notice before I proceed to deal with the contentions raised. The nearest relations of the infants

are, their father, the petitioner, their mother, the Ranee, their uncle the Maharajakumar of Vizianagaram, and lastly their grand-mother, the Dowager Ranee. The Court of Wards alleges that its decision was taken after consulting these four relations and that it received the approval of all excepting the father; but during the argument the proposal was condemned by every relation other than the mother, and in this connexion, I must remark that although the petitioner was eager to argue in person even the intricate questions of law that this petition has raised, he found himself out of his depth, but the Dowager Ranee, who supported him, was ably represented by Mr. Vepa, a junior advocate, whose industry and research were such, that we obtained considerable assistance from his argument. Besides the Dowager Ranee and the Maharajkumar, there are other relations, though not so near (the petitioner's sister, grand-father and grand-mother) who filed affidavits expressing their disapproval. The reason for my referring to these facts is this : The Court of Wards insists that what really matters, was the attitude taken by the relations when its decision was reached; but we pointed out in the course of the argument repeatedly that the paramount consideration being the welfare of the minors, if its decision required to be revised in the light of the subsequent events, it ought not to hesitate to do so and should not allow any question of prestige to stand in its way. These shortly are the facts connected with this petition, and I shall now proceed to deal with the contentions raised.

The first contention that I shall examine is that based upon the terms of S. 23, Court of Wards Act. It is urged that the rights possessed by the petitioner as the father in respect of his minor children came to an end consequent on the action taken by the Local Government under S. 15. The superintendence was assumed not only of the property of the petitioner but also of his person; it is said that in such a case, the wards of the ward become virtually the wards of the Court of Wards. Whether such a far-reaching result inevitably follows from the provisions of the Act, is a question which needs careful examination. Does the Act, though not by express enactment or by necessary implication, nevertheless deprive the disqualified proprietor, and as I shall show, even third parties sometimes, of valuable legal rights ?—that in short is the question to be decided. S. 23 runs as follows :

> The Court may make such orders and arrangements, as it may seem fit, in respect of the custody, residence, education and marriage: (a) of any ward whose person is for the time being under its superintendence ; (b) of any minor child, minor brother, or minor sister of such ward, who, in the opinion of the Court, is entitled to maintenance at the charge of the ward's estate ; (c) of the ward's next male heir being a minor and also entitled to maintenance.

It is maintained that the control of the Court of Wards over the specified minor relations of the ward in respect of the four matters mentioned here, namely, custody, residence, education and marriage, is absolute and unfettered. The learned Advocate General further suggests that these four incidents exhaust what is known as the right of the guardianship, which consists of these four component parts, in other words, while, the disqualified proprietor becomes the direct ward of the Court of Wards, his minor relations named in the section become the indirect wards of the Court. This contention is opposed to the entire scheme of the Act and is inconsistent with its provisions. S. 15 shows that it is the proprietor that is disqualified and it is his person or property alone over which the superintendence is assumed. Under S. 19 the person that becomes a ward under the Court is the disqualified proprietor, and if it is intended that his minor relations also should be the Court's wards, the section would have said so. S. 24, which immediately follows S. 23 and along with which it should be read, dispels the idea that under the Act, the disqualified proprietor and his minor wards are treated alike. While the section specifically provides for the appointment of a manager or guardian for the property or person of the proprietor himself, there is nothing there to suggest that similar powers are conferred over the person or property of the ward's minor relations. Further, there is no warrant for reading into the Act more than it actually enacts and especially in matters concerning the rights of a subject, it would be wrong to hold that valuable rights are taken away by implication. The primary purpose of the Act is to preserve and safeguard the property of certain proprietors and as ancillary to that main purpose, the Court of Wards is empowered to assume in some cases superintendence of their persons also. S. 9, the first of the group of sections dealing with this matter, makes it clear

that the disqualification which the Act contemplates is that which renders the proprietor unfit to manage his property and not his person. In four places in this section reference is made to "property" as distinguished from "person." Then S. 16 declares in no uncertain terms that it is the safeguarding of the property with which the Act is primarily concerned; it emphasises the idea that the compelling factor that leads to the declaration is that public interests demand that the proprietor's property should be managed by the Court. This being so, even were two constructions possible, the Court should prefer that which would leave unimpaired the rights of the ward in respect of matters not connected with his property, over which the superintendence has been assumed. But the position here is much simpler, there being little or no ambiguity in the matter. S. 34 carefully enumerates the disabilities which the Act imposes upon the ward, but nowhere does it say that he is incapacitated from continuing to be the guardian of his own minor wards. Indeed, the present contention is opposed both to the spirit and the letter of the section. The section is expressed in a negative form but leads inter alia to the following positive results: (i) A ward may make himself pecuniarily liable in respect of that part of his property not under the superintendence of the Court of Wards, (ii) he may transfer or create any interest in such property or collect rents and profits of such property, (iii) he may enter into a contract of marriage; that is an unquestioned right he possesses, although as regards the expenses to be incurred, the Court of Wards in the interests of the estate has a right to fix the amount, (iv) he can adopt or give permission to adopt with the consent of the Court of Wards, which however it cannot arbitrarily or capriciously withhold, (v) subject to the same restriction, he can dispose of his property by will.

There is nothing therefore either in the language or the purpose of the Act to show that a disqualified proprietor becomes legally incapacitated for all purposes; on the contrary, certain legal rights which he possessed previously, are preserved to him unimpaired. Is it to be lightly assumed that a person, who the Act declares is capable of exercising such legal rights, as making an adoption or executing a will, is to be treated, as has been suggested, as a "practical lunatic" and deprived of his powers of guardianship? S. 9, it must be borne in mind, deals with four different categories of disqualified proprietors. Leaving out the case of women covered by Cl. (b) (which has no bearing on the present discussion), the proprietors falling under Cls. (a) and (c), namely, minors and lunatics should be carefully differentiated from those falling under Cl. (d). As regards the former two categories, certain disabilities attach to them under the general law; but the disqualified proprietors governed by Cl. (d), like the present petitioner, are created by the Act, by the provisions of which alone, the extent and the nature of their disabilities must be determined. The only possible inference therefore to be drawn from the sections to which I have adverted is, that it would be contrary both to the scheme and the language of the Act to hold that the power of the disqualified proprietor over his children, has been in any way affected or curtailed. The same result is arrived at in another way. I have shown that there is not a single provision which enacts or from which it can be inferred, that the Court of Wards, by becoming the guardian of the disqualified proprietor, ipso facto becomes the guardian of his own wards.

If the Court of Wards does not become their guardian, is there any reason to hold that the pre-existing rights have been altered or affected? That they must have some guardian cannot admit of doubt; it reasonably follows that the person who was their guardian previous to the proprietor being disqualified, continues to be so. This raises a question as regards the rights of third parties also. The following illustration will serve to make that point clear. Suppose there are two minor brothers, of whom the elder is the holder of an impartible estate. Their parents are dead and their paternal uncle is their natural guardian. If the elder brother has been made a ward of the Court of Wards, does that put an end to the uncle's right of guardianship over the other minor? Here the uncle is not the disqualified proprietor but a third party, and the contention urged seems to assume that even such third party's powers are taken away. A construction which leads to such an anomalous result no Court ought to accept. My view based so far on the Court of Wards Act receives further support from the Guardians and Wards Act, with the relevant provisions of which I shall now

proceed to deal. S. 19 provides (I quote only the material part) :

Nothing in this chapter shall authorise the Court (i. e., the Court of law) to appoint or declare a guardian of the person . . . . , (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint guardian of the person of the minor.

This section removes from the jurisdiction of the Courts of the land, the minor wards under the Court of Wards, but does not exclude the minor relations of such wards. The present contention would have been sound, had S. 19 contained a further clause to the following effect : "(d) of any minor child, minor brother or minor sister of a ward under the Court of Wards." Now, turning to S. 41, the next relevant section, it enacts inter alia that the powers of a guardian of the person cease [S. 41 (i) (b)]—by the Court of Wards assuming superintendence of the person of the ward. It does not say, as it ought to have said if the present contention were right, that those powers cease by the Court of Wards assuming superintendence of the person of the guardian of the minor ward; for be it noted that a minor is competent to act as guardian of his own minor wife or child (see S. 21, Guardians and Wards Act). Unless by express statute, no subject can be deprived of his rights under the law—I take this to be a fundamental principle. Here, the two relevant statutes to which I have referred, far from taking away the rights in question, contain positive indications which strongly suggest the very opposite. There is another part of S. 19 very pertinent to the present enquiry. I quote again so much of it as is material :

Nothing in this chapter shall authorise the Court to appoint or to declare a guardian of the person . . . . (b) of a minor whose father is living and is not in the opinion of the Court unfit to be the guardian of the person of the minor.

This shows that if the Court of Wards desires to put an end to the guardianship of the petitioner, it should, to achieve that object, institute a proper proceeding under this section, in which case, it would be bound to show affirmatively that the father is unfit to be the guardian of the persons of his minor children. There is however in the Guardians and Wards Act, S. 3, which saves the jurisdiction of the Court of Wards, and this brings us to the question, does S. 23, Court of Wards Act, curtail the powers of the father? If it does, nothing in the Guardians and Wards Act, can derogate from the authority of the Court of Wards. That is the question which therefore remains now to be considered.

I have said that the learned Advocate-General has contended that the effect of S. 23 is to make the Court of Wards the legal guardian of the minor relations of the ward specified there. That contention, I have held, is untenable and opposed to the purpose of the Act. The learned Advocate-General puts forward an alternative contention; granting that the Court of Wards has not the full rights of guardianship, S. 23 confers upon it, at any rate, certain defined rights, in the exercise of which, it cannot be controlled by a judicial tribunal. His argument involves that in respect of the four matters—custody, residence, education and marriage of minor indicated—the rights which originally vest in the legal guardian become by virtue of the section transferred to the Court of Wards. If this contention is right, what remains in the legal guardian is a truncated right, no more in fact than a merely theoretical right, as the four ingredients referred to above constitute, without question, some of the most essential incidents of a right of guardianship. In effect the argument is, if the Court of Wards is not the guardian in the strict sense of law, for all practical purposes it possesses that character. The provision, (if properly understood) does not lend the slightest support to this contention. What is conferred upon the Court of Wards by Cls. (b) and (c), S. 23 (with those clauses alone we are here concerned), is not a right but a power, and a good deal of confusion has been imported into the argument by failing to distinguish the one from the other.

The purpose of those clauses is merely to make that legal and possible which otherwise the Court of Wards would have no right or authority to do; it is empowered to incur charges or make disbursements, which it would have no right to incur or make, in the absence of that provision. But the power so conferred is for the benefit of the persons indicated in the section. When a statute confers authority on some public body or person, in terms simply permissive or enabling (by the use of expressions, such as, "may" or "shall have power"), the question has often arisen, whether the power so conferred is merely a discretionary power or has a compulsory force. The learned Advocate-General con-

tends that every one of the enabling words in every clause of S. 23 is to be construed as creating a duty, in other words, as mandatory. This may be granted as it is not to his opponent's interest to contest this proposition. But what follows? Is the power to be regarded as having been conferred upon the Court of Wards for its own benefit, in which case the power may amount to a right, or for the benefit of others, namely, the persons specifically pointed out in the clauses in question? There can be no doubt, having regard to the scope and the object of the Act, that the second of these two alternatives is what is intended. Numerous statutes have made us familiar with instances where public bodies have been entrusted with powers for the benefit of persons specifically indicated, and it is incontestable that no question of exercising the power can arise unless, when the case arises, its exercise is duly applied for by the party, for whose benefit the power is reposed. In (1880) 5 A C 214,[1] Earl Cairns, L. C., points out that in 11 C B 755,[2] Jervis, C. J. stated the rule to be that:

> When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application: (p. 224).

Earl Cairns, L. C., himself expresses the idea thus:

> Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out. and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised: (p. 225).

Lord Blackburn deals with the point in the following passages:

> If the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it, for the benefit of those who have that right, when required on their behalf: (p. 241). The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. It is far more easy to shew that there is a right where private interests are concerned than where the alleged right is in the public only, and in fact, in every case cited, and in every case that I know of (whether the words conferring a power are enabling only, and yet it has been held that the power must be exercised), it has been on the application of those whose private rights required the exercise of the power: (p. 244).

In deciding whether the intention of the legislature is to grant a mere discretion or to impose a positive duty, it is pointed out in the judgments delivered in the case cited, that regard should be had inter alia to the general object of the statute with reference to which the question arises. Similarly, for determining whether a power is reposed in a statutory body for its own benefit or for the benefit of certain specified persons or class of persons, it is of the utmost importance to consider, what the object is which the legislature may be presumed to have intended. The object of the Act is to preserve the estate of a disqualified proprietor, and how is this object achieved or furthered by the Court of Wards being enabled to assume control over his minor relations?

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with irresistible clearness : (Maxwell on the Interpretation of Statutes, Edn. 7, p. 71).

Why should it be assumed that for no intelligible reason, a public body whose function is to preserve the estate of *A*, is given the right to have the physical control of the persons of *B* or *C* or *D*? On the other hand it would lead to no such injustice or absurdity to hold that a power has been conferred upon the Court of Wards to be exercised for the benefit of the minor relations when required on their behalf. Throughout in the argument, it was wrongly assumed that Cls. (b) and (c), S. 23 conferred an indefeasible right on the Court of Wards, which it could exercise at its pleasure.

The true effect of those clauses, as I have been endeavouring to point out, is to empower the Court of Wards to provide, when required, for the dwelling of the minor relations, such residence as it thinks fit, and not to enable it even without being required, to thrust upon them a house in which they can be compelled to live; similarly, when called upon to provide for their education, to incur such charges as it may deem fit and not, even without an application for the exercise of the power, to compel them to attend a particular school or to pursue a particular course of studies. The point, as I conceive it, is really a simple one, but owing to the confusion that has been imported, the matter has been argued at great length at the

1. Julius v. Lord Bishop of Oxford, (1880) 5 A C 214=49 L J Q B 577=42 L T 546=28 W R 726=44 J P 600.
2. Macdougall v. Paterson, (1851) 11 C B 755=2 L M & P 681=21 L J C P 27=15 Jur 1108.

bar. The reason for holding that when public officers are empowered to do certain things for a third person, the words are to be construed as mandatory, is stated to be, that the power is placed with the depositories, not for their benefit, but for the benefit of such third party, to meet the demands of right (Maxwell on the Interpretation of Statutes, Edn. 7, pp. 213 and 214).

In the light of these principles, the meaning of Cls. (b) and (c), S. 23 becomes perfectly clear. Certain minor relations of the disqualified proprietor are to be provided maintenance out of the estate, the more important incidents of what is shortly termed the maintenance right being set out in the section, as comprising "custody, residence, education and marriage." The clauses confer on the Court of Wards "a legislative right and power" (per Lord Penzance in 5 A C 214[1] at p. 229) to make arrangements for the purposes specified, if required, or if duly applied for, in other words, it makes legal and possible the incurring of the expenses and charging them to the estate. That is the scope and effect of the relevant clauses of the section and it would be a perversion of the Act to call this power a right and to argue that in the exercise of that right the authority of the Court of Wards is absolute and unfettered. It will be seen that I have confined my remarks to Cls. (b) and (c) alone, for, the position under Cl. (a), which refers to the disqualified proprietor himself, is entirely different; the Court of Wards having been constituted his guardian by the Act, it possesses in relation to him a legal right as opposed to a mere power. But that is a matter with which, as already observed, we are not concerned. A brief reference to S. 48, in this connexion becomes necessary. It says:

> No act done in the exercise of any discretionary power conferred by the Act shall be questioned in any civil Court.

But how does any question of discretionary power arise in the case at all ? As pointed out above, the power vested in the Court of Wards is not such as is available against the minors; that is confided to it for their benefit and for enabling it to charge the expenses to the estate. Before leaving this subject, I must observe that some reliance has been placed upon S. 67 of the Court of Wards Act, which provides that:

> Whoever without the previous consent of the Court, abets the marriage of any of the persons specified in Cls. (a), (b) and (c), S. 23, shall be liable on conviction

to a fine or imprisonment. It is said that this section by implication recognizes the power of the Court of Wards in respect of at any rate the marriage of the persons mentioned. One of the persons referred to in S. 23 is the disqualified proprietor himself: Cl. (a). I have already pointed out while dealing with S. 34, that it enacts that the disqualified proprietor's capacity to enter into a contract of marriage remains unaffected in spite of S. 23. Thus by entering into a contract of marriage the disqualified proprietor himself does not violate any provision of law; but S. 67 declares that anyone abetting his marriage commits an offence and is liable to be punished. This section leads to a strange anomaly and hardly fits in with the scheme of the Act or its other provisions, and abruptly occurring as it does in the chapter relating to penalties, cannot be treated as affecting the rights under the general law. We are not however, concerned in this case with the marriage of any person and so S. 67 is not really relevant. The learned Advocate General has addressed a lengthy argument with a view to show, that where a public body has statutory powers conferred upon it with a discretion in regard to their use, its decision cannot be contested unless it has acted mala fide, that is, as he puts it, fraudulently, corruptly or maliciously: (1905) A C 426.[3] With this I shall presently deal, but in view of the opinion already expressed by me, this question does not arise. When construing a statute of this sort, the first thing to ascertain is what powers the public body has been invested with; the second thing is to ascertain whether it has bona fide exercised these powers for the purposes for which the Legislature has conferred them: Lindley, M. R. in (1900) 82 L T 362.[4] I have held that the Court of Wards has not been confided the power which it claims; this being so, the second question whether it has bona fide exercised the alleged power, does not arise. But granting for a moment that

3. Westminster Corporation v. London and North-Western Railway, (1905) A C 426=72 L J Ch 629=69 J P 425=54 W R 129=93 L T 143.
4. Goldbery & Son v. The Mayor etc. of the City of Liverpool, (1900) 82 L T 362.

the power in question has been conferred on it with a discretion how it is to be used? I am prepared to hold without the slightest hesitation, that those elements which would preclude our interference, do not exist in the present case. Lord Macnaghten declares in (1905) A C 426[3] already cited:

> It is well settled that a public body invested with statutory powers, such as those conferred upon the Corporation, must take care not to exceed or abuse those powers. It must keep within the limits of the authority committed to it; it must act in good faith and it must act reasonably.

And the expression "acting reasonably" is explained later on as meaning "with judgment and discretion" and Turner, L. J. is quoted in support of this statement. Sir Francis Jeune in 82 L T 362[4] to which I have referred, defines the expression "bona fides" in terms particularly appropriate to the facts of the present case. The test according to him is, has the public body acted bona fide in the sense that it has fairly endeavoured to ascertain what is necessary or expedient, clearing its mind from personal motives and personal feeling? I quite realize that the mere fact that another person might arrive at a different conclusion, is no ground whatsoever for reviewing the decision of the public body in whom the discretion has been vested. But I wish to apply the two tests mentioned above, those laid down by Lord Macnaghten and Sir Francis Jeune with a view to see whether the decision of the Court of Wards is reviewable or not. The Raja of Vizianagaram belongs to an ancient family and is the foremost among the zamindars of the Presidency. The income his estate yields is about 22 lakhs, the highest in the province and the peishcush amounts to six lakhs. The petitioner's father's predecessor attained great distinction, was granted the personal title of Maharaja and created a G.C.I.E. The latter's immediate ancestor was made a K.C.S.I., and upon him was likewise bestowed the personal distinction of Maharaja (Gazetteer of the Vizagapatam District, pp. 338 and 340). These facts I advert to for showing that this family has attained a predominant position in the presidency. That it has established itself in the affections and hearts of the public of the Northern Sircars, is common knowledge.

The petitioner protests with great force against his minor sons and daughters being sent to England. He maintains that he is deeply attached to his children, whose removal will cause him great mental anguish and imperil their own well-being and happiness. The action of the Court of Wards, he says, is almost without precedent, as never before has a boy or girl of tender age from the landed aristrocracy, been sent abroad for purposes of education. The proposal has roused the resentment of his nearest relations who feel that it is opposed to their cherished usages and traditions. His mother, the Dowager Maharanee, a lady greatly respected and the seniormost member of the family, and his brother, the Rajkumar of Vizianagaram, have filed statements condemning the proposed step in no uncertain terms. There are in this country many institutions where children of the status and position of the minors can be received and educated. One such institution is Mayo College, Ajmere, which as the petitioner points out, His Majesty the King as the Prince of Wales described as "the Eton of India" (from the speech delivered at Mayo College on 28th November 1921). Sir George Anderson the Educational Commissioner with the Government of India, recently referred to "the record of achievement and the high position which the College now holds." Mr. D. G. H. De La Fargue, Secretary to the Agent to the Governor-General, Rajputana, refers to the 'acute sense of the *esprit de corps* and pleasant atmosphere which pervades the whole college.'

> Apart from Ruling Princes and their relations, only the sons of landholders of particular ranks are eligible for admission. (See the Annual Report on the working of the Mayo College, Ajmere, for 1934-35.)

Another institution of the same kind is the Rajkumar College, Raipur, which turns out boys "well equipped to take charge of their States and Zamindaries" (See the report of Mr. Wilcock, Secretary to the Agent to the Governor-General, Eastern States, contained in the Annual Report on the Rajkumar College, Raipur, for 1934-35.) There are three more such institutions in India and as regards them it has been observed that :

> In point of buildings, staffs and organizations these institutions approach English Public Schools: (See Sir Stanley Reed's Indian Year Book, 1935-36).

The petitioner mentioned various other grounds : First, that a prolonged stay in

England would make it difficult for the minors upon their return here, to re-adapt themselves to Indian conditions; secondly, that the absence of instruction in the vernaculars would be highly detrimental to their interests; thirdly, that they would be strangers in their own land and would find their natural environment unsuited to them; fourthly, that the boys would lose touch with their tenantry, whose affections they would alienate—a serious handicap when they enter on the administration of the estate; and that in the case of the girls the public would look upon the step with the utmost disfavour.

We find it difficult to ignore or resist any of these arguments. Not one of them has been answered by the Court of Wards, which simply maintains that it has a legal right which it cannot allow to be challenged. It has made one suggestion and no other, namely, that it is necessary that the children should be removed from the alleged pernicious influence of their father. This objection can be easily overcome. The father has expressed willingness to be subject to such restrictions as may be imposed upon him. We made it clear that we would be prepared to make such order as would have the effect of keeping the minors out of the reach of the petitioner, whose access to them would be carefully and strictly regulated. I have given this matter my most anxious consideration and feel constrained to say, that applying every test, the exercise of the power has not been reasonable or bona fide. In the words of Lord Macnaghten, a public body entrusted with a statutory power must act "with judgment and discretion."

It appears to me, I say so with great reluctance, that these two requisites are entirely absent. As against every near relation of the minors, the father, the uncle and the grandmother, the only person who favours the proposal is the minor's mother, who, for reasons not clear seems disposed to prefer a sojourn abroad. It has been hinted that we should pay no regard to the wishes of the father, as he is addicted to abnormal and eccentric habits. On this we are not competent to form any judgment at present. But the petitioner has, as already stated, argued his case in person and his behaviour in Court has not shown the slightest signs of mental instability; on the contrary, he behaved with great dignity, moderation and restraint and his bearing and address were marked by refinement and courtesy. Even when serious imputations were made against him, he was not heard to make one harsh remark either against the Court of Wards or against his wife. For this part of the case, it may be assumed that circumstances exist which would induce the Court to interfere with the father's control, but that is not the point that is now relevant. The question is, the only ground alleged, namely, the possible contamination of the children disappearing, is there any reason why the Court of Wards should transport the children to England, flouting the wishes of the father and the other near relations? I cannot but recall in this connexion, the pregnant observations of Lord Macnaghten, who thus describes the position of public bodies entrusted with the exercise of statutory powers, involving the invasion of private rights:

> It seems to me that when a public body is exercising the statutory powers conferred upon it for the benefit of the public, it is bound to have some regard to the interests of those who may suffer for the good of the community: (1905) A C 426,[3] at p. 433.

Here, assume for a moment that the Act has deprived the Raja in the public interests (S. 16) of his legal rights; then as a matter of simple justice, his wishes and inclinations ought to count for something and not to be wholly disregarded. Even putting aside the father's wishes, in the children's interests, which must be the paramount consideration, their removal from the country at the most impressionable period of their lives seems very undesirable. Nor has anything been adduced to justify the attempt to remove them from the jurisdiction of the Courts of the province. However, as I have said, my view being that the Court of Wards does not possess the power claimed, the question whether the exercise of the alleged power is bona fide or not, does not arise. But in view of the insistence with which this matter has been argued, I have had, with considerable reluctance, to come to the conclusion (should a finding on the facts become necessary) that the Court of Wards has not acted "bona fide" (I say so with sincere respect) as that term has been explained by Sir Francis Jenne or "with judgment and discretion," in the words of Lord Macnaghten.

It is next contended that S. 50, Court of Wards Act, renders the petition incompetent. It says inter alia that in all suits

or proceedings in any Civil or Revenue Court, the ward shall sue and be sued in his own name, and the manager of his property appointed under S. 24 shall represent him as next friend of guardian ad litem as the case may be. A manager has been appointed by the Court of Wards under S. 24 for the property of the petitioner and it may be mentioned that no guardian for the person has been so appointed. It is urged that a disqualified proprietor is wholly disabled from instituting any suit or proceeding,. which can be filed by the manager alone on his behalf, in other words, that this section imposes upon the ward a total disability in regard to the institution of proceedings in Court. First, this contention involves that even where the superintendence of the Court is restricted to the ward's property, the alleged disability extends to proceedings relating to his person; it is unnecessary to inquire whether this result is intended. Secondly, it involves that the disability alleged attaches even to the property of which, the Court acting under S. 19 has refrained from assuming superintendence; why this should be so, having regard again to the professed object of the Act, is somewhat difficult to follow. But I prefer for the present not to express any opinion on this question either. The contention involves, thirdly, that the extent of the disability is so great that it exists, even where the intended suit or proceeding relates neither to his person nor property. This contention in my opinion ought not to prevail.

A disqualified proprietor can under S. 34 enter into a contract of marriage, as already pointed out; is it to be held that in spite of this he cannot sue in respect of a breach of promise of marriage? Again, in matters relating to his status why should be be disabled from filing proceedings intended to assert his rights? For instance, would it be proper to hold that the section is intended to preclude him from instituting a suit complaining against his expulsion from caste? To extend the alleged disability to proceedings of this sort, seems opposed to the scheme of the Act and outside its purview. Apart from the implied intention of the Act, I should prefer to rest my judgment upon the wording of S. 50 itself. It enacts, to start with, that in all suits or proceedings the ward shall sue and be sued in his own name. This requirement has been here fulfilled. The difference between the language of this section and the provision in the Civil Procedure Code relating to suits by or against minors and persons of unsound mind is most significant. O. 32, R. 1 of the Code provides that every suit by a minor shall be instituted in his name by his next friend and R. 2 goes on to say that where such a suit is instituted without a next friend, it is liable to be dismissed. S. 50, Court of Wards Act, enacts a very different rule. After providing as already stated that the ward shall sue and be sued in his own name (that has been complied with here), it goes on to say that the manager of his property shall represent him as next friend or guardian ad litem as the case may be. The result, to my mind, appears to be, that a petition constituted as the one in the present case, cannot be held to be defective. The present S. 50 repealed and amended a provision which ran thus :

> Every ward shall sue and be sued in the civil Courts in the name of the District Collector specified in the notification under S. 19 or the Collector appointed under S. 46 as the case may be.

The language of the repealed section makes it imperative that the suit shall be brought in the name of the guardian, and the fact that the legislature thought fit to repeal it and enact a new provision on entirely different lines ought not to be ignored. The need for the amendment that was made is illustrated by this case. It is inconceivable that the same person should have been intended to be both plaintiff and defendant, for that is the effect of the contention that has been put forward. The manager, who it is urged ought to have filed the present proceeding is no more than a "servant" of the Court of Wards (S. 31) "subject to its control" and "bound by its orders" (Ss. 24 and 28) and required by S. 52 to obtain its previous authorization before representing a ward in any legal proceeding. My view of the section is this: a proceeding instituted by a male proprietor, not being a minor or a lunatic, is not a nullity, and the fact that the manager does not appear on the record as his next friend, is a mere irregularity and is no ground for dismissing it. Ordinarily, the manager should represent him, and where that has not been done, the Court acting reasonably and on proper grounds being shown, ought to give the parties an opportunity to cure the defect. But when as in the present case the proceeding is directed against the Court of

Wards itself, to pursue the usual course would lead to an obvious absurdity as it would be contrary to settled principles to permit the same person to figure both as plaintiff and defendant. And on the facts here it would be idle to pretend that the servant of the Court of Wards can effectively represent the petitioner or adequately safeguard his interests. In my opinion therefore there is no substance whatever in the contention that the proceeding is barred by S. 50.

If my conclusions so far are correct, it would inevitably follow that this application would have been allowed, had it been filed under the Guardians and Wards Act, before the District Court of Vizagapatam where the minors are residing; but it is maintained that as the petitioner has chosen to move the High Court which has no jurisdiction in the matter, his petition is incompetent and ought to be dismissed. After carefully considering the question, I feel compelled altogether to dissent from this view. S. 3, Guardians and Wards Act saves the power of the chartered High Courts and there is also a provision in the Court of Wards Act (S. 3) which similarly saves the High Courts' jurisdiction. If we confine ourselves to the relevant provisions relating to infants in the various charters of justice, the question to my mind presents little difficulty. The argument has covered much ground, in my opinion quite unnecessarily. A careful scrutiny of the charters will show that the Court is vested with different kinds of jurisdiction, sometimes restricted, sometimes extensive; and at the outset it seems to me that this distinction ought to be borne in mind. To illustrate my point I may refer, taking the Madras High Court Charter of 1865, to a few sections for showing that the extents of the jurisdictions vary. As regards the original civil jurisdiction, Cl. 2 declares that it shall not extend beyond certain prescribed local limits. By way of contrast, Cl. 34, may be referred to, which says that the High Court's testamentary and intestate jurisdiction is not subject to such territorial limitation. Again, provisions in regard to other jurisdictions such as criminal, admiralty and matrimonial, are entirely dissimilar. Now the question is what is the extent of the High Court's jurisdiction in regard to infants? Cl. 17 of the 1865 Charter says that the jurisdiction of the High Court in regard to infants within the Presidency of Madras is the same as that vested in it under Cl. 16 of the Charter of 1862; the jurisdiction under the latter provision is declared to be "that which is now vested in the said Supreme Court at Madras." Turning to the Charter of 1800 establishing the Supreme Court, the relevant provision is Cl. 32 the material part of which runs as follows:

> We do hereby authorize the said Supreme Court of Judicature at Madras to appoint guardians and keepers for infants and their estates according to the order and course observed in that part of Great Britain called England.

It will be observed that this clause confers plenary authority unlike several other clauses which occur in this Charter. In defining the ambit of jurisdiction, Cl. 4 uses words of extensive application. It says that the Court shall have (I quote the relevant portion):

> full power to exercise such civil, criminal, admiralty and ecclesiastical jurisdiction both as to natives and British subjects and be invested with such power and authority within Fort St. George and the towns of Madras and the limits thereof and the factories subordinate thereto and within the territories which then were or thereafter may become subject to or dependent upon the Government of Madras, as the Supreme Court of Judicature in Bengal is invested with, within Fort William or the Kingdoms and provinces of Bengal, Behar and Orissa.

I have set out a good part of this clause as its language shows beyond doubt that subject to the provisions that follow the jurisdiction conferred, both as to territory and as to persons, is general and not restricted. Passing on to the succeeding clauses, each of them deals with a different kind of jurisdiction. In Cl. 21, for instance, there is a reference to 'British subjects' and to the power possessed by the abolished Recorder's Court. Now turning to the Charter of 1798 establishing that Court, we find in the clause dealing with the extent of civil jurisdiction, reference is made to 'our subjects,' which term is equivalent to 'His Majesty's subjects,' the expression occurring in 1797, 37 Geo. III, Ch. 142, in pursuance of which statute, the aforesaid Charter was granted.

To return to the 1800 Charter, the point I wish to make is this: Cl. 4 defines the extent and ambit of jurisdiction and as I have said, the words used there are perfectly general. Then follow several heads of jurisdiction, not in all cases of equal extent—some restricted, some not; but in the case of infants with which alone we are concerned, the jurisdiction conferred is

plenary ; for in Cl. 32, as already stated, there is no restriction either as to place or persons, as it provides in the most general terms, that the Supreme Court in the matter of appointing guardians for infants, is authorised to follow the same order and course, as that "observed in that part of Great Britain called England." It is further material to observe that the power and authority with which the Madras Supreme Court is invested under Cl. 4, already quoted, is similar to that possessed by the Supreme Court in Bengal; as regards the jurisdiction over infants, there is no difference whatsoever between the powers conferred on the Madras and the Calcutta Courts (Cl. 25 of the Calcutta Charter, 1774). The learned Advocate General contends that the Supreme Court's jurisdiction over infants is both as to territory and as to persons restricted in the same way as its original civil jurisdiction, in other words, that its jurisdiction is limited to the City of Madras and, outside the city limits, to European British subjects only. We are in effect asked to read into the clause relating to infants, all the limitations that appear in the clause relating to original civil jurisdiction. I fail to see why we should depart from the plain meaning of the provision and read into it restrictive words which do not occur there. It is urged that the view that the High Court possesses a general jurisdiction over infants, would lead to the result that the provincial Courts and the High Court possess a concurrent jurisdiction over them. But does the learned Advocate General's argument avoid this result altogether? Even according to him, the jurisdiction over infants would extend beyond the city in the case of European British subjects, who undoubtedly under the Guardians and Wards Act are subject to the provincial Courts. The argument therefore based upon the supposed anomaly entirely falls to the ground. I agree with respect with the observations of Sir Arnold White, C. J. who says :

> The jurisdiction in connection with the estates and persons of minors is, in my opinion, the jurisdiction which was exercisable by the Lord Chancellor in England acting for the Sovereign as *parens patriae* when the Supreme Court in Madras was instituted : 25 M L J 661[5] at p. 686.

The contention urged in that case was that the fact the minors were outside the Presidency ousted the jurisdiction of the High Court. Here the minors are within the Presidency but outside the City, but for the purpose of the present argument that makes no difference. Referring to Cl. 32, Letters Patent of 1800, the learned Chief Justice says :

> The language of this clause is quite general and is not qualified by any limitations as to persons or place such as we find in other clauses of these Letters Patent : (see for instance Cls. 4, 21, 22, 31 and 41) : 25 M L J 661[5] at p. 686.

There has been a good deal of discussion at the bar as to what is meant by the expressions "The British Subjects" and "His Majesty's Subjects," occurring in the various statutes and charters belonging to the period 1773 to 1824. It was then that the Recorder's Courts at Madras and Bombay and the Supreme Courts in the three Presidency towns came into existence.

> Before the Government had passed from the Company to the Crown, it was a matter of doubt whether natives of India (excepting the island of Bombay which had once been a Crown possession) were 'British subjects,' as that term was occasionally used in Acts of Parliament relating to India : (10 Halsbury's Laws of England Edn. 1, p. 588).

This has been a moot point on which divergent opinions have been expressed. It is sufficient to refer to the judgments of the Bombay High Court in 6 M I A 348,[6] to show how widely eminent jurists and writers have differed on this question. Sir William Yardly, C. J. in his judgment refers to the opinion of Sir Erskine Perry in support of his extended interpretation of the term 'British Subjects.' Sir Charles Jackson, the other learned Judge, who places a narrower meaning on the expression finds support in the opinion of Sir Charles Grey. Indeed it would be tedious and would serve no useful purpose to attempt a solution. As writers on constitutional law point out, the Parliament deliberately avoided a precise definition of the term 'British subjects,' and the Act of 1813 (53 Geo. III, Ch. 155) for the first time expressly proclaimed the sovereignty of the Crown over the Company's possessions; then by the Charter Act of 1833 (3 and 4 William IV, Ch. 85) the territorial possessions of the Company were continued to it for 20 years "but in trust for His Majesty, his heirs and successors for the service of the Government of India." (Keith's Constitu-

5. Annie Besant v. Narayaniah, A I R 1915 Mad 157=21 I C 789=1914 M W N Sup 1=25 M L J 661.

6. Ardaseer Cursetjee v. Perozeboye, (1854-57) 6 M I A 348=4 W R 91 (P C).

tional History of India, 1600-1935, pp. 127 and 131). True, as observed by the Judicial Committee in another connection, in (1919) A C 211[7] at p. 221, if there is a conquest by the Company's arms, then by well settled constitutional practice, that conquest would be on behalf of the Crown: (1919) A C 211[7] at p. 211. Equally unassailable is the proposition, that all persons born within King's Dominions, by whatsoever manner acquired, are natural born British subjects. But this most fundamental principle of British nationality, the statesmen of the period shrank from asserting unequivocally, as they found it sometimes convenient or even necessary, to recognise the formal overlordship of the Mogul Emperor. It is not possible to define exactly at what precise point of time sovereignty became applicable to the various territories which fell under the Company's control: (1836) 1 M I A 175[8] at p. 274. Ilbert observes:

> Notwithstanding the declaration in the preamble to the Charter Act of 1813, there was still room for doubt whether the native inhabitants of those possessions were British subjects within the meaning usually attached to that term by Acts of Parliament and whether their status did not more nearly resemble that of natives of the territories in Africa which are under protection but have not been formally incorporated in the British dominions: p. 411.

After the assumption of direct control by the Crown under 21 and 22 Vict. Ch. 106, the doubt as to sovereignty no longer existed and the Crown became the paramount power both in theory and in fact: see 10 Halsbury's Laws of England Edn. 1, p. 588. But how far is this discussion germane to the point at issue? As I have said, I am emphatically of the opinion, and I wish to repeat it, that in regard to the jurisdiction over infants, the relevant clause in the Charter, differing in this respect from several other clauses, recognises no kind of limitation. So, to my mind, the question as to who were British subjects, possesses little importance. If I am correct in this view, the High Court possesses undoubted jurisdiction in regard to the minors, though not of British birth, resident outside the limits of the presidency town. But supposing that the jurisdiction of the Supreme Court over infants was confined to British subjects of British descent, what follows? The moment direct control was assumed by the Crown, every native of British India became ipso facto a British subject and from that time onwards nothing could hinder the supreme Court from exercising jurisdiction ever over native Indian infants in the mofussil. To put it concretely, in 1856 it would be (I am granting this for the purpose of argument) beyond the competence of the Supreme Court to assert jurisdiction over native Indian minors outside the City, but in 1859 such a bar would no longer exist. This seems to my mind simple enough, for I stress once again that under Cl. 32 the jurisdiction is general and it contains no reference to British subjects; but if nevertheless the test of a person being a British subject is to be applied, the question is merely, at the material time is he a British subject or not? By S. 8, High Courts Act, the Supreme Court and the Courts of Sudder Adaualt and Foujdari Adaulat were abolished upon the establishment of the High Court and by S. 9 the jurisdiction of the abolished Courts became subject to certain limitations vested in the High Court.

What matters therefore is the power possessed by the Supreme Court at the time of its abolition and it was that power that the newly established High Court was vested with. If, as I have shown, the Supreme Court between the passing of the Government of India Act, 1858 and its abolition, could have exercised jurisdiction over native Indian infants in the mofussil, the High Court inherited its power and jurisdiction. This removes every possible doubt which, in spite of what I have already said, might still be supposed to exist on the point. There is another aspect to which I may advert, making it however clear that it is not intended to seek any ground for my judgment in the remarks to be made in this connection. By Cl. 22 of the 1800 Charter, jurisdiction is conferred upon the Supreme Court over the inhabitants of Madras, irrespective of any question of race or birth. The petitioner, the Rajah of Vizianagaram, owns a valuable and spacious house at Madras, for which he pays the rates, keeps up an establishment there and resides in it during his visits to the city at frequent intervals. That on these facts which are not disputed, he would answer the description of the "inhabitant of Madras," does

7. *In re* Southern Rhodesia, (1919) A C 211=88 L J P C 1=119 L T 698=34 T L R 595.
8. Mayor of the City of Lyons v. East India Co., (1836) 1 M I A 175=1 Moo P C 175=1 Sar 107 (P C).

not admit of doubt. Sir W. Page Wood, V. C. observes :

> Generally if a party has two or three establishments, every one of them may be called his residence, and not less so because he may not go there for some years. If he keeps up an establishment in it, the place is still his residence ; and thus he may be said to have his residence in two or three different countries : Kay 534 at 543=69 E R 226[9] (230).

In (1884) 25 Ch D 605,[10] (610) the legatee was bound under the terms of a will to reside in a certain house for at least six months in every year. In one year he actually resided for 18 days only and in the year following for no more than 24 days. The question arose whether there was such non-compliance as would lead to a forfeiture. Bacon V. C. observes that it is necessary, in order to comply with the conditions contained in the will, that the place should be kept up and goes on to say,

> kept up it has been, for there is a staff of servants there, and the man's horses and poultry are there .... The defendant has resided there ; he did take possession ; he has complied in all respect with the reasonable interpretation of the will and there is no ground for saying that he has not done so : 25 Ch D 605[10] at p. 610.

These cases have been followed in India in 32 C L J 314,[11] where Sir Ashutosh Mukherjee, A. C. J. points out that some persons have more than one residence and that in respect of them the word 'reside' may be used in relation to either their personal or legal residence : see p. 330. I have now shown that the Raja of Vizianagaram would answer the description of the 'inhabitant of Madras' occurring in Cl. 22, of the 1800 Charter. I have already said that at any rate subsequent to the Act of 1858, the Supreme Court would undoubtedly possess jurisdiction over the native inhabitants in the mofussil. But even prior to that year, the position of the inhabitants of Madras in virtue of Cl. 22 was different from that of the inhabitants of the rest of the Province ; the Supreme Court's jurisdiction over them did not depend upon any question of nationality. I conceive therefore that the Supreme Court, acting upon the English analogy would not have hesitated to assist a resident of Madras invoking its jurisdiction, in asserting his parental authority over his children resident in the mofussil. Indeed the question is not, who would have to move the Supreme Court. For, by whomsoever moved, it would have exercised jurisdiction over the infant children, though resident in the mofussil, of the inhabitants of Madras. In 30 Ch D 324[12] the infant was born abroad but his paternal grandfather was a natural born British subject, and it was held that the Court had jurisdiction to appoint a guardian of such infant, although resident abroad. Kay, J. whose decision was upheld by the Court of appeal, observes :

> According to the principle of our law, the Sovereign as *parens patriae* is bound to look to the maintenance and education of all his subjects. First the question is, whether this principle applies to children born out of the allegiance of the Crown ; and I confess that I do not entertain any doubt upon the point, because the moment it is established by statute that the children of a natural born father born out of the Queen's allegiance are to all intents and purposes to be treated as British born subjects, of course it is clear that one of the incidents of a British born subject is, that he or she is entitled to the protection of the Crown as *parens patriae* (p. 328).

This case of course does not in terms apply ; but if for 'British subject' is substituted 'inhabitant of British India,' the parallel would be complete. The Court of Chancery would extend its protection to the child of a British subject, though resident abroad, thus the residence of the infant is immaterial. By analogy, in the case of an inhabitant of Madras over whom the Supreme Court had jurisdiction, it would extend the same protection to his children wherever resident. For these reasons it seems to me that the contention that the High Court has no jurisdiction completely fails. In the result, an injunction will issue restraining the Court of Wards from removing the minors out of the Province or otherwise interfering with them or exercising any sort of control over them, subject to the condition, that directions of the High Court may be applied for by any party interested in regard to their removal to any place, within the limits of British India. The enquiry is adjourned for the purpose of ascertaining, whether the petitioner has rendered himself unfit to continue to be the guardian of the minors in question, for appointing, if necessary, in his place a

9. Walcott v. Botfield, (1854) Kay 534=69 E R 226.
10. *In re* Moir Warner v. Moir, (1884) 25 Ch D 605 =53 L J Ch 474=50 L T 10=32 W R 377.
11. Anibala v. Dhirendra, A I R 1921 Cal 309=65 I C 57=48 Cal 577=25 C W N 178=32 C L J 314.
12. *In re* Willoughby, (1885) 30 Ch D 324 = 54 L J Ch 1122=53 L T 926=33 W R 850.

suitable person as their guardian and for passing final orders.

Venkataramana Rao, J. — This is an application under Cl. 17, Letters Patent, by the Rajah of Vizianagaram in the matter of his four minor children (1) for an order that he should have custody and control over the said children as their natural guardian ; (2) but if the Court deems it necessary for the preventing of the children from being sent to the British Isles, that a guardian other than the petitioner should be appointed, for an order that his mother, Sri Lalitha Kumari Devi, the Dowager Rani Saheba of Vizianagaram be appointed as guardian, and (3) for other reliefs. The circumstances which have necessitated this application have been fully dealt with, by my Lord the Chief Justice and I do not therefore propose to recapitulate them. This application is strongly opposed by the Court of Wards. At the outset an objection has been taken to its maintainability. The objection is formulated thus in para. 4 of the affidavit filed by the Collector of Vizagapatam on behalf of the Court of Wards :

> The petitioner, being a ward of the said Court of Wards, is precluded from instituting Court proceedings without the consent of the Court of Wards or without intervention of a next friend.

The objection is based on S. 50, Court of Wards Act, which runs thus':

> In all suits or proceedings in any civil or revenue Court the ward shall sue and be sued in his own name and the manager of his property appointed under S. 24, or, if there is no such manager, the officer competent to act as manager under S. 25 shall represent him, as next friend or *guardian ad litem* as the case may be.

In construing this provision and other provisions of the Court of Wards Act the scope and object of the Act has to be kept in view, viz., to conserve and preserve the properties of proprietors disqualified within the meaning of the Act : vide the preamble to the Madras Court of Wards Regn. 5 of 1804. The Act is not intended to override private rights. As observed by Sulaiman, J. :

> A ward with certain disabilities is a creation of law and can have no existence outside the law : 54 All 954[13] at p. 964.

If a ward is a minor or a lunatic declared by a competent Court, he is incapable under the general law of acting by himself and has to be represented by a next friend or guardian as the case may be; but if he is not, his incapacity must be such as is imposed by the Act. In defining the extent of incapacity of a ward under the Oudh Land Revenue Act of 1876, the Privy Council in 28 All 570[14] at p. 580, make the following observations :

> From a perusal of the group of sections above referred to, their Lordships are of opinion that it was not intended to interfere with the personal status or rights of an adult disqualified proprietor who is neither idiot nor lunatic, except as regards the management of his property or anything expressly prohibited.

Their Lordships refused to read into the Act a curtailment of the proprietor's personal rights when they did not find it there. In this case the Rajah is neither a minor nor a person of unsound mind within the meaning of S. 9 (a) or S. 9 (c) of the Act ; but, in the public interest, the local Government appears to have declared the Rajah a disqualified proprietor under S. 9 (d). The only disabilities therefore that are imposed by the Act seem to be those enacted in S. 34 of the Act. Examining the extent of those disabilities, it is seen they relate to his property over which the superintendence of the Court of Wards extends, the object being that by no act of his the said property should be imperilled. To this extent therefore his incapacity is thus defined. In other matters, it follows, his capacity to act must remain unaffected. He can enter into a contract of marriage; he can adopt or make a will and the Court of Wards cannot withhold their consent except on specified grounds. He is not prevented from dealing with the property the superintendence of which had not been assumed by the Court of Wards nor from incurring any pecuniary liability in respect thereof. Therefore the words "in all suits or proceedings," must be construed with reference to the extent of disability imposed by the Act and so construed they must relate to the person and property of the ward. It is only in such cases, if at all, an adult ward not of unsound mind may be said to be incompetent to sue or be sued in any proceedings without a next friend or a guardian. The application in this case does neither relate to the person nor to the property of the ward but relates to the person of a third party who is not a ward and is therefore not barred by S. 50 of the Act.

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13. Kaulapatti Kunwar v. Ram Baran Singh, A I R 1932 All 494=139 I C 39=1932 A L J 677=54 All 954 (F B).

14. Dhanipal Das v. Maneshar Baksh Singh, (1906) 28 All 570=33 I A 118=9 O C 188=3 A L J 495 (P C).

An examination of some of the cases decided with reference to analogous provisions in Acts *pari materia* seems to support this view. It has been held that in respect of property of a religious institution whereof a ward is a trustee, when there is no provision in the Court of Wards Act providing for management in respect of such property, a ward is competent to sue himself and to be sued without his being represented by a next friend or a guardian. In 44 All 634,[15] the question arose with reference to the property of an idol whereof the ward was one of the trustees. It was contended that under S. 55, United Provinces Court of Wards Act, 4 of 1912, the ward could not sue without a next friend. S. 55 of the said Act is in much wider terms than S. 50 according to which,

> no ward shall sue or be sued nor shall any proceedings be taken in the civil Court otherwise than by and in the name of the Collector in charge of his property or such other person as the Court of Wards may appoint in this behalf.

But the contention was negatived. The learned Judges observed :

> That section has, however, no application to cases where a disqualified proprietor has no personal interest in the property by virtue of which a right to sue is claimed. His disability extends to the property he owns and not to that which he holds as a trustee . . . He cannot be regarded as a disqualified proprietor in regard to the property which he so holds as manager.

In 5 C L J 434[16] a question arose as to the representation of a minor ward in respect of certain property which the Court of Wards had not taken charge of. It was contended relying on S. 51, Bengal Act, 9 of 1879 that the only person competent to represent the ward was the Court of Wards and not the mother who made an application to set aside a sale of the said property as his next friend. It was held by Mookerjee, J. that S. 51 had no application to the case, and the Court of Wards was not entitled as a matter of right to represent the minor ward. This decision was confirmed by the Privy Council in 40 Cal 635[17] wherein at p. 749 occurs the following observation:

> It is clear that the Court of Wards did not in fact take over Gadi Gandey at any time . . . Their Lordships are therefore of opinion that inasmuch as the interests of the infant with regard to this property were not in fact represented by the Court of Wards, it was open to the mother as natural guardian to appear in the name of the infant to protect this property from sale . . . The proceedings taken by her were therefore in order.

A similar view was taken by the Patna High Court in 46 I C 316,[18] wherein Mullick and Thornhill, JJ. observe that though S. 51, Bengal Court of Wards Act, 9 of 1879, is enacted in very wide terms, judicial decisions have considerably restricted the very wide meaning sought to be attached to the section. They also seem to be of the opinion that in a case where the suit is in respect of property which is not in the actual possession of the Court of Wards, the suit may proceed against the proprietor alone. I may mention that under the proviso to S. 19, Cl. 2, Madras Act, it is in the discretion of the Court of Wards to assume or refrain from assuming the superintendence of any property which the ward may acquire otherwise than by inheritance. It cannot be urged that in respect of a property of this description which the Court of Wards has not taken charge of, the ward would not be competent to sue or be sued without his being represented by the Court of Wards. The cases relied on by the learned Advocate General do not militate against this view. In 46 I C 68[19] and on appeal to the Privy Council in 43 All 478,[20] the question related to the property of the ward vested in the Court of Wards and in regard thereto it may be said he was incapable of acting. As the Court of Wards represented him, he was held to be bound by their act. Further the decision also turned on the language of S. 55, United Provinces Act, 4 of 1912. The observations in 46 I C 68[19] are too wide, if it is meant that the moment a person is declared a ward of Court he becomes so to speak a minor or lunatic for all purposes. There is nothing in 43 All 478[20] which supports these observations.

It is argued that in cases where the Court of Wards take superintendence of the person he must be treated as a minor or a lunatic. I find however nothing in the Act which supports that contention either expressly or by necessary implica-

15. Sri Thakurji v. Hiralal, A I R 1922 All 408=75 I C 335=44 All 634=20 A L J 609.
16. Krishna Pershad Singh v. Goshta Behari Kuudu, (1907) 5 C L J 434.
17. Krishna Pershad Singh v. Moti Chand, (1913) 40 Cal 635=19 I C 296=40 I A 140 (P C).
18. Mohammed Abdus Salam v. Kamalamuchi, A I R 1918 Pat 520=46 I C 316.
19. Narendra Bahadur Singh v. The Oudh Commercial Bank, A I R 1918 Oudh 163=46 I C 68=5 O L J 153.
20. Narendra Bahadur Singh v. Oudh Commercial Bank Ltd., A I R 1922 P C 1=64 I C 187=48 I A 494=43 All 478 (P C).

tion. The superintendence of the person is after all assumed only as ancillary to the main object of the Act, namely the preservation of the property. Under the general law a person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for a suit (O. 32, R. 4, Civil P. C.). It cannot be said that an adult ward who is neither a minor nor a lunatic is incompetent to act under the said rule. The Rajah in this case would thus be competent to represent his minor children and it will be idle to contend that nevertheless he in his turn should be represented by some one else as if he were a minor or a lunatic. Again S. 50 can obviously have no application in suits or proceeding to which the Court of Wards is a party. It seems to me impossible that in a proceeding against the Court of Wards the manager can represent the Rajah. The proceeding in this case is initiated by the Rajah against the Court of Wards in respect of a claim wholly dissociated from the person and property of the ward. Therefore also the application in its present form is perfectly competent. I am also of the opinion that the contention that this application is not maintainable without the manager or other officer representing the Rajah can be met successfully with a construction of S. 50 which probably least affects personal or private rights. The section is made of two parts. The first lays down that the ward shall sue and be sued in his own name. So far this application is in accordance with the statute. The second part lays down that the manager appointed under S. 24 or the officer appointed to act as manager under S. 25 shall represent him as next friend or guardian ad litem as the case may be. Now the expressions 'next friend' and 'guardian ad litem' are well known to procedural law, being expressions used in the Civil P. C., which was in force when the Court of Wards Act was passed.

These expressions occur in O. 32, Sch. 1, Civil P. C., dealing with suits by or against minors and persons of unsound mind. Provision therein is made for representation of minors and lunatics by next friends when they are plaintiffs and by guardians ad litem when they are defendants. The Court of Wards Act contemplates minors and lunatics to become wards: see S. 9, Cls. (a) and (c). A suit by or against such persons should conform to the provisions of the Civil P. C., i. e., such persons should be represented by next friends or guardians ad litem. Consistent with the policy of the Act, what S. 50 lays down is only this, that if in any suit or proceeding it is necessary under the general law of procedure that there should be a next friend or guardian ad litem, then, the manager or other officer shall be such next friend or guardian, i. e., he will be a statutory next friend or guardian. In this view, several of the anomalies pointed out earlier will not arise and the personal rights of the ward will not be affected any more than expressly declared to be affected by S. 34. This application therefore by an adult person who is neither a minor nor a lunatic nor a person so mentally infirm as to be unable to conduct this case is perfectly competent under the general law and there is nothing in S. 50 which renders it incompetent.

Even assuming the Rajah is not competent to maintain this application, it is open to this Court to take action under Cl. 17, Letters Patent, if it is brought to the notice of the Court that the interests of infants required to be safeguarded. Apart from the Rajah, his mother, Dowager Rani, has filed an affidavit intimating her willingness to be appointed guardian and further through her counsel has requested this Court to appoint a proper guardian as the interests of the infants are in real danger unless adequate protection is given by this Court. The next objection taken by the Court of Wards is that this Court has no jurisdiction "to receive and adjudicate upon an application relating to the guardianship of infants residing outside the ordinary original civil jurisdiction of this Honourable Court unless it be he is a European British subject." The jurisdiction of this Court over infants is conferred by Cl. 17, Letters Patent, 1865, which runs thus:

> And we do further ordain that the said High Court of Judicature at Madras shall have the like power and authority with respect to the persons and estate of infants, idiots, and lunatics within the Presidency of Madras, as that which was vested in the said High Court immediately before the publication of these presents.

What was thus vested in Cl. 17 was what was vested under Cl. 16, Letters Patent of 1862, which runs thus:

> And we do further ordain that the said High Court of Judicature at Madras shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics, whether within or without the Presidency of Madras,

as that which is now vested in the said Supreme Court at Madras.

The power that was vested in the Supreme Court in this behalf under Cl. 32 of the Madras Charter of 1800 is to this effect:

And we do hereby authorize the said Supreme Court of Judicature at Madras to appoint guardians and keepers for infants, and their estates, according to the order and course observed in that part of Great Britain called England.

The question is, what is the order and course observed in England? The jurisdiction in regard to persons and properties of infants is that exercised by the Chancellor in the Court of Chancery as a part of the general delegation of the authority of the Crown *virtute officii*. It has therefore its foundation in the prerogative of the Crown flowing from its general power and duty as *parens patriae*: see (1891) A C 388,[21] (395). This power is exercised even if the infant is residing outside the jurisdiction of the Court of Chancery: vide 30 Ch D 324,[13] at p. 338, (an infant) (per Cotton, L. J.) and arising out of the prerogative of the Crown is not subject to any territorial limitation. All that is necessary is that at the time it is invoked the minor must be a subject of His Majesty. It is the same jurisdiction which is conferred by Cl. 32. As pointed out by White, C. J. in 25 M L J 661,[5] at pp. 684 and 685,

The language of the clause is quite general and is not qualified by any limitation as to persons or place such as we find in other clauses of these Letters Patent.

There is nothing to prevent the jurisdiction being exercised over infants in the mofussil in the Presidency provided they fulfil the requisite laid down above. Mr. Broughton in his book on the Civil Procedure Code of 1859 comments on Cl. 16, Letters Patent of 1862, thus:

The jurisdiction given by this clause seems, with the like clause of the Charter of the Supreme Court, to confer power and authority in those cases without respect to nationality: (1869) 3rd Edn., App. p. 29.

It is contended that Cl. 32 must be deemed to be qualified by the clauses which define the extent of the jurisdiction, namely, Cls. 21, 22 and other Clauses and that they indicate that the jurisdiction of the Supreme Court is confined only to the City of Madras and over the European British subjects in the mofussil. It will be seen that the Charter confers various jurisdictions, civil, criminal, ecclesiastical, admiralty, equity, testamentary as well as jurisdiction over infants, idiots and lunatics. The extent of the jurisdiction in each case will have to be ascertained from the language used with reference to each. In regard to the issue of certiorari to an officer in the mofussil, a similar contention was advanced with reference to Cl. 8 of the Charter, which like Cl. 32 contains no limitation as to place or person. Sadasiva Iyer, J. repelled the same and observed thus in 36 Mad 72,[22] (93):

I agree with Norman, J. that while as regards original, civil and criminal jurisdiction, the Letters Patent confined the jurisdiction of the Supreme Court to the Presidency town the powers of the Supreme Court as a Court of Judicature for the whole of the Presidency of Madras extend to the issuing of writs of *habeas corpus* and like prerogative writs into the mofussil also, provided that they are not issued so as to affect Courts. The fixing of the civil, criminal and other jurisdiction of the Supreme Court and inhabitants who do not owe undivided allegiance to the British Crown by Cls. 21, 22, 33 and 34, Letters Patent, cannot, in my opinion, limit the powers given by Cl. 8.

This view has been followed in 53 Mad 979[23]: vide the observations of Venkatasubba Rao, J. as he then was at p. 989. It accords with the general principle to be observed in the exercise of a power arising out of the prerogative of the Crown conferred on a Court by virtue of a statute, viz., that it must have full effect unless there are precise words which limit or define its extent. There being thus no limitation of the power conferred on the Supreme Court under Cl. 32 this Court has jurisdiction to appoint a guardian for an Indian infant residing in the mofussil if a proper case is made out. Even otherwise what is the scope and extent of the jurisdiction conferred by the other clauses of the said Charter of 1800. It is argued for the Court of Wards that the jurisdiction is only over a limited class of people, namely, all such persons as have been described and distinguished "by the appellation of British subjects" and employees under them and inhabitants of Madras, and that the natives of India as such residing in the moffussil, not being 'British subjects', would not come under any of these designated classes.

It may be a question how far the view propounded by the learned Advocate

21. Barnardo v. Mac Hugh, (1891) A C 388=65 L T 423=40 W R 97=55 J P 628.

22. *In re* Nataraja Iyer, (1913) 36 Mad 72=16 I C 755=13 Cr L J 723=23 M L J 393.

23. Venkataratnam v. Secretary of State, A I R 1930 Mad 896=128 I C 851=53 Mad 979=60 M L J 25.

General is correct, viz., that the natives of India without any exception were intended to be excluded from the class designated as 'British subjects' in some places and 'His Majesty's subjects' in other places in the legislation relating to India before 1858. No doubt several provisions suggest that their application was contemplated only in respect of those subjects of the British Crown who were natives or descendants of natives of Great Britain. But it must not be forgotten that these statutes were passed and charters granted during a period when the greatest uncertainty prevailed as to the exact position occupied by the native inhabitants of the Company's possessions in relation to the British Crown. It was with great hesitation that sovereignty was even theoretically asserted over the Company's dominions. Till a very late period the fiction of the native subjection to the Moghul was kept up. The following passage from the Cambridge History of India, Vol. 5, pp. 594 and 595, gives an indication of the uncertainty :

> That Act (the Regulating Act) takes for granted the existence of British sovereignty in Calcutta and its immediate neighbourhood, but not apparently beyond. At best its language is hesitating and uncertain. A distinction appears between British subjects and the native born inhabitants. The India Act of 1784 leaves the question still untouched, although it legislates for the full exercise of all sovereign powers in territory that in 1773 was clearly not yet a part of the dominions of the Crown. The Act of 1793 merely declared that all territorial acquisitions and their revenues were to remain in the possession of the East India Company for the next twenty years, thus leaving the question of sovereignty still open. Not until 1813 do we find the claim to sovereignty formally asserted. In the Act renewing the Company's privileges in that year, the territorial acquisitions were continued under its control 'without prejudice to the undoubted sovereignty of the Crown of the United Kingdon, etc., in and over the same.' But at what moment that sovereignty came into being still remained a riddle.

To an English jurist of the period, therefore, the essential attribute of a British subject, viz., permanent and unquestioned allegiance to the Crown, was not perhaps very apparent in the native inhabitants of the factories or territories of the Company. At the same time it is clear that divergent views were entertained by responsible persons. It has been held by the Supreme Court of Bombay that even native inhabitants of the island of Bombay would be British subjects owing allegiance to the Crown within the meaning of that term in the Charter of the Supreme Court of Bombay. A striking exposition of the opposing views on the subject will be found in the judgment of Yardley, C. J., and Jackson, J. in 6 M I A 348[6] at pp. 353 to 374. But Yardley, C. J.'s opinion seems to be borne out by the provisions of the Charter of Charles II, by which the Island of Bombay was granted to the East India Company. The following clause occurs therein :

> That all and every persons being our subjects (excluding therefore, mere sojourners or aliens), which do or shall inhabit within the said port and island, and every of their children and posterity which shall happen to be born within precincts and limits thereof, shall have and enjoy all liberties franchises, immunities, capacities, and abilities of free denizens and natural subjects within any of our dominions, to all intents and purposes as if they had been abiding and born within this our kingdom of England.

The observation of Perry. J., thereon is instructive :

> This clause, it will be observed, expressly confers the rights of denizenship on all His Majesty's subjects which do or shall inhabit, and the rights of natural subjects on all who shall be born, within the island of Bombay. Morely's Digest, Vol. 2, p. 340.

This is the view of writers of Constitutional Law : (See Taring, Halsbury, Vol. 10, Edn. 1, p. 588, Dodwell in Cambridge History of India, Vol. 5, p. 589). But any detailed investigation into this matter is perhaps unnecessary for the determination of the question in issue. The fundamental fact however remains that the essential requisites for being designated as a British subject is permanent allegiance to the British Crown, an attribute which was apparently assumed to be wanting in natives of India before 1858, though there are also instances suggesting a contrary inference. After 1858 however there cannot be any doubt that the natives of India would be included in the category of British subjects. Taring says in his Article on Dependencies, Colonies and British Possessions, Vol. 10 Hals., p. 588 (Edn. 1) thus :

> Before the Government had passed from the Company to the Crown it was a matter of doubt whether natives of India except in the island of Bombay which had once been a Crown possession were 'British subjects' as that term was occasionally used in Acts of Parliament relating to India. Since the Government of India Act, 1858 this doubt can no longer exist, so far at least natives of British India were concerned.

Sadasiva Ayyar, J., in 36 Mad 72[22] at p. 95 says :

> But when all the people became subject to the King's Laws and the King's Courts instead of the Company's laws and Company's Courts, they must be entitled to invoke the King's prerogative vested in the Superior Courts for their protection.

It follows therefore that when Cl. 16 of the Letters Patent 1862 incorporates by reference the power vested in the Supreme Court over British subjects, that term would include also the new species of British subjects, the native subjects of the British Crown. It is to a case like this that the following canon of statutory construction well applies :

> The language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs when the Act deals with a genus and the thing which afterwards comes into existence is a species of it. (Maxwell, Edn. 7, p. 69.)

The Charter of 1800 deals with the genus 'British subjects'. Even assuming that the only species then contemplated was the 'European British subject,' when the new species of the "Indian British subject" came into existence in 1858, then the Charter will extend in its application to the new species as well. I shall now advert to some of the facts and circumstances which support the conclusion that the Statutes and Charters of Justice of the period prior to 1858 dealt with British subjects or His Majesty's subjects as a genus with well recognized characteristics, though, as pointed out, it is doubtful if the native subjects of the Company's territories were unequivocally treated as an accepted species of it. The Supreme Court was first established in India at Fort William in or about 1772 in pursuance of 13 Geo. III, Ch. 63. The said Act and the Charter issued in pursuance thereof formed the foundation for the Acts and Charters by which the Supreme Courts in other provinces were constituted with the same powers and jurisdiction. An English Jurist of the period must be presumed to have been aware of the conception of the term "British subject" as then understood. Dicey states the Common Law view of English nationality which prevailed at least from the time of Edward III thus:

> English lawyers at the time of Edward III based the law of what we should now call "British nationality," on one broad principle. Any person, they held, who was born within the legiance of the King of England was a natural born British subject, whilst on the other hand no person was such a natural born British subject unless he was born within the legiance of the King. The word "legiance" . . . . meant the duty of the King's subject to yield permanent obedience to the King and his claim in return for this obedience to receive the King's protection. Birth within the legiance was held to mean birth in territory subject to the King . . . . Over 500 years have elapsed, since the death of Edward III, yet the most fundamental rule of British nationality remains all but absolutely unchanged. It is still true that all persons born within the King's dominions or to use an ordinary expression, the British dominion is a natural born British subject : (vide Dicey's Conflict of Laws Edn. 5, pp. 896 to 898.)

Clause 67 of the Charter of the Supreme Court of Madras and Cl. 80 of that of Bombay seem to indicate that this connexion was kept in view. It was also understood at the time that inhabitants of territories acquired by conquest or cession would become subjects of the King when once received under the King's protection: vide (1774) 1 Cowp 204 (208)= 98 E R 1045[24] at p. 1047. Turning to 13 Geo. III, Ch. 63, the persons over whom jurisdiction was to extend were specified in Ss. 14 and 16. It will be seen that while defining the extent of the jurisdiction and the power of the Charter to be granted in pursuance of the Act it states that the same shall and may extend to all "British subjects." While defining the jurisdiction of the Supreme Court it states that the said Court shall have full power and authority over all "His Majesty's subjects" and persons employed under them. British subjects must have been used to have the same meaning as His Majesty's subjects i. e., subjects, of the British Crown. His Majesty's subjects on the date of the Act comprised not only natives or descendants of natives of Great Britain but also natives or descendants of natives of its acknowledged colonies.

This view derives support from some of the clauses of the Charter issued in pursuance of the Act. Cl. 13 of the Charter which gives effect to Ss. 14 and 16 of the Act describes the class of subjects as "our subjects" meaning His Majesty's subjects. Cl. 19 of the Charter which defines criminal jurisdiction refers to them as "any of the subjects of us." Again in the conferment of the King's prerogative rights under Ss. 4 and 25 of the Charter, no definition of territory or person is mentioned, but the power is stated to be that exercised by the Courts in England which, it must be conceded, extended over all His Majesty's subjects in the widest sense of the term. One of the objects of the statute was to establish a Supreme Court of Judicature and the object of S. 14 is to define its jurisdiction. One must presume

24. Campbell v. Hall, (1774) 1 Cowp 204=98 E R 1045.

that in establishing a Supreme Court for a Presidency, the intention of the legislature will be to confer as wide a jurisdiction as possible. It will be seen that in the statute 37 Geo. III, Ch. 142, 39 and 40 Geo. III, Ch. 79, the Recorders and Supreme Courts were intended to have jurisdiction also over the territories to be acquired and on acquisition by conquest or otherwise natives of the said territories would become British subjects. The question is not whether the British subjects were intended to include the native inhabitants of India at the time of the passing of the said Act or Charters but whether the term "British subjects" was used only in the sense of natives or descendants of natives of Great Britain. If it is not the latter, the natives of India would become British subjects as and when they fulfil the requisites which are necessary to make them so, and once they become British subjects, the Supreme Court would have jurisdiction over them.

The interpretation put by the Calcutta Supreme Court even after 21 Geo. III, Ch. 70 seems to suggest that the test to determine a "British subject" within the meaning of the Charter of the said Court was allegiance to the British Crown, (1 Morton 139[25]); the question arose whether Armenian Christians living in Cassimbazar were British subjects within the meaning of the Charter. Three learned Judges of the Supreme Court decided they were, the ground of the decision being that "they do not acknowledge any other sovereign than the King of Great Britain." Sir Charles Grey's opinion was whether the term "British subjects" comprehended natives of India or not, it would apply to all persons "having indefeasibly the character of the subjects of the British Crown:" (vide Cowell, pp. 37 and 38). At p. 412 of his book "The Government of India Act" Mr. Ilbert refers to Clarke's note to his edition of 9 Geo. IV, Ch. 33 to show the conflicting opinions held with regard to the meaning of the term "British subjects," but from the note itself it is clear, whether it comprehended the natives of India or not, it included not only the natives or descendants of natives of Great Britain but also those of its acknowledged colonies of whatever colour or race. In 1813, Act 55 Geo. III, Ch. 155, was passed extending the Charter granted to the East India Company for another period of 20 years and by S. 95 of the Act the undoubted sovereignty of Great Britain was for the first time asserted and declared in a statute. The legal effect of such a declaration would be in theory to make the natives of India the subjects of His Majesty. Mr. Ilbert however points out at p. 411 of his book:

> Notwithstanding the declaration in the Preamble to the Charter Act of 1813 . . . . there was still room for doubt whether the native inhabitants of those possessions were British subjects within the meaning usually attached to that term by Acts of Parliament, and whether their status did not more nearly resemble that of natives of the territories in Africa which are under British protection but have not been formally incorporated in the British dominions.

But from 1833 one may see clearly an indication to regard the natives of India as the subjects of His Majesty because of the increasing definiteness in the minds of the British statesmen to exercise in fact direct sovereign control over British possessions in the East. It was finally in 1858 the Crown asserted direct control and assumed sovereignty both 'in form and in fact.' In unmistakable terms was it declared by S. 1 of Acts 21 and 22, Vic. Ch. 106 that the Government of territories vested in the Company in trust for His Majesty shall cease and shall become vested in Her Majesty and India shall be governed 'by and in the name of Her Majesty.' The legal consequence of this direct assumption of sovereignty was that all the natives of India became British subjects or His Majesty's subjects and the above statute as well as subsequent statutes make this position abundantly clear. Thus if natives of India had become British subjects or His Majesty's subjects, they were certainly amenable to the jurisdiction of the Supreme Courts in and from 1858 till 1862, when those Courts were abolished. The language of Cl. 16, Letters Patent of 1862, is very 'significant viz., "now vested in the Supreme Court" i. e., in 1862. The learned Advocate-General combats this view by saying that to adopt it would be a violent construction as all natives of India would be subject to the concurrent jurisdiction of both Company's Courts and the Supreme Court. It is not possible to see what the difficulty is in subjecting them to such concurrent jurisdiction.

It is because of the confusion that may arise by having a plurality of jurisdiction

25. *In the matter of* N. K Cochick, 1 Morton 139.

that the High Courts Act was passed to systematise the judicial administration by abolishing the Supreme Courts and Saddar Dewani Adalat Courts and defining the powers of the High Court. The High Court has therefore under Cl. 17, Letters Patent, 1865 jurisdiction to appoint a guardian of an infant residing in the mofussil and who is not a European British subject. This is the view taken by Lort-William, J. in 57 Cal 533[26] and in 25 M L J 266[5] by White, C. J. and Oldfield, J. Considerable emphasis was laid by the learned Advocate General on the decision of the Privy Council in 1 Knapp 1.[27] According to him the Privy Council conclusively laid down therein that the Supreme Court of Bombay had no jurisdiction over the natives of India in the mofussil and the importance of the decision consisted in the fact that it was pronounced after the declaration of sovereignty in 55 Geo. III, Ch. 155, in consequence whereof every native of India would be a British subject. In my opinion *Knapp's case*[27] did not lay down the proposition contended for. The actual decision in that case so far as it relates to the present discussion was that the Supreme Court of Bombay had no jurisdiction to issue a writ of habeas corpus to one Moro Ragonath who was then residing in Poona outside the jurisdiction of the City of Bombay. One of the propositions enunciated in that decision was that :

> The Supreme Court had no power or authority to issue a writ of habeas corpus except when directed either to a person resident within those local limits wherein such Court has a general jurisdiction or to a person out of such local limits who is personally subject to the civil and criminal jurisdiction of the Supreme Court.

The question still remains who are personally subject to the civil and criminal jurisdiction of the Supreme Court? The actual ground on which the writ was held to be bad is not stated in the report of the Privy Council. It might have been on the ground as alleged in the petition of Moro Ragonath that he was a relation of the Peishwa and at no time owed allegiance to the Crown and therefore not a British subject within the meaning of the statute. If so, the decision is not against the view I have indicated. It may be that according to the notion of sovereignty prevalent at the time with reference to the territorial acquisitions in India as already pointed out by me, the Company's subjects were not treated as His Majesty's subjects and therefore Moro Ragonath was not treated as His Majesty's subject. If according to that decision the condition for the exercise by the Supreme Court of the Crown's prerogative is personal subjection to the civil and criminal jurisdiction of the Supreme Court, it follows the moment a native of India becomes personally subject to the said jurisdiction, he can seek the benefit of the said prerogative. An argument was based by the learned Advocate General on lunacy legislation. It is thus: The jurisdiction of the High Court under the Letters Patent and of the Supreme Court under Cl. 32 of the Charter of 1800 over lunatics and infants is the same; Act 34 of 1858 and Act 35 of 1858 and Ss. 37 and 62, Lunacy Act, 4 of 1912 (an amendment consolidating the previous Acts) make it clear that the Supreme Court had not and the High Court has now no lunacy jurisdiction over Indians residing in the mofussil. Reliance is placed on 58 Cal 919,[28] 32 C L J 314[11] and 4 All 159[29] in support of this view. 4 All 159[29] is based on an alleged practice in the Calcutta High Court. Both the decisions in 58 Cal 919[28] and 32 C L J 314[11] at p. 318 proceed on the assumption that Cl. 14 of 13 Geo. III, Ch. 63, has the effect of confining the jurisdiction of the Supreme Court beyond the limits of Calcutta to British subjects, the subjects of the King of British birth, an assumption which I have shown is unfounded. The Lunacy Acts do not in my opinion bear out the view contended for. Referring to the Acts of 1858 and 1912 Beachcroft, J. in 32 C L J 314[11] at p. 320 observes as follows :

> In none of them was any definition or limitation of the jurisdiction of the Supreme Court attempted. This may possibly have been due to the fact that the extent of that jurisdiction has always been uncertain and to a reluctance on the part of the legislature to make any enactment which might interfere with it . . . . There is then no provision in any of the three Acts which indicates the extent of the jurisdiction of the Supreme Court.

Beachcroft, J. was only pointing out what I already indicated that the legislation regarding Courts of justice was partly coloured by the prevailing notions of

26. *In re* Tarunchandra Ghose, A I R 1930 Cal 598=128 I C 329=57 Cal 533.
27. *In re* Bombay Justices, 1 Knapp 1 (P C).
28. *In the matter of* Phanindra Chandra Set, A I R 1932 Cal 91=133 I C 188=58 Cal 919 =35 C W N 1045.
29. Jaundhakuar v. The Court of Wards, (1882) 4 All 159=1881 A W N 172.

sovereignty in regard to the territorial acquisitions in India and the hesitancy and uncertainty which dominated the British statesmen in defining precisely the nature of the control of the Crown. In dealing with Cl. 17, Letters Patent, and S. 25 of the Charter of the Supreme Court of Calcutta, Beachcroft, J. again says :

> It would be necessary to examine historically the extent to which sovereign powers had been acquired by 1774 so as to justify the claim to legislation in respect of persons other than European British subjects living outside the town of Calcutta.

Herein Beachcroft, J. clearly assumes that subjection to the British Crown would be the basis for determining the extent of jurisdiction, but having done so, in my opinion, the mistake which he commits is that British subjects must be confined for ever to European British subjects of the King and S. 25 must be controlled by other clauses of the Charter, a view which I have already shown is not well founded. Dealing with Act 4 of 1912, Mookerjee, J. in the same case remarks thus :

> It will be observed that S. 38 does not formulate the test to be applied to determine whether a person is or is not subject to the jurisdiction of the High Court for purposes of judicial inquisition as to alleged lunacy. In this respect the law is left as it was under Ss. 1 and 8, Lunacy Act of 1858.

Section 38 occurs in Ch. 4, and the said chapter is mainly intended to deal with persons subject to the local limits of the jurisdiction of the High Court. This seems to be made clear by the fact that the High Court under S. 43 of the said Act is also empowered to deal with persons outside the local limits of the jurisdiction of the Court, which will be the jurisdiction under Cl. 17, Letters Patent. The heading of Ch. 4, also furnishes the key to the interpretation of S. 38. The words in S. 62, "not subject to the jurisdiction of the Supreme Court" therefore in my opinion mean not subject to the local limits of the jurisdiction of the Supreme Court. A consideration of the provisions of Acts 34 and 35, of 1858, also seems to support this view. S. 1, Act 34 of 1858 is in general terms as it refers to "any person subject to the jurisdiction of the Court," and S. 8 corresponds to S. 43, which refers to a "lunatic beyond the local limits." Ss. 4, 6 and 8 seem clearly to indicate that the jurisdiction can be exercised beyond the local limits.

The expression "not subject to the jurisdiction of the Supreme Court" in Act 35 of 1858 can only be referable to the local limits of the jurisdiction of the Supreme Court. I am, therefore, of opinion that the jurisdiction over lunatics under Cl. 17, Letters Patent, was not meant to be affected by the said Acts. Again the legislation regarding the writ of habeas corpus was referred to as throwing light on the question under discussion. The legislation referred to is the enactment of Ss. 81 and 82, Civil P. C., 1882. S. 82 enacts :

> Neither the High Court nor any Judges of such High Courts shall issue any writ of habeas corpus, mainprise, *de homino replagiando* nor any other writ of the like nature beyond the Presidency towns.

The contention is that the enactment was necessitated in consequence of the decision of Norman, J., in 6 Beng L R 392,[30] wherein he held that the High Court has authority to issue a writ of habeas corpus into the mofussil. It is argued that this enactment is thus a legislative declaration of the fact that the High Court did not possess any such jurisdiction. I am unable to follow this argument. All that the section says is that no High Court shall issue any writ as indicated therein. It may mean the legislature was taking away the power which the High Court had and but for that section the High Court would always have the power to do so. A Full Bench of the Madras High Court in 45 Mad 922,[31] has taken the view that apart from any legislation, the High Court has the power to issue a writ of habeas corpus to an Indian residing in mofussil. It is not necessary for the purpose of the present case to go into the question whether 45 Mad 922,[31] was correctly decided or not. But 45 Mad 922[31] is an authority in so far as it goes and it affirms the view taken in 6 Beng L R 392,[30] and that of Sadasiva Ayyar, J., in 36 Mad 72,[22] a view which had been consistently followed in this High Court up to now. This is also the view taken by the Bombay High Court in 50 Bom 616,[32] where it was held that the High Court was competent to issue a writ for the production of a person outside British India provided the Court was satisfied that the person was in the custody and control of the person within its jurisdiction.

30. *In re* Amirkhan, (1871) 6 Beng L R 392.
31. *In re* Govindan Niar, A I R 1922 Mad 499=68 I C 838=23 Cr L J 614=45 Mad 922=43 M L J 396 (F B).
32. Mohamed Ali Allabux v. Ismailji, A I R 1926 Bom 332=95 I C 49=27 Cr L J 721=50 Bom 616=28 Bom L R 471.

The learned Judges observe :

The High Court still retains such powers as were granted by the Supreme Court Charter of 1823 as were not inconsistent with the Charter of 1865 or have not been taken away by subsequent legislation. : p. 620.

It is contended by Mr. K. R. Vepa, who on behalf of the Dowager Rani presented the case of the petitioner very ably, that even assuming the learned Advocate General's argument to be correct in regard to the jurisdiction over persons residing in the mofussil, the Rajah is a resident of Madras and he can invoke the jurisdiction of this Court for the protection of his parental rights and it is immaterial where the children are residing as long as they are within this Presidency. It cannot be disputed that the Rajah is an inhabitant of Madras within the meaning of Cl. 22 of the Charter of the Supreme Court of 1800. He has got a permanent home "Admiralty House," where he resides for a not inconsiderable portion of the year. He has got a regular establishment in Madras and pays taxes as a citizen. This would have been sufficient to entitle him to the protection of the Supreme Court. (Vide the cases referred to by Mookerjee, J. in 32 C L J 314,[11] at p. 323.)

The residence of the children is immaterial. Cl. 17, Letters Patent does not impose as a condition the residence of the infant for the exercise of the jurisdiction thereunder. As a father, the Rajah is entitled to the custody of his children and if that right is infringed by one who is also subject to the jurisdiction of this Court, I do not see why he is not entitled to get the relief he seeks. It cannot be denied that the Court of Wards is subject to the jurisdiction of this Court, and would have been subject to the jurisdiction of the Supreme Court. Under similar circumstances in 43 E R 534,[33] Lord Chancellor Cranworth made an order in respect of an infant residing in France against the mother, Mrs. Hope, on the ground that she submitted herself to the jurisdiction of the Court. (See p. 542.) In 25 M L J 661,[5] at p. 686, White, C. J., observes :

If the domicile and residence of the father within the jurisdiction of the Court of Chancery in England would have been sufficient to the Court in England, I think the same facts *mutatis mutandis* would be sufficient to give jurisdiction here.

33. Hope v. Hope, (1854) 43 E R 534=23 L J Ch 682=2 W R 698.

Again at p. 687 :

In the present case the statutory power as regards the appointments of guardians for infants is given with express reference to 'the order and course observed in that part of Great Britain called England.' The test seems to me, would the fact that an infant was resident out of England in itself deprive the Courts in England of power on the application of a father domiciled and resident in England to appoint a guardian of the person of the non-resident infant? The answer is surely "no."

I am therefore of opinion that on this ground also this Court has power in this case to exercise its jurisdiction under Cl. 17, Letters Patent and give protection to the father and safeguard his parental rights. It is also contended on behalf of the Court of Wards that after the passing of the Guardians and Wards Act, the only power the High Court has is that conferred by the Act and as there is no power to act independently under the Letters Patent and under the Guardians and Wards Act, the High Court cannot entertain an application in respect of an infant resident in the mofussil. I find it difficult to follow this argument. Reliance is placed on the definition of "district Court" and S. 19 of the Act. S. 4, Cl. 4 defines "district Court" as follows :

"District Court" has the meaning assigned to that expression in the Civil Procedure Code, and includes a High Court in the exercise of its ordinary original civil jurisdiction.

But the jurisdiction of the High Court under Cl. 17, Letters Patent, is not in the exercise of its ordinary original civil jurisdiction and it is saved by S. 3 which says that :

Nothing in the Act shall be construed to take away any power possessed by any High Court established under the Statute 24 and 25 Vict. Ch. 104.

I may point out that it has been consistently held by the High Courts of Bombay, Calcutta and Allahabad that apart from the Guardians and Wards Act, the High Court has jurisdiction to appoint a guardian for a minor. (1892) 16 Bom 634,[34] (1895) 19 Bom 96,[35] (1901) 25 Bom 353,[36] 54 Bom 75,[37] 50 Cal 141,[38] 59 Cal 570[39]

34. *In re* Jairam Laxman, (1892) 16 Bom 634.
35. *In re* Jagannath Ramji, (1895) 19 Bom 96.
36. *In re* Manilal Hurgovan, (1901) 25 Bom 353 =3 Bom L R 411.
37. Narsi Tokersey & Co. v. Sachindranath Gajanan, A I R 1929 Bom 475=122 I C 129=54 Bom 75=31 Bom L R 1009.
38. *In re* Hari Nain Das (an infant), A I R 1923 Cal 409=74 I C 244=50 Cal 141.
39. *In re* Bijay Kumar Singh, A I R 1932 Cal 502=138 I C 739=59 Cal 570.

and 50 All 709.[40] The practice in this Court, so far as my experience goes, has been consistent with the view taken by the other High Courts. The argument based on S. 19 of the Act is also absolutely untenable. S. 19 refers to a minor ward and not to the children of a minor ward. S. 3 occurs in one chapter and S. 19 in another chapter and thus the saving clause is not affected by S. 19.

The next argument of the learned Advocate-General is that S. 23, Court of Wards Act, makes the Court of Wards in effect the guardian of the children of the ward, that by S. 3, Guardians and Wards Act, the power and authority conferred by S. 23 is saved and the High Court's jurisdiction to this extent must be deemed to have been taken away and if it has got any power it can appoint a guardian in respect of matters not covered by S. 23 of the Act. This contention is also equally unsustainable. S. 4, Court of Wards Act, defines a ward as being a person who has been made a ward of the Court under S. 19. Therefore, the minor children are not wards within the meaning of the Act. It is only in respect of a ward the Court of Wards under S. 24 can appoint a guardian of his person and a manager in respect of his property. So it has no power to appoint a guardian for the person of his minor children. The Collector's power under the Act under S. 25 is only to do anything that might be done by a guardian. The powers of a guardian are only in respect of the ward and not in respect of his minor children. Thus there is nothing expressly provided in the Act which prohibits a Court appointing a guardian for the minor children of the ward. Has the power of a father as the natural guardian been taken away by the Act, and if so, to what extent? The father is a guardian by nature and nurture. His right to the custody and control of his children is absolute. His powers unless taken away expressly or by necessary implication by statute or deprived by the Court remain unaffected. So far as the Act goes there is no express taking away of his right. Has there been such by plain intendment or necessary implication? It is contended that by S. 23 it must have been necessarily intended to take away his rights in respect of the matters mentioned therein by virtue of the fact that the superintendence of his person has been assumed. The question, therefore, is, what is the scope of S. 23? The section is enacted to enable the Court of Wards to make the necessary orders and arrangements in regard to the matters mentioned therein as incidental to and arising out of the management of the property vested in them. It does not clothe them with any power as is contended for in the sense that by the exercise of it they can interfere with the rights of others. It affords a statutory protection for certain orders and arrangements which they will be obliged to make when required to do so during the course of their management. The section says 'may.' It is prima facie enabling and permissive. Generally when coupled with a duty it is construed as obligatory. In *Julius* v. *Lord Bishop of Oxford*,[41] both in the Court of Appeal, 4 Q B D 525,[41] and in the House of Lords in appeal therefrom, 5 A C 214,[1] there is a clear enunciation of the principles as to how words like 'it shall be lawful' or 'may,' which are prima facie discretionary should, be construed. In 5 A C 214,[1] at p. 222, Earl Cairns, L. C. says :

> They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power.

Lord Selborne in the same case observed thus at p. 235 :

> The meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential and never (in themselves) significant of any obligation. The question whether a Judge or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.

In 4 Q B D 525,[41] at p. 558 the same case in the Court of Appeal, Baggallay, L. J. observed thus :

> Such words may have different meanings in different sections of the same statute, or even in different portions of the same section ; and, whether, in any particular section or portion of a section, they are to be regarded as compulsory or as importing a discretion, must depend, not only upon the immediate contexts, but also upon the object and general scope of the enactments.

40. *In the matter of* Govind Prasad, A I R 1928 All 709=112 I C 873=50 All 709=26 A L J 595.

41. (1878) 4 Q B D 525.

Having regard to these principles let me proceed to examine S. 23. It contains three clauses : (a) deals with the ward, (b) deals with the minor relations of the ward, (c) the legal heirs of the ward. The section provides for orders or arrangements being made in regard to four things, custody, residence, education and marriage. In so far as the ward is concerned superintendence of whose person the Court of Wards assumes, he may be a minor or a lunatic or an adult who is neither, but over whom for purposes of high policy, to use the language of the learned Advocate-General, they choose to assume superintendence under S. 15 of the Act. It will be seen that under S. 27 the statute makes it imperative on them to provide in respect of the ward for all the above matters in virtue of their having taken the property of the ward. One may, therefore, say that in so far as the ward is concerned it is a compellable duty under the statute and 'may' should be construed as obligatory.

But can it be similarly said of the persons mentioned in (b) and (c) ? In my opinion, it cannot be. Prima facie Cl. (b) suggests that the Court of Wards are not bound to provide for all the minor's relations of the category mentioned in that section but only for such persons who in the opinion of the Court of Wards are entitled to maintenance. It is only with reference to such persons they can pass the orders or make arrangements. Thus the basis of the power or authority conferred is the obligation to provide for maintenance at the charge of the ward's estate, that is to say, in cases where the estate in the hands of the ward would have been liable if the Court of Wards had not assumed superintendence of the estate. But for the power conferred by S. 23 the Court of Wards would have no right to do any of the things mentioned in S. 23 with reference to them. In the exercise of their discretion the Court of Wards, when called upon to do so, may provide for a residence or suggest a particular marriage or a course of education and provide funds therefor or direct that a particular relation should be in charge of somebody and provide funds for its maintenance and keeping. This they will do having regard to the resources of the estate. It may be, their orders cannot be questioned in the sense they cannot be rendered liable therefor or be compelled to vary or alter them. But it does not follow that the Court of Wards can impose their will on the natural guardian who may be in charge of such minors or prevent the civil Court from disregarding such orders and arrangements made by the Court of Wards as are not to the benefit of the minors. To so construe would be to infringe the private rights of the natural guardian of such relatives or encroach on the powers of the Court to do what is best for the minors. One of the principles of statutory construction to be kept in view in this connexion is thus stated by Lord Watson in 6 A C 193[42] (213) :

> Where the terms of the statute are not imperative but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in conformity with private rights.

Even viewed as a compellable duty, it is intended to be exercised for the benefit of the several persons mentioned therein and in fulfilment of the liability cast on the estate which they have taken charge of and when called upon to do so. Cockburn, C. J., in the case, 4 Q B D 245[43] (260), refers to an American decision which correctly enunciates the principle to be applied even construing 'may' to have been used in an imperative sense :

> The conclusion to be deduced from the authorities is that where a power is given to public officers, in the language of the Act before us, or in equivalent language—whether the public interest or individual rights call for its exercise — the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given not for their benefit but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

Where the power is given by the word 'may,' Lord Blackburn explains :

> It is merely enabling the donee to act and so may not inaccurately be said to be equivalent to saying he may act ; yet if the object of giving the power is to enable the donee to effectuate a right, then it is the duty of the donee of the powers to exercise the power when those who have the right to call upon him do so.

When the power is exercised and the order or arrangement made in pursuance

42. Metropolitan Asylum District v. Hill, (1881) 6 A C 193=50 L J Q B 258=44 L T 653=29 W R 617=45 J P 664.
43. Queen v. Bishop of Oxford, (1819) 4 Q B 245.

thereof, it is open to those who have invoked the power to take the benefit of the order or arrangement. The use of the word 'order' therefore in S. 23 does not indicate that it has any obligatory force on the person for whose benefit it was made. And the Court of Wards is not clothed with any right or power over the persons mentioned therein. S. 23 therefore in my opinion does not take away the powers of the natural guardians of the minors mentioned in (b) or (c). In the exercise of their powers, the Court of Wards is bound to conform to their wishes. If they choose to do anything in violation of their rights it will be illegal, and the natural guardians are entitled to seek the aid of the Court for the protection of their rights. It has been repeatedly and persistently pressed upon us that dictated by a high policy S. 23 clothes the Court of Wards with plenary powers and any order or arrangement made by them in the exercise of such a power should not be interfered with unless exercised maliciously, fraudulently or corruptly. The learned Advocate-General relied on a number of cases in which the Courts have refused to interfere with the discretion of corporations empowered by statute in the execution of works intended for public benefit. In my opinion these cases are irrelevant and have no bearing on the facts of this case. As pointed out already there is no right or power conferred on the Court of Wards in the sense of an authority to interfere with the rights of others, and no question of corruption or malice can arise in the alleged exercise of it. The next question is whether the action of the Court of Wards in the purported exercise of their alleged powers is beneficial or detrimental to the interests of the minors so as to warrant this Court's interference. In dealing with the nature of the jurisdiction over infants and to what extent the Court can control even the right of the father to the person of his child or education which he intends to impart to them, Lord Esher, M. R. in (1893) 2 Q B 232,[44] after discussing the scope of Common Law jurisdiction regarding infants, proceeded to observe thus at p. 239:

> But there was another and an absolutey different and distinguished jurisdiction, which has been exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine right as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent.

The Lord Chancellor (Eldon) in 10 Ves Jun. 52 (63-5) : 32 E R 762[45] (767) says :

> The Court represents the King, as *parens patriae*. But Lord Thurlow's opinion went upon this : that the law imposed a duty upon the parents ; and in general gives them a credit for ability and inclination to execute it. But that presumption, like all others, would fail in particular instances, and if an instance occurred, in which the father was unable or unwilling to execute that duty, and, further was actively proceeding against it, of necessity the State must place somewhere a superintending power over those, who cannot take care of themselves, and have not the benefit of that care, which is presumed to be generally effectual.
>
> Then if there is a jurisdiction, under what circumstances is it to be exercised ? . . . . . Looking at the father's situation, and taking his own representation as to his inclination with regard to this child, upon the affidavits there is a fair suspicion of real danger, that the child may be removed out of this country . . . . . Some method must be taken to secure to the Court, that the person of the child shall remain in this conntry.

The Rajah says the Court of Wards is proposing to send his infant children, two boys of the ages of 12 and 9 and two girls of the ages of 14 and 10, out of the jurisdiction of this Court with the avowed object of giving them the benefit of public school education in Great Britain, but their object is to completely cut away all his relations with them. He submits that the course the Court of Wards intends to follow is not also beneficial in the interests of his infant children, having regard to their situation in life and to their health, that education and residence in England are ill-suited to them and his wishes in respect thereof have been completety disregarded and there are ample facilities in this country, where education can be imparted to them suited to their condition in life. It is a recognised principle of English Courts that an infant should not be sent out of their jurisdiction. Of course it is not an inflexible rule and there are exceptions to it. But it is an invariable rule. Vide 6 Ves 363: 31 E R 1095.[46] In 2 My & Cr 31:40 E R

44. Queen v. Gyngall, (1893) 2 Q B 232=62 L J Q B 559=69 L T 481=4 R 448=57 J P 773.

45. De Mannevelle v. De Mannevelle, (1804) 10 Ves Jun 52=32 E R 762=7 R R 340.

46. Mount Stuart v. Mount Stuart, (1801) 6 Ves 363=31 E R 1095.

552,[47] the Lord Chancellor (Cottenham) delivered himself to the same effect at p. 553:[47]

> In the case in 6 Ves 363,[48] Lord Eldon appears to have said that the Court never makes an order for taking the infant out of the jurisdiction. Subsequent decisions show that exceptions are sometimes made to the rule, but such exceptions are and ought to be very rare. Since I have held the Great Seal I have had reason to lament that the rule has not been more strictly adhered to.

Then he proceeds to make certain observations as to why an English infant should not be sent out of England for a permanent residence abroad which in my opinion would apply to the children of the Rajah in the present case and completely bear out what the Rajah and the Dowager Rani sought to impress upon us. They are to this effect:

> Independently of this well established rule of the Court and the principle upon which it proceeds, I am convinced that scarcely anything can be more injurious to the future prospects of English children, and particularly of English boys, than a permanent residence abroad. Without the proper opportunities of attending the religious service of the church to which they belong, separated from their natural connections, estranged from the members of their own families, withdrawn from their courses of education which their contemporaries are pursuing, and accustomed to habits and manners which are not those of their own country, they must be becoming, from day to day, less and less adapted to the position which, it is to be wished, they should hereafter occupy in their native land. (40 E R 552,[47] at 553.) In addition to all these considerations I find, in the present case, the most anxious wishes expressed by the father of these children that they should be settled in this country and receive a purely English education . . . . It is needless to observe that the law which permits the father to appoint the guardians of his children, will pay the highest respect to the expression of his wishes as to the mode of their education. (40 E R 552,[47] at 553.)

The eldest boy is the legal heir to an impartible estate which is the biggest in this Presidency and situated as these boys and girls are, Lord Cottenham's observations would exactly fit in, if I were to substitute for English boys and children Indian boys and children of a person of the position in life to the Rajah of Vizianagaram. No such 'irresistible necessity' as would entitle a Court to disregard these considerations has been made out by the Court of Wards. It is not pretended that the children cannot get the necessary training and education suitable to their position in life in this Presidency or in India. I am therefore clearly of opinion that it is not in the interests of these minor children that they should be sent to England for the purposes of their education.

It will also be seen from the observations of Lord Cottenham that the wishes of the father are a paramount consideration which ought not to be slighted. Vide also observations of Brett M. R. in 24 Ch D 317,[48] (329) and also Bowen L. J, at pp. 337 to 339. The Court of Wards state they had to ignore the wishes of the father on account of his being their ward. They treat him practically as civilly dead. They say they consulted the relations and decided on the course they have taken in the interests of the children. It transpired however that except the mother, other relations, like the Dowager Rani, i. e., the mother of the Rajah and the grandmother of the children, the sister of the Rajah and the brother of the Rajah, the Raj Kumar of Vizianagaram are against sending the children to England. What the Court of Wards say is some of them have changed their minds now but so far as they are concerned they have arrived at the decision and so long as they have acted under the provisions of the Court of Wards Act none can question their right to do so and what they have laid down must be carried out. But we cannot take the same view as the Court of Wards. On account of high policy the Court of Wards might have thought it expedient to assume the superintendence of the person of the Rajah. The Rajah is questioning the declaration made under the Act in a suit in Vizagapatam.

It is unnecessary for us to express our view on the propriety of the action of the local Government in making the declaration and whether the declaration can be questioned in view of S. 48. For the purpose of the Court of Wards Act it may be open to the Court of Wards to treat the Rajah as non-existent. But we cannot shut our eyes to what has been going on in Court. The Rajah has conducted his case in person. He has done it with considerable sobriety and moderation and we have watched him carefully. It is difficult for any Court to treat him as a person of unsound mind. No Court of law would be justified in ignoring the wishes of the Rajah as father and not giving due weight to them. From what has transpired and

47. Campbell v. Makey, (1836) 2 My & Cr 31=40 E R 552.

48. *In re* Agar Ellis v. Lascelles, (1883) 24 Ch D 317=53 L J Ch 10=50 L T 161=32 W R 1.

the attitude of the Court of Wards, the Rajah's apprehension cannot be said to be unfounded, namely, that the minors are being sent away so that his relations with them would be permanently cut off and he be prevented from having any access to them for a considerable time to come. No Court of law could tolerate such a conduct. Therefore when the rights of the natural guardian are disputed on the ground that he cannot act, when there is no other legally constituted guardian, when there is danger of the minors being removed out of the jurisdiction of this Court and when such a course is not beneficial to the minors, it is absolutely necessary for us to interfere. I therefore agree in the order proposed by my Lord the Chief Justice.

C.R.K./D.S. *Order accordingly.*

*** * A. I. R. 1937 Madras 81**
FULL BENCH

VENKATASUBBA RAO, OFFG. C. J., CORNISH AND VENKATARAMANA RAO, JJ.

Madana Mohana Naiko—Appellant.

v.

Krupasindhu Naiko and *others*—Respondents.

Appeal No. 432 of 1929, Decided on 7th October 1936, against decree of Sub-Judge, Berhampore, in O. S. No. 35 of 1927.

*** * Court-fees Act (1870), S. 12 (ii) — Powers of appellate Court—Cl. (ii) comprises questions of category as well as computation — Appellate Court finding decision of lower Court erroneous on either questions—Appellate Court has power to require to make good deficiency in court-fee payable in lower Court.**

The expression "the said question" in Cl. (ii) has no limited meaning. It refers to words 'every question' in Cl. (i) which comprises both questions, namely computation as well as category. The appellate Court, therefore, has power to require the plaintiff to pay the deficiency in fee payable in lower Court, when it finds that the decision, express or implied, of the lower Court even as to category, was erroneous : *4 Mad 204* and *11 All 91 (F B)*, *Ref.*; *4 M L J 183 (F B)*, *Explained. Case law referred.*

[P 83 C 1; P 84 C 2]

B. Jaggannadha Doss—for Appellant.

S. A. Seshadri Iyengar, *C. Rama Rao*, *S. Suryaprakasa Rao* for *G. Ranga Rao*—for Respondents.

K. S. Champakesa Ayyangar — for Government Pleader.

Order of Reference

Varadachariar, J. — In this case a question as to the scope of Cl. (ii), S. 12, Court-fees Act, has been raised, under the following circumstances: The plaintiff who sued for partition valued the suit for purposes of jurisdiction at Rs. 6,000; but he paid a court-fee of Rs. 100 only under Art. 17-B, Court-fees Act. An issue (No. 10) was raised as to whether the court-fee paid was correct; the lower Court, without any discussion, held it was correct. As the suit was decided against the plaintiff, he filed an appeal here, valuing the appeal at Rs. 6,000 but again paid a court-fee of Rs. 100 only. When the matter came before us, we held that court-fee should be paid on an ad valorem basis, under S. 7 (iv) (b), Court-fees Act, and the appellant has accordingly paid in the amount required to make up the fee payable on the valuation of Rs. 6,000. With reference to the additional fee payable on the same basis in the lower Court Mr. Jagannadha Doss has contended that the case does not fall under Cl. (2), S. 12, Court-fees Act, and the plaintiff cannot now be called upon to pay the additional fee. The argument was based on certain decisions of this Court and of the other High Courts, relating to the provision as to finality in the concluding part of Cl. (i), S. 12.

As the question raised is one of some general importance we gave notice to the Government Pleader and have had the benefit of an argument on behalf of the Government. Though we do not feel much doubt as to the true construction of Cl. (ii) we have preferred to refer the matter to a Full Bench, because our view may seem to restrict or qualify the language employed in the judgment of the Full Bench in 4 M L J 183.[1] Beginning with 4 Mad 204[2] this Court has consistently held that the concluding words of Cl. (i), S. 12 do not preclude an appeal by a party when the question raised relates not to 'valuation' in the narrow sense of amount but to the "category' in which a suit is to be placed for the purpose of determining the court-fee. The view taken in 4 Mad 204[2] was affirmed by a Full Bench in 4 M L J 183.[1] Mr. Jagannadha Doss argues that the expression "that said question" in Cl. (ii), S. 12, must be interpreted in the light of these decisions that an appellate Court can act under this clause only when there has been an error in the lower Court's determination of the amount at which the subject

1. Lakshmi Amma v. Janamajayan Nambiyar, (1894) 4 M L J 183 (FB).
2. Annamalai Chetti v. Lieut. Col. J. G. Cloeta, (1882) 4 Mad 204.

matter of the suit should be valued and that where, as in the present case, the lower Court has erred in determining the 'category' in which a suit is to be placed, the appellate Court cannot invoke this clause and require the party to pay the additional fee required to make up the proper fee payable on the plaint in the lower Court. We are not prepared to accept this contention.

The decisions above referred to do not proceed on the footing that the word 'valuation' will not comprise the question of category as well as the question of amount. Indeed, under the opening words of Cl. (i), it is the duty of the Court to decide both classes of questions; the question of category will fall to be decided on the construction of the plaint and the question of amount may have to be determined after an investigation under Ss. 9 and 10 of the Act. But in pursuance of the principle that court-fee is primarily a question of revenue and not a matter in dispute between the parties, the legislature thought it right to exclude a right of appeal in such matters and hence provided that the decision of a Court under Cl. (i), S. 12, "shall be final as between the parties." Difficulties arose in reconciling this provision with the provision in the Civil Procedure Code giving a right of appeal against an order rejecting a plaint for non-payment of the proper court-fee. The High Courts have sought to reconcile the two provisions by holding that the finality enacted by S. 12, Cl. (i), Court-fees Act, must, in view of the right of appeal given in the Code, be restricted to cases where the decision of the lower Court relates to the question of amount and not to the question of category. It is unnecessary for us to say anything as to the correctness or otherwise of this line of reasoning. But we think that the language employed in the decisions dealing with this question must be understood with reference to the question then under consideration and not extended to cover the interpretation of Cl. (ii) of S. 12 which has been enacted with a wholly different purpose in view, namely the protection of the interests of the revenue.

Even as a matter of construction, it seems to us that the expression 'said question' in Cl. (ii) refers back to the expression 'every question' in the opening part of Cl. (i), and if the opening words of Cl. (i) will comprise both the sets of questions, namely amount as well as category, we see no reason why the same scope should not be given to Cl. (ii) as well. The last few words of Cl. (i) are really parenthetical and there is no reason why Cl. (ii) should be read as a proviso to the main provision in Cl. (i). It is true that a fiscal enactment should be interpreted according to the natural meaning of the words employed, but there is no more justification for restricting their natural meaning than for widening it. If by reason of the collocation of the provisions there is any room for ambiguity, it seems to us legitimate to have due regard to the fact that the purpose of Cl. (ii) is to protect the interests of the revenue. In 7 Cal 348[3] and in 49 M L J 608,[4] the power of the appellate Court to take action under S. 12, Cl. (ii), in circumstances like those of the present case was recognized, but the question was not raised or considered in its present form. The observations of the Privy Council in 43 Bom 507[5] at p. 518 and the decision of this Court in 25 I C 506[6] no doubt affirm the differentiation between the interests of the revenue and the rights of the parties, but they do not throw much light on the present aspect of the question, nor are the decisions in 39 C L J 217[7] and 51 All 886[8] of much help in this connexion. We may add that it has been contended on behalf of the Government that even if Cl. (ii), S. 12 should be construed in the manner suggested on behalf of the appellant, the appellate Court may insist on the payment of the deficient fee even in respect of the lower Court either under S. 28, Court-fees Act, or in the exercise of inherent power. We are not much impressed with this argument but as we are referring the question to a Full Bench, we have thought it right to refer to the argument. We refer the following question for the opinion of a Full Bench:

Has an appellate Court power to require a party to make good the deficiency in

3. Shama Soondary v. Hurro Soondary, (1881) 7 Cal 348=8 C L R 528.
4. *In re* Laksmi Ammal, A I R 1926 Mad 96=91 I C 729=49 M L J 608.
5. Rachappa Subrao v. Shidappa Venkatrao, AIR 1918 P C 188=50 I C 280=46 I A 24 =43 Bom 507 (P C).
6. Tekana Kavandan v. Aligiri Kavandan, A I R 1915 Mad 271=25 I C 506.
7. Raj Rajeswari Jin v. Gati Krishna, A I R 1924 Cal 953=82 I C 292=39 C L J 217.
8. Baijnath v. Dani Ram, A I R 1929 All 577=117 I C 107=51 All 886=1929 A L J 1024.

the court-fee payable by him in the lower Court in cases in which the lower Court has expressly or impliedly decided the question of category in which the suit ought to be placed for purposes of court-fee, but such decision is, in the opinion of the appellate Court, erroneous?

OPINION

Venkatasubba Rao, Offg. C. J.—The question of law referred to the Full Bench for determination is interesting and not covered by authority. When the appeal came to be heard by the referring Judges, it was found that the court-fee paid on the memorandum of appeal was deficient and an order was thereupon made directing that the proper amount should be paid. So far the case presented no difficulty, but the question arose whether the learned Judges could require the appellant to pay the proper court-fee in the Court of first instance. That doubt that has arisen, which has led to this reference may be expressed as follows: S. 12, Court-fees Act, runs thus:

> i. Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.
>
> ii. But whenever such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid, to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of S. 10, para. 2, shall apply.

It seems to have been argued, that in what is termed 'valuation' two different things are involved, first, the fundamental question of category and secondly, the question of appraisement, and, that it has been held in numerous decisions that the finality contemplated in the first sub-section, attaches to a decision relating to appraisement as distinguished from category. The next step in the argument seems to be, that the words "the said question" in the second part must receive the same interpretation as the expression "every question relating to valuation" in the first part and if that be so, when the decision relates to category, it does not attract the operation of the second part and the appellate Court cannot therefore make an order directing the deficiency to be made good. This contention appears to us to involve a fallacy. The words "every question" are of a comprehensive nature and there seems to be no reason why they should be construed in the restrictive sense suggested; indeed, some at any rate of the decided cases show that the view that a decision relating to category is not final, is not based upon any such limited construction. True, that in 4 Mad 204[2] the learned Judges place upon the words the narrow meaning. They observe:

> In our judgment the terms of S. 12 ought not to receive a larger interpretation than they fairly admit of. They do not declare the decision of the Court in which the plaint or appeal is filed final on all questions which may arise respecting the court-fee but on every question relating to valuation for the purpose of determining the amount of the court-fee.

It is difficult to see, as observed in 11 All 91,[9] how a Court could determine the amount without deciding the question as to the relief sought, (i. e., the category to which a particular suit belongs) and how yet the relief sought is to be deemed as not comprised in the question relating to the valuation (at page 93). On the other hand, in a later case on the point, namely, 4 M L J 183,[1] the learned Judges proceeded upon the footing that the word "valuation" comprises both the factors i.e., the category as well as the computation of value. Having said so, they felt constrained to hold, in view of certain provisions of the Civil Procedure Code, that the question of valuation should be viewed in two aspects for the purpose of deciding, when a decision as to valuation is final and when appealable. They ultimately decided that when the mistake made by the Judge relates to the category, an appeal lies and not when it relates to the computation. Whether the 1877 Code, which was then under consideration, warrants this conclusion, is a matter open to doubt, but it is not at present within our province to express any final opinion on that point.

The difficulty felt seems to have been, as to how to reconcile the provisions of the Code relating to appealability with S. 12, Court-fees Act. Now let us examine the provisions of the present Civil Procedure Code. O. 7, R. 11 shows that the question of deficient court-fee can be viewed not only in two (as assumed in 4 M L J 183[1]) but in three aspects. Cl. (b)

9. Muhammad Sadik v. Muhammad Jan, (1888) 11 All 91=1888 A W N 286 (F B).

refers to the case where the relief claimed is undervalued; this comprises both the category and computation. Under Cl. (c), the mistake relates neither to category nor to appraisement; the valuation in both these aspects having been properly made, the plaint is nevertheless written upon an insufficiently stamped paper. R. 11 provides that the plaint shall be rejected, when the plaintiff being required to make good deficiency, fails to do so. The rejection of a plaint under S. 2, amounts to a decree and is appealable under S. 96. Were the matter res integra, it does not seem to us impossible to reconcile these provisions with S. 12, Court-fees Act, giving full effect to both the statutes. The present trend of decisions seems to be that where a plaint is rejected under Cl. (b), O. 7, R. 11, the order rejecting the plaint is not appealable, when the order is based on a question of valuation pure and simple; but if the order involves a decision of the category to which a suit belongs, the order is appealable.

As we have said, this view is the result of the endeavour to reconcile the Code with the Court-Fees Act, but is it really necessary to take such a view ? One might suggest that, if the decision under S. 12, Court-fees Act, leads to a rejection of the plaint under the Code, then such a rejection, amounts as it does to a decree, ought in all cases to be appealable; but where the decision does not lead to a rejection of the plaint, there is no reason why finality should not in every case attach to that decision. In this way, as we have observed, both the statutes can be reconciled. To explain what we mean, let us take this example. Supposing the Court decides that the proper court-fee has been paid, that decision should be final as between the parties and it should not be open to the defendant to question it. Again, let us suppose that the Court decides that the court-fee paid is deficient and requires the plaintiff to make good the deficiency and he complies with that order; here no question of the rejection of the plaint can arise and the decision as between the parties ought to be final. As we have said, however, this is not a matter which directly arises under the present reference, but the discussion is relevant in this way. It shows that the view taken in the numerous cases as to appealability does not necessarily rest upon the restrictive construction suggested of the opening words of S. 12. We have already referred in this connection to 4 M L J 183.[1] The only ground urged therefore disappearing, we can see no ground which would justify us in giving to the words "the said question' in the second part the limited meaning contended for. Though the question has been pointedly raised here for the first time, we may observe that our attention has been drawn to numerous cases where it was assumed, without discussion, that the High Court acting under S. 12 (ii), has power to require the plaintiff to bring the additional fee payable in the lower Court even where its decision was as to category as distinguished from computation. Our answer to the question is, therefore, in the affirmative.

C.R.K./S.C. *Reference answered.*

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* A. I. R. 1937 Madras 84

PANDRANG ROW AND MENON, JJ.

Ramanandhan Chettiar—Appellant.

v.

Veerappa Chettiar and *others*—Respondents.

Appeals Nos. 344 of 1931 and 234 and 394 of 1932, Decided on 9th March 1936, against order of Sub-Judge, Ramnad, D/- 17th March 1931 and 8th February 1932.

(a) Civil P. C. (1908), O. 5, R. 19—Summons served on refusal under O. 5, R. 17—Still declaration of service by Court is essential under O. 5, R. 19—Order passed without such declaration does not constitute res judicata.

The provision of O. 5, R. 19, will apply to all cases in which return of summons is made under O. 5, R. 17 whether due to absence or refusal of person to be served. Even in the case of a refusal, unless there is a declaration by the Court that the service under O. 5, R. 17, is sufficient as required by the provisions of O. 5, R. 19, any order passed by the Court in the absence of judgment-debtor will not constitute res judicata: *A I R 1933 Mad 466, Rel. on.* [P 87 C 1]

(b) Res judicata—Execution proceedings—Execution already pending—Order of attachment without objection from judgment-debtor on notice returned as refused and affixed but without declaration by Court of service as sufficient in subsequent execution—Subsequent execution dismissed—There being no personal service, order of attachment so passed, cannot operate as res judicata in pending execution.

A decree-holder applied for execution of a decree. A notice was ordered on judgment-debtor and later on the notice having been refused and

therefore affixed, an order for attachment was passed. Subsequently this execution petition was dismissed as a result of certain revision petition against an order for rateable distribution. At this time a previous application for execution was already pending and the judgment-debtors contended that the execution of the decree was barred by limitation. It was contended on the part of the decree-holder that the order of attachment coupled with the non-objection to the execution of the decree by the judgment-debtor in subsequent execution, operated as res judicata :

Held: that as there was no personal service nor was there any declaration by the Court that there was sufficient service, the order of attachment on non-objection in the subsequent petition could not operate as res judicata. [P 86 C 2; P 87 C 1]

(c) Execution—Execution of decree attached before judgment—Declaration of intention to execute the decree attached is essential before attachment before judgment can become attachment in execution —Intention can be inferred not only by presenting application to execute attached decree but even from other circumstances.

There must be some unmistakable declaration of the decree-holder's intention to execute the decree, before the attachment before judgment can become an attachment in execution of the decree. In ordinary cases such an election or declaration of intention would be made by presenting an execution application, but in every case it is not necessary that it should be done in this manner and in no other. If intention to execute can be inferred by other circumstances it is sufficient : *A I R 1924 Mad 494 (FB)* and *A I R 1936 Mad 91, Rel. on.* [P 89 C 1]

*** (d) Attachment — Attachment before judgment—Application for attachment made before but actual attachment made after judgment—Attachment not deemed in law to be attachment before judgment.**

Attachment actually made after judgment cannot be deemed in law to be made before judgment, simply because it happens that the application for such attachment was made before the judgment was actually passed. The legal effect of the attachment comes into being only when the attachment is actually made, and its nature is defined also by the time when it is made and not when it is ordered: *A I R 1928 P C 139, Rel. on.* [P 90 C 2]

B. Sitaramarao, R. Gopalaswami Ayyangar and *R. Ramamurthy Iyer*—for Appellant.

S. Srinivasa Iyengar, R. Kesava Ayyangar and *C. S. Ramarao Sahib*—for Respondents.

Pandrang Row, J.—These appeals arise out of certain execution proceedings in the Court of the Subordinate Judge of Ramnad at Madura, namely E. P. No. 104 of 1928, E. A. No. 436 of 1929 and E. P. No. 42 of 1931. The Substantial petition was E. P. No. 104 of 1928 in which Veerappa Chettiar and his four minor brothers were the petitioners and they sought as attaching decree-holders in O. S. No. 330 of 1911 to execute the decree in O. S. No. 153 of 1910. E. A. No. 436 of 1929 was for rateable distribution by the same petitioners and it was heard along with E. P. No. 104 of 1928 and both were disposed of by one and the same order. The learned Subordinate Judge found that the decree-holder in O. S. No. 153 of 1910 who was the judgment-debtor in O. S. No. 330 of 1911 was barred or estopped from setting up the plea that the execution of the decree in O. S. No. 330 of 1911 was barred by limitation. Though as a matter of fact he found that the decree was barred by limitation he found however that, in the absence of an application to execute the decree in O. S. No. 330 of 1911, E. P. No. 104 of 1928 was not maintainable except to the extent of the costs allowed in appeal No. 26 of 1918 on the file of the High Court in favour of the petitioners and the costs of execution in respect of those costs. In substance, therefore, E. P. No. 104 of 1928 ended against the petitioners. The other application E. A. No. 436 of 1929 shared the same fate. E. P. No. 42 of 1931 was an application put in after the disposal of the other two petitions and it was for liberty to execute the decree in O. S. No. 153 of 1910, and it proceeded on the basis that E. P. No. 104 of 1928 had not been dismissed and was still pending. That petition which was heard by a different Subordinate Judge was also dismissed though the principal findings by the learned Judge were in favour of the petitioners. He held that, though E. P. No. 104 of 1928 must be deemed to have been dismissed on 17th March 1931, nevertheless liberty if necessary could be given to execute the decree in O. S. No. 153 of 1910, and that the decree-holder in that suit was barred by res judicata from pleading that the execution of the other decree was barred by limitation. The Judge further found that liberty to execute the decree was really unnecessary, and he declined to give such liberty because it was unnecessary.

C. M. A. No. 344 of 1931 is the appeal by Ramanadhan Chettiar the legal representative of the judgment-debtor in O. S. No. 330 of 1911, and the respondents are Veerappa Chettiar and his four minor brothers. In C. M. A. No. 394 of 1932 the parties are arrayed similarly, and that is an appeal from the order in E. P. No. 42 of 1931, whereas C. M. A. No. 344 of 1931 is an appeal from the order in E. P. No.

104 of 1928. The remaining C. M. A. No. 234 of 1932 is from the order of the Subordinate Judge in E. P. No. 104 of 1928 dated 8th February 1932 to the effect that the petition had already been dismissed on 17th March 1931. For the purpose of convenience the appellant in C. M. A. No. 344 of 1931 and C. M. A. No. 394 of 1932 will be referred to as the appellant, and Veerappa Chettiar and his brothers who are the respondents in these appeals and the appellants in C. M. A. No. 234 of 1932 will be referred to as the respondents.

About the facts there is no dispute and the facts consist mainly of the proceedings in Court. The respondent's father was the assignee of a major portion of the decree in O. S. No. 330 of 1911. He died sometime in 1924 and the respondents came on record thereafter. The suit O. S. No. 330 of 1911 was instituted on foot of a mortgage, and the preliminary decree therein was made on 7th December 1912. Even in that decree the personal liability of the principal defendant who is the father of the appellant is declared. The final decree was dated 5th February 1915, and instead of that decree itself embodying a conditional decree personally against the mortgagor for the balance due after sale it merely provided that the plaintiff be at liberty to apply for a personal decree for the amount of such balance. It was sometime after this final decree that the respondent's father got the assignment of a portion of the decree in the other suit. He applied in 1923 in E. A. No. 151 of 1923 as assignee decree-holder for a personal decree against the assets of the appellant's father. That application was made on 11th April 1923, and a personal decree was actually passed on 11th August 1923. On 26th July 1923 while this application was pending, another application, namely E. A. No. 174 of 1923, for attachment of the decree in O. S. No. 153 of 1910 was put in. On this petition attachment and notice were ordered on 30th July 1923. The notice of attachment was actually signed on 14th August 1923, that is to say, three days after the personal decree had been passed, and it appears to have been received by the Court to which it was issued on 17th August 1923, and the attachment was made absolute on 10th October 1923. It may be mentioned in this connection that after 1925 the Court to which the notice was issued ceased to exist and the jurisdiction of that Court became vested in the Court which issued the notice. The personal decree in question was for a sum of about three lakhs and a quarter with interest. Apparently the only means of executing this personal decree was by proceeding in execution of the decree attached i. e., the decree in O. S. No. 153 of 1910. Execution of that decree however had been stayed by the High Court in connection with the appeals preferred by various parties thereto.

The appeals which were filed in 1918 and 1919 were disposed of only on 26th April 1928. In some of those appeals the respondent's father and after his death the respondents themselves were impleaded at their own request and the appeals were prosecuted to their conclusion. It was apparently because that decree was pending in appeal and had been stayed that no steps were taken to execute the decree in O. S. No. 330 of 1911. The appellate decree of the High Court in these appeals though dated 26th April 1928 allowed time till 2nd September 1928 for payment, and the present E. P. No. 104 of 1928 was presented the very next day, that is to say 3rd September 1928. In fact the numerous proceedings clearly show that the respondents' father and the respondents themselves after their father's death were taking step after step for the purpose of realizing the fruits of the decree obtained against the appellant's father. There was no lack of diligence on their part so far as can be seen. Sometime after E. P. No. 104 of 1928 was presented; exactly seven days afterwards, another application was presented, namely E. P. No. 252 of 1928. On that petition notice was ordered and attachment was ordered later on, the notice having been refused and therefore affixed. Ultimately that petition itself was dismissed as a result of the judgment of the High Court in certain revision petition against an order for rateable distribution. It is necessary to refer to this petition because the order on this petition dated 8th October 1928 directing attachment is relied upon by the respondents as an order which bars the appellant from pleading that the execution of the decree in O. S. No. 330 of 1911 is barred by limitation.

The preliminary point for decision in these appeals is whether this order dated 8th October 1928 constitutes res judicata and thereby debars the appellant from

pleading that the execution of the decree in O. S. No. 330 of 1911 is barred by limitation. No doubt that order was passed on an application to execute the decree and if notice had been served in person on the judgment-debtor and he had failed to appeal to object to the execution being allowed on the ground that the execution is barred by limitation, his failure to do so coupled with the order for attachment would constitute a bar in any later proceeding. In this particular case however there was no personal service nor was there any declaration by the Court that there was sufficient service. This question was considered by a Bench of this Court in 64 M L J 629[1] and it was held therein that unless there is declaration by the Court that the service made under O. 5, R. 17 is sufficient as required by the provisions of O. 5, R. 19, Civil P. C., any order passed by the Court in the absence of the judgment-debtor will not constitute res judicata. It is obvious that the principle of constructive res judicata cannot be applied unless the party against whom it is sought to be applied has had notice of the proceeding in which the order relied upon as res judicata was passed. In this particular case there was no such notice personally served and the notice was affixed on the ground that it had been refused. No doubt in 64 M L J 629[1] affixture was made by the reason of the reported absence of the defendant from his house, and a distinction has been sought to be drawn by the learned Subordinate Judge who disposed of E. P. No. 42 of 1931 between the case and the present case on this ground, namely that whereas in the former case the affixture was by reason of the absence, in the present case the affixture was by reason of refusal; it is on account of this distinction that the learned Subordinate Judge did not follow the decision in 64 M L J 629.[1]

It is however clear that the provisions of O. 5, R. 19 which were relied upon in 64 M L J 629[1] would apply to all cases in which return of the summons is made under R. 17, O. 5. R. 17 provides for affixture both when the defendant refuses to accept service and also when he cannot be found, and R. 19 provides that where a summons is returned under R. 17 the Court shall either declare that the summons has been duly served or order such service as it thinks fit. This has not been done in this case, and there is thus no real distinction between the present case and the case reported in 64 M L J 629.[1] Another point may also be mentioned in this connexion. The order relied upon as constituting res judicata was made on a petition presented subsequent to the present petition, and the principle of res judicata can hardly be applied with propriety to orders passed in subsequent proceedings. It would therefore follow that the plea of res judicata is really without substance, and that there is no bar in the way of the appellant by reason of the order in question which prevents him from objecting to the execution of the decree in O. S. No. 330 of 1911 on the score of limitation. The further question that arises is whether E. P. No. 104 of 1928 is maintainable. It is conceded, and the point is indeed abundantly clear, that if the attachment which was made absolute on 10th October 1923 was an attachment in execution of the decree in O. S. No. 330 of 1911 or must be deemed to be such an attachment, there can be no bar of limitation against the execution of the decree. In the case of attachments in execution of a decree when the attachment is of another decree the provisions of O. 21, R. 53, sub-r. (3), Civil P. C., clearly show that the holder of the decree sought to be executed can always proceed to execute the attached decree just as the holder of that decree.

It is desirable to state as far as possible in the words of the Code what the result of an attachment of a decree in execution is: Where the property to be attached is a decree for payment of money, as in this case, the attachment shall be made if the decree sought to be attached was one passed by another Court by the issue of a notice by the Court which passed the decree sought to be executed requesting the other Court to stay the execution of its decree unless and until the Court which passed the decree sought to be executed cancels the notice, or the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree. Sub-rr. 2 and 3 of O. 21, R. 53 define the rights of the attaching decree-holder. Sub-rule 2 states that on the application of the creditor who has attached the decree or his judgment-debtor, the Court shall proceed to execute the

1. Azagappa Chetti v. Ramanathan Chettiar, A I R 1933 Mad 466=147 I C 1242=64 M L J 629.

attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. Sub-r. 3 provides that the holder of a decree sought to be executed by the attachment of another decree shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof. It is not denied that the attached decree in the present case is one the execution of which is not barred by limitation.

In fact the decree to be executed in O. S. No. 153 of 1910 is the appellate decree dated 26th April 1928, and the application E. P. No. 104 of 1928 is certainly not barred by limitation. The real objection is, not that the execution of the decree in O. S. No. 153 of 1910 is barred by limitation, but that the respondents are not entitled to execute their own decree by merely filing an application to execute the attached decree. In other words it is contended that in the absence of a separate execution application for execution of their own decree in O. S. No. 330 of 1911 they have no locus standi to apply for execution of the attached decree, and further, that, even assuming that the application to execute the attached decree can be deemed to be an application to execute their own decree, such an application to execute their own decree is barred by limitation as it was presented more than three years after the date of the decree, no proceedings in execution having been taken in the interval. The contention of the appellant rests on the assumption that the attachment of the decree in O. S. No. 153 of 1910 which was made absolute on 10th October 1923 was an attachment before judgment, and it is contended that an attachment before judgment does not become an attachment in execution unless there is a subsequent application, i. e., after the attachment and after judgment, to execute. The contention that there must be an application to execute the decree, before an attachment before judgment can become an attachment in execution derives considerable support from the Full Bench decision in 47 Mad 483.[2]

Though it would appear from certain observations of Sir John Wallis, C. J. in 44 Mad 902,[3] another Full Bench case, that he was at first disposed to think that an attachment before judgment might be regarded as an attachment in execution of a decree in view of the fact that attachment is always the first step in execution and because in exceptional cases such a step is allowed to be taken without waiting for the decree, on second thoughts he was of opinion that such a construction was not admissible. In the later Full Bench decision in 47 Mad 483[2] it was held that an attachment before judgment becomes an attachment in execution when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale. That case however dealt with attachment of property other than decree for money in which the procedure is not to sell after the attachment but to execute the decree itself, under the provisions of O. 21. R. 53, sub-r. 3. In 47 Mad 483[2] Ramesam, J, was of opinion that the effect of O. 38, R. 11, was that the attachment before judgment becomes an attachment in execution when it is definitely sought to be made available for execution and at p. 512 he mentions certain differences, not very vital, between an attachment before judgment and an attachment in execution and winds up the discussion with the following observations :

> But do these differences make the attachment before judgment so entirely different in character from one after judgment that one can never pass into the other ? I am of opinion it is not ; in my view, the attachment before judgment and that after judgment are identical in their essential features. Each is effected by a prohibitory order. The purpose of both is the same. The consequences of both are the same. All alienations by the judgment-debtors are void against claims enforceable in pursuance of the attachment. Neither has got the character of a charge. It is thus seen that, so far as they vacate or affect rights, they are substantially identical in character.

In the recent case in 43 M L W 40,[4] a bench has observed :

> As a question of principle, if an attachment before judgment can be treated as an attachment for purposes of execution at all, it is difficult to see what necessity there is for an order of Court. The more reasonable view seems to us to hold that from the time the decree-holder applies for execution, he elects to avail himself of the attachment before judgment and from that moment the

2. Meyyappa Chettiar v. Chidambaram Chettiar, A I R 1924 Mad 494=83 I C 91=47 Mad 483 =46 M L J 415 (F B).

3. Arunachalam Chetty v. Periyaswami Servai, A I R 1921 Mad 163 = 70 I C 439 = 44 Mad 902=41 M L J 252 (F B).

4. Dalayya v. Sundara Narayana, A I R 1936 Mad 91=161 I C 93=59 Mad 303=69 M L J 908=43 M L W 40.

attachment before judgment becomes an attachment available for purposes of execution.

They quote in this connection the following observations of Coutts Trotter, J., in 47 Mad 483,[2] at p. 511:

> The turning point comes in my opinion when the decree-holder by filing an execution petition has shown that he means to execute his decree; and I am myself unable to escape from what seems to me the logical conclusion, that, when he has elected to proceed in execution an attachment which he has obtained and on which he must necessarily base his petition and demand for sale becomes automatically an attachment in execution.

The ratio decidendi of the Full Bench case appears to be that there must be some unmistakable declaration of the decree-holder's intention to execute the decree, before the attachment before judgment can become an attachment in execution of the decree. No doubt in ordinary cases such an election or declaration of intention would be made by presenting an execution application. But it does not seem that in every case without exception it should be done in this manner and in no other. If intention to execute can be inferred from other circumstances, there can be no doubt in this case there was an intention to execute as is apparent from the fact that the respondents impleaded themselves in the appeals pending in the High Court in connexion with O. S. No. 153 of 1910 and were appearing in those appeals till the very end. It would also seem that any earlier application to execute the decree in O. S. No. 330 of 1911 by proceeding against the attached decree in execution thereof would have been fruitless in view of the stay orders made by the High Court in appeal. The learned Subordinate Judge observes that when the attachment of the decree in O. S. No. 153 of 1910 was applied for, all the orders of the High Court in the appeals against the decree for stay of execution had been subsisting and that such stay orders of the High Court terminated only on the passing of the decree in the appeals in April 1928. It would therefore appear that any earlier application with this object in view would have been fruitless. As observed by their Lordships of the Judicial Committee in 11 All 47[5] at p. 56:

> It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not.

After all, attachment before judgment is a proceeding in execution though before a decree is passed. As O. 38, R. 5 itself says the attachment is made because the Court is satisfied that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property or is about to remove it from the local limits of the jurisdiction of the Court. Attachment therefore even before judgment is in a sense a step towards execution. It is a proceeding in execution though it is a proceeding before the decree is passed, and there is no reason why it should be treated very differently from an attachment in execution after the decree has been actually passed. The state of the authorities however is such that it is not possible to adopt or give effect to what might be called this prima facie view of the case, and the observations in the Full Bench case, 47 Mad 483,[2] in particular make it impossible to say that the mere passing of a decree converts an attachment before judgment into an attachment in execution. Whether in this case the subsequent impleading of the respondents as parties in the appeals in the High Court can be regarded as a sufficient indication of their election or intention to execute the decree obtained by them is a question of some difficulty, and it would be desirable not to base a decision in these appeals on this somewhat uncertain ground.

The question however remains whether we are dealing in the present case with an attachment before judgment at all, and not with an attachment after judgment. The facts are, as already stated, as follows: The attachment was made long after even the final decree in the suit was passed. The final decree was passed in 1915, and there was no doubt at the time that the appellant's father was personally liable for any balance remaining due after the sale. No doubt no formal decree to this effect making him personally liable was drawn up at the time, and the final decree merely provided that the plaintiff should be at liberty to apply for a personal decree. Application for a personal decree was made in the form of an execution application. It was clear therefore that it was intended as an application in execution of the final decree, and the attachment was ordered on this application to execute the final decree. Even assuming that what styled

5. Bassu Kaur v. Dhum Singh, (1889) 11 All 47 =15 I A 211=5 Sar 260 (P C).

an execution application was only an interlocutory application for the purpose of taking further proceedings in the suit itself, and not in execution, it remains a fact that the attachment though ordered before, was actually effected or made after, the personal decree was passed. The decree is dated 11th August 1923. Notice of attachment is dated 14th August 1923, and the attachment was not received by the Court to which it was issued till 17th August 1923. Finally the attachment itself was not made absolute till 10th October 1923, that is to say, long after the personal decree had been passed.

It is also seen that the notice of attachment that was actually issued, namely, Ex. C, recites that the application for attachment was made under S. 273, Civil P. C. This section of the old Code corresponds to O. 21, R. 53 of the present Code. It is thus clear from the notice of attachment sent to the Court which passed the decree that the application for attachment was made under O. 21, R. 53, that is to say, in execution, and as the notice itself was signed three days after the personal decree was passed, it is not an unfair inference nor an unreasonable conclusion to draw that when actually issuing the notice of attachment the Court intended it to be an attachment after judgment and not before judgment, or, in other words, to be an attachment in execution of the decree that had been passed three days before. In 51 Mad 349,[6] at p. 356, their Lordships of the Judicial Committe observe :

> In view of these provisions the Board listened with some surprise to a protracted argument which culminated in the proposition that a property was in law attached whenever an order for attachment was made. The result, if this were so, would be that a person holding an order could dispense with attachment altogether, as an operation or a fact. Their Lordships need not repeat in another form these propositions. The order is one thing, the attachment is another. No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Code have been done.

In the present case the attachment was actually made and must be deemed to have been made only when the notice of attachment was received by the Court to which it was addressed, that is to say on 17th August 1923, and this was six days after the decree had been passed. In these circumstances it is impossible to hold that the attachment when made was an attachment made before judgment. Attachment actually made after judgment cannot be deemed in law to be made before judgment simply because it happens that the application for such attachment was made before the judgment was actually passed. The legal effect of attachment comes into being only when the attachment is actually made, and its nature is defined also by the time when it is made and not when it is ordered. The result is that when the attachment was actually made, or in other words when the decree of the other Court was made available for the purpose of satisfying the demands of the applicant applying for the attachment, a decree had already been passed and such attachment must be deemed to be an attachment in execution of the decree that was actually passed before it was made. This seems to be plain common sense and it is not easy to see why this commonsense view should not also be accepted as being correct in law. The law does not require any other interpretation to be put upon the facts of the case and there is really no authority which supports the view that an attachment actually made after judgment or decree must nevertheless be deemed to be an attachment made before judgment or decree.

It is clear that, if the attachment in the present case which was made absolute on 10th October 1923 was an attachment in execution of the personal decree passed on 11th August 1923 in O. S. No. 330 of 1911, the application to execute the attached decree is certainly maintainable under the provisions of O. 21, R. 53, subr. 3 which by operation of law makes the decree-holder in O. S. No. 330 of 1911 the representative of the decree-holder in O. S. No. 153 of 1910. Execution of the decree in O. S. No. 153 of 1910 is obviously not barred and it is not contended that it is barred. It follows from what has been said that the application to execute the decree in O. S. No. 153 of 1910 was maintainable and that it was also not barred by limitation. The appeals by the appellant, namely C. M. A. Nos. 344 of 1931 and 394 of 1932 are therefore dismissed with costs ; in view of the memorandum of cross-objections filed by the respondents in C. M. A. No. 344 of 1931 the orders of the lower Court in E. P. No. 104 of 1928 and E. A. No. 436 of

6. Muthiah Chetti v. Palaniappa Chetti, A I R 1928 P C 139=109 I C 626=55 I A 256=51 Mad 349 (P C).

1929 must be set aside and those petitions must be remanded to the lower Court for fresh disposal in the light of the observations contained in this judgment, that is to say, by treating them as maintainable and as being not barred by limitation. In C. M. A. No. 234 of 1932 there is no need to pass separate orders, for that arises out of an attempt merely to treat E. P. No. 104 of 1928 as pending, though it had been dismissed on 17th March 1931.

C. M. A. No. 234 of 1932 will simply be dismissed.

Menon, J.—I agree.

C.R.K./S.C. *Order accordingly.*

A. I. R. 1937 Madras 91

CORNISH, J.

G. A. S. Shanmuga Nadar—Petitioner.

v.

P. S. P. Kandasami Nadar— Opposite Party.

Civil Revn. No. 738 of 1936, Decided on 13th October 1936, from order of Dist. Munsif, Tuticorin, D/- 11th July 1936.

(a) Court-fees Act (1870), S. 7, Cl. xi (cc) —Ejectment after notice — Tenant holding over refusing to vacate after notice to quit —Suit by assignee of landlord to recover possession—Assignee invested with all rights of assignor regarding tenancy—Suit to eject falls under S. 7, Cl. xi (cc).

The landlord brought a suit for ejectment of a tenant and for possession stating that he was the assignee of the landlord, that the lease was terminated by the assignor and he had given notice to defendants to quit :

Held : that the plaintiff was invested with all the rights of the assignor in respect of tenancy under S. 109, T. P. Act. The claim in the plaint was as a landlord to recover possession of land from the tenant holding over and as such the suit fell within S. 7, Cl. xi (cc), Court-fees Act : *A I R 1928 Cal 753, Distinc.; A I R 1930 Cal 42, Rel. on; A I R 1929 Mad 529, Ref.*

[P 91 C 2 ; P 92 C 1]

(b) Pleadings — Nature of suit—Right of action and power of action—Distinction between.

The character of the plaintiff's suit must be determined by the plaint. A plaintiff is *dominus litis*. He may frame his suit as he pleases. Whether he has a good right of action (as distinguished from a right to bring an action) is another matter which will be decided at the trial : *A.-G. v. Lord Sudeley, (1896) 1 Q B 354, Ref.*

[P 91 C 2]

A. Swaminatha Iyer and *S. Tyagaraja Iyer*—for Petitioner.

R. Krishnaswamy Ayyangar — for Opposite Party.

Order.—The question raised in the Revision Petition is whether the suit is a suit by a landlord against a tenant to recover possession within S. 7, Cl. xi (cc) of Court-fees Act. If it is, the Munsif has jurisdiction to try the suit. But if it is a suit governed by S. 7, Cl. v, the suit is beyond the Munsif's jurisdiction. The plaint alleges that the suit land which had been leased by one Marakayar to the defendant had been purchased by plaintiff from Marakayar under a registered sale-deed ; that the defendant's tenancy had been terminated by Marakayar ; and that defendant was holding over in spite of that termination of his tenancy and of the plaintiff's notice to him to quit possession ; and the plaintiff prayed that possession of the land be given to him. On the face of the plaint the plaintiff is claiming to be the assignee of the reversion from the defendant's lessor, Marakayar. If the assignment is valid it follows that the plaintiff is invested with all the rights of his assignor in respect of the tenancy : S. 109, T. P. Act. The relief for which he prays is that as such assignee he may recover possession from the defendant who persists in holding over.

It is clear from the plaint—and this alone is the test of the nature of the suit —that the suit purports to be brought within S. 7, Cl. xi (cc). But it has been strongly contended that the particular clause only contemplates a suit where the plaintiff's title as landlord cannot be denied by the defendant, and that it has no application to a case such as the present where the plaintiff being the assignee of the original lessor, the defendant is not estopped from denying his title. I think, the fallacy of this argument is that it would make the character of the plaintiff's suit dependent on the defence set up in the written statement, and to so hold would be contrary to principle. The character of the plaintiff's suit must be determined by his plaint. A plaintiff is *dominus litis*. He may frame his suit as he pleases. Whether he has a good right of action is another matter which will be decided at the trial. But a right to bring an action and a right of action are not, as was pointed out by Lord Esher in (1896) 1 Q B 354[1] at 359, the same thing :

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1. A.-G. v. Lord Sudeley, (1896) 1 Q B 354.

What is called a right of action is not the power of bringing an action. Anybody can bring an action though he has no right at all. The meaning of the phrase is, that the person has a right or claim before the action which is determined by the action to be a valid right or claim.

If the plaintiff in the present suit is unable to establish his claim under the alleged assignment his suit will fail and have to be dismissed. But at the present stage all that can be determined is that on the face of the plaint his claim is as a landlord to recover possession of land from a tenant who is holding over.

Much reliance was placed by the petitioner's learned advocate in 32 C W N 1113.[2] But the actual decision in that case was a tenant who continued in possession after notice to quit as a trespasser and accordingly a suit to recover possession would not come within S. 7, Cl. xi (cc). But the Court disapproved of this view in 57 Cal 349[3] where it was observed that it would be disastrous if the law was that a landlord would have to bring a suit for declaration of title and possession whenever the tenant refused to vacate. If the plaintiff chooses to sue for a declaration of his title as landlord and to recover possession the suit will come within S. 7, Cl. 5 : see 29 M L W 760.[4] But this is not the suit instituted by the plaintiff in the present case. In my judgment the plaintiff's suit falls within S. 7, Cl. xi (cc) and this Revision Petition must be dismissed with costs.

C.R.K./S.C. *Petition dismissed.*

2. Govinda Ram Agarwalla v. Dulu Pada Dutt, A I R 1928 Cal 753=116 I C 374=32 C W N 1113.
3. Gobinda Kumar Sen v. Mohini Mohan Sen, A I R 1930 Cal 42=125 I C 726=57 Cal 349 =33 C W N 769.
4. Ramalinga Mudali v. Ramaswami Ayyar, A I R 1929 Mad 529=119 I C 577=29 M L W 760.

✻ A. I. R. 1937 Madras 92

VENKATARAMANA RAO, J.

Achanta Chittamma—Appellant.

v.

Gunisetti Mureyya and *others*—Respondents.

Second Appeal No. 119 of 1932, Decided on 24th February 1936, against decree of Sub-Judge, Narsapur, in A. S. No. 370 of 1927.

(a) Vendor and Purchaser — Unpaid purchase money — Statutory charge — Part of purchase money left with vendee to be paid to vendor after happening of certain event— Agreement containing no indication that statutory charge was intended to be extinguished — Charge is not extinguished and auction-purchaser of vendor's right can enforce it.

In order to extinguish the statutory charge under S. 55 (4), T. P. Act, there must be an express contract or something from which it is a necessary implication that such contract exists and is not excluded by a contract, covenant, or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge. [P 93 C 1]

Where, by an agreement between the vendor and purchaser, a part of the purchase money was left with the purchaser to be paid to the vendor after the happening of certain event and there was no indication in the agreement that the charge was intended to be extinguished :

Held : that the charge was not extinguished and the auction-purchaser of vendor's right could enforce it : *31 Cal 57, Rel. on.* [P 93 C 1, 2]

✻ (b) Vendor and Purchaser—Unpaid purchase money—Statutory charge is interest in immoveable property — In absence of special provision charge operates even against bona fide purchaser for value without notice.

The statutory charge under S. 55 (4), T. P. Act, is an interest in immoveable property. If therefore it is an interest in immoveable property and not a mere equity, the purchaser can only take such interest as his vendor can convey which will be the property subject to such interest. Therefore in absence of special provision of law, charge created on the property purchased operates even against a bona fide purchaser for value without notice : *12 Mad 69 ; A I R 1919 Mad 528 ; A I R 1925 Mad 95 ; A I R 1933 Mad 181 ; A I R 1926 P C 94* and *A I R 1934 Mad 615, Rel. on.* [P 94 C 1]

Ch. Raghava Rao—for Appellant.

M. Appa Rao—for Respondents.

Judgment.—The suit out of which this second appeal arises was instituted by the plaintiff to enforce a statutory charge which defendant 1 had under a sale-deed dated 5th May 1915 executed by him in favour of defendant 3 of the suit property and which the plaintiff purchased at a Court-sale. The sale by defendant 1 was for Rs. 5,500 and out of the same a sum of Rs. 833 was retained with defendant 3. The object was to enable defendant 3 to pay maintenance out of the interest thereon to one Manickam, the step-mother of defendant 1. The sale-deed was executed on 5th May 1915, and on the same date an agreement was also executed by defendant 3, Ex. 1, in favour of defendant 1 reciting the retention of the said sum of Rs. 833 and providing that the sum should be retained with defendant 3 so long as

the maintenance payable to the step-mother continues, that he should pay the interest on the said amount at the rate of nine per cent towards the maintenance payable to the said Manickam and that the principal sum of Rs. 833 should be paid after the death of the said Manickam whenever demanded or if in the meanwhile, the maintenance claim was adjusted. The said sale-deed refers to Ex. 1. The said Manickam died on 1st June 1923. In execution of a decree in O. S. No. 306 of 1917 on the file of the Court of the District Munsif of Narsapur, a creditor of defendant 1 attached the right to the said sum of money and the same was sold and purchased by the plaintiff. On the strength of the said purchase the plaintiff has instituted this suit to recover the said sum by the sale of the said property. The main contesting defendant is defendant 4, wife of defendant 3, who purchased the suit property by a sale-deed dated 3rd April 1931. Both the Courts have decreed the plaintiff's claim.

Mr. Raghava Rao on behalf of defendant 4 urges three contentions before me. His first contention is that as defendant 1 has taken Ex. 1 the statutory charge under S. 55 (4), T. P. Act, has been extinguished. This contention seems to me to be untenable. In order to extinguish the statutory charge there must be an express contract or something from which it is a necessary implication that such contract exists and it is not excluded by a contract, covenant, or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge: *vide* 31 Cal 57[1] at p. 72. It is on this principle that the mere taking of a promissory note or a collateral security was held not to extinguish a statutory charge. In this case Ex. 1 embodies an arrangement in and by which the principal sum of Rs. 833 was to be paid after the happening of a certain event. Instead of embodying the conditions relating thereto in the sale-deed, a separate document was executed and the sale-deed does refer to Ex. 1 so that both the sale-deed and Ex. 1 must be treated as one transaction. There is absolutely nothing from the recitals of Ex. 1 to indicate that the statutory charge was intended to be extinguished. The payment of the said sum was only deferred and nothing more. I am therefore of opinion that the statutory charge subsisted on the date of the purchase by the plaintiff.

The next contention is that there was no assignment of the charge. On a reference to the sale proclamation and the sale list it is clear that what was sold was the right which defendant 1 had under the sale-deed. It was not a right to mere money alone that was sold and purchased but all the rights which defendant 1 had under the sale-deed. Therefore the charge was also sold and it passed to the plaintiff. The last contention of Mr. Raghava Rao is that his client is a bona fide purchaser for value without notice. I do not find this plea has been specifically taken nor is there any issue relating thereto. The only issue which I find is whether the sale in favour of defendant 4 is a nominal transaction. I find in para. 8 of the learned District Munsif's judgment that the sale in favour of defendant 4 was held to be a nominal transaction. The learned Subordinate Judge has not given any finding on the point as he considered it unnecessary to do so. A finding on this issue does not necessarily establish that the purchase was without notice. The purchase in this case was made and the suit was filed before the amendment of the Transfer of Property Act. The case, therefore, will have to be judged according to the law which prevailed before it. So far as our High Court is concerned the charge was held to be enforceable even against bona fide purchasers for value without notice : *vide* 12 Mad 69,[2] 36 M L J 618[3] and 47 M L J 622[4] at p. 639. Mr. Raghava Rao relies upon 66 M L J 566,[5] wherein at p. 569, Madhavan Nair, J. makes the following observations referring to the amendment as to the notice in S. 100 of the Act :

> But it may be said that the amendment does not alter the law but shows more clearly what the rights and liabilities of a charge-holder are.

There is no discussion of the matter and further the position seems to have been conceded. If the observations are meant

1. Webb v. Macpherson, (1904) 31 Cal 57=30 I A 238=8 Sar 554 (P C).

2. Cooling v. Saravana, (1889) 12 Mad 69.
3. Srinivasa Raghava Ayyangar v. Ranganatha Ayyangar, A I R 1919 Mad 528=51 I C 963=36 M L J 618.
4. Mollaya Padayachi v. Krishnaswami Ayyar, A I R 1925 Mad 95=85 I C 855=47 M L J 622.
5. Arvamuda Ayyangar v. Abiramanalli Ayah, A I R 1934 Mad 353=150 I C 930=66 M L J 566.

to imply that the law as declared by the amendment was the same as before, I am not inclined to agree. It was certainly intended to set at rest the conflict of views prevailing in the various Courts. The statutory charge under S. 55 (4) has been held to be an interest in immoveable property : *vide* the decision of Madhavan Nair, J. in A I R 1933 Mad 181[6] following 51 M L J 788[7] and 40 M L W 481[8] which confirmed the decision of Madhavan Nair, J. If therefore it is an interest in immoveable property and not a mere equity, the purchaser can only take such interest as his vendor can convey which will be the property subject to such interest. The decisions of our High Court are based upon this view. In 12 Mad 69[2] where the facts were that *A* mortgaged his land to *B* to secure repayment of the loan and *A* agreed that in case the property is lost by an adverse claim, *B* can realise the money from *A's* house, a charge was held to be created on the house so as to be operative against a bona fide purchaser for value without notice. At p. 71, Muttusami Ayyar, J. observes as follows :

> When that document was executed Varada Desikachari was competent to encumber his property either at once or subject to a contingency, and a subsequent purchaser who can only stand in his place takes the property subject to such restrictions, as would attach to him as owner if he never parted with the property. In the absence of a special provision of law we do not see how a bona fide purchase can operate to secure a larger interest than the vendor himself had and was competent to transfer.

It seems to me therefore that defendant 4, even if he were a bona fide purchaser for the value without notice, will be bound by the charge. I therefore dismiss the second appeal with costs. (Leave refused.)

C.R.K./M.D. *Appeal dismissed.*

6. Ranganatha v. Rajagopala, A I R 1933 Mad 181=142 I C 730.
7. Dayal Singh v. Indar Singh, A I R 1926 P C 94=98 I C 508=53 I A 214=51 M L J 788 (PC).
8. Rajagopala v. Ranganatha, A I R 1934 Mad 615=152 I C 375=40 M L W 481.

A. I. R. 1937 Madras 94

PANDRANG ROW, J.

S. Dharmalinga Nayakar—Appellant.

v.

D. Balasubramania Ayyar and *another*—Respondents.

Appeal No. 61 of 1934, Decided on 30th April 1936, against order of City Civil Judge, Madras, D/- 11th December 1933.

Copyright—Infringement of— Madras City civil Court cannot try suit for infringement.

Madras City Civil Court has no jurisdiction to try a suit for infringement of copyright. S. 3, City Civil Court Act, gives general jurisdiction to the City Civil Court, but the Copyright Act which deals with the special subject matter of copyright clearly restricts jurisdiction to hear a suit or proceeding relating to copyright to the High Court and the District Courts. [P 94 C 2].

Judgment.—This is an appeal from the order of the City Civil Judge, Madras, returning the plaint in O. S. No. 566 of 1932 for presentation to the proper Court. The plaintiff sued for four reliefs. Two of them related to the copyright claimed by him in a certain book known as "Gopal New Tamil Reader No. 1," and so far as these reliefs were concerned the learned City Civil Judge was of opinion that he had no jurisdiction to grant these reliefs, and his view is obviously correct. Under S. 13, Copyright Act, every suit or other civil proceeding regarding infringement of copyright shall be instituted and tried in the High Court or the Court of the District Judge. The City Civil Court does not come under either of these categories and it is obvious that the City Civil Court had no jurisdiction. S. 3, City Civil Court Act, which constituted the Court does not avoid the effect of a specific provision like S. 13, Copyright Act. S. 3, City Civil Court Act, gives general jurisdiction to the City Civil Court, but the Copyright Act which deals with the special subject matter of copyright clearly restricts jurisdiction to hear a suit or proceeding relating to copyright to the High Court and the District Courts. As regards the other two reliefs: one of them is cognizable by the Presidency Court of Small Causes, being a claim for money due under a contract and therefore not within the jurisdiction of the City Civil Court.

The only relief left is a declaration that the plaintiff is the author of the book in question. As regards this relief the learned City Civil Judge says that the plaintiff even on his own showing is entitled to other consequential reliefs besides a bare declaration, and that no useful purpose would be served by granting a relief of this kind to the plaintiff. I entirely agree. After all, the grant of a declaration is a matter of discretion and I think the learned City Civil Judge exercised a wise discretion in nipping a suit for a declaration of this kind in the bud instead of wasting his own time and that of the defen-

dants in trying a suit for a mere declaration like this. The appeal is really hopeless and I would even say frivolous. The plaintiff-appellant was definitely told to present his plaint to the proper Court. Instead of doing that he has preferred a baseless and hopeless appeal. The appeal is dismissed with costs.

C.R.K./B.D. *Appeal dismissed.*

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* A. I. R. 1937 Madras 95

VENKATARAMANA RAO, J.

(*Firm*) *Ratnaji Chandanmall*—Appellant.

v.

Kolli Ramakrishnayya—Respondent.

Appeal No. 143 of 1933, Decided on 7th August 1936, from appellate order of Sub-Judge, Tenali, in A. S. No. 21 of 1933.

*** (a) Restitution—When should be granted—Court paying to wrong person—Court is bound to restore to right person—Non-applicability of S. 144, Civil P. C. is no bar to restitution under S. 151, Civil P. C.**

One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. This statement of the law is general enough to cover a case where the executing Court has been made to take a wrong step by an erroneous decision passed by another Court. The non-applicability of S. 144 would not prevent a Court from granting restitution in the exercise of its inherent powers. Where a Court has wrongly paid the money to a person not entitled thereto, it has not only the power but it is also its duty to recover it from him: *A I R 1934 Mad 320* and *Rodyers* v. *Comptoird, Escompte de Paris, (1809) 2 P C 393, Rel. on.* [P 96 C 1, 2]

*** (b) Restitution—*A* suing *B* for possession—Receiver appointed—Profits pending suit deposited in Court—*A* claiming those profits—Trial Court refusing *A*'s claim—*A* appealing—*C* obtaining decree during pendency of *A*'s appeal attaching profits lying in Court in *B*'s name—*A*'s title established on appeal—*A*'s claim for restitution against *C* is valid.**

A brought a suit against *B* for possession of property and mesne profits for one particular year. Receiver was appointed in the suit who collected profits for the year pending the suit and deposited them in Court. *A* claimed those profits but Court refused to grant the relief because *A* had not claimed future profits. *A* appealed. During the pendency of the appeal one *C* also obtained a decree against *B* and attached the deposit in Court, and was given over the money that was in Court deposit. Ultimately *A* succeeded in his appeal after contest with *B* and claimed restitution from *C*. *C* contended that as he was not a party to the appeal by *A*, any order passed on the appeal was not binding on him:

Held: that the claim of *C* to the deposit was in the right of *B* and as the order passed in appeal was passed after active contest between *B* and *A*, *C* must take the deposit subject to the decision of the appeal. As the order in appeal negatived the title of *B*, *C* also lost his title and was bound to make restitution to *A*: *A I R 1933 All 218, Rel. on.* [P 96 C 2]

V. Subramanian and *V. Suryanarayana*—for Appellant.

P. Satyanarayana Rao—for Respondent.

Judgment.—The question involved in this appeal is one of restitution. The facts necessary for the disposal of the same may be briefly stated. Respondent 1 filed a suit O. S. No. 657 of 1928, on the file of the District Munsif's Court of Repalle against one Moturi Chimpayya and others for recovery of possession of certain immoveable property and for mesne profits for the year 1927. During the pendency of that suit he applied for the appointment of a receiver and a receiver was accordingly appointed on 12th December 1929. The receiver leased the said property and deposited the amount collected by him, a sum of Rs. 451, into Court as rent for the year 1929. The said suit was ultimately decided in favour of the plaintiff. He then applied to the Court for payment of the said sum of money, but the Court took the view that since he had not prayed for future profits in his plaint, he would not be entitled to the said amount until he takes appropriate proceedings to establish his right to the same and gets a decree. The result of this order was as between respondent 1 and the defendants in the said suit that the title of the plaintiff to the said fund in Court was negatived and the judgment-debtor from whom the property was taken possession of by the receiver must be deemed to be entitled to the same. So long as the said order stood unreversed and till the plaintiff established his right to the same, it would not be open to the plaintiff-respondent 1 to resist the claim of the said Moturi Chimpayya and other defendants in the suit or anybody who derives title from them or by virtue of the said right asserts a claim thereto.

The appellant in this appeal filed a suit, O. S. No. 295 of 1929, on the file of the District Munsif of Rapalle against the said Moturi Chimpayya and others for recovery of a sum of money and obtained a decree. Subsequent to the order made in O. S. No. 657 of 1928 negativing the

title of the plaintiff, to the amount in Court deposit in that suit, the appellant applied for an order of attachment of the said sum in execution of his decree. The plaintiff-respondent 1 intervened and objected to the said attachment alleging that he had preferred an appeal against the order declining to grant him the said amount in his suit and that the appellant is not entitled to attach the said amount as the fund did not belong to the judgment-debtors. As the title to the said fund was already negatived the District Munsif by his order dated 29th August 1930 directed the attachment to issue and subsequently paid over the said amount to the appellant. Meanwhile the plaintiff respondent 1 who preferred an appeal against the order negativing his title to the said fund succeeded in his appeal, and it was therein held that the plaintiff was entitled to the said money and the judgment-debtors had no right thereto. Thereupon the plaintiff-respondent 1 put in an application for restitution of the money taken by the appellant herein. Both the lower Courts concurred in granting the relief to the plaintiff-respondent 1. Mr. V. Suryanarayana contends that neither S. 144 nor S. 151, Civil P. C., applies to the case, that the lower Court had no jurisdiction to grant restitution, that the order directing attachment of the said fund was final and so long as the said order stands, it is not open to the plaintiff-respondent 1 to claim the said sum of money. In my opinion, this contention is unsustainable.

There can be no question that S. 144 would not apply to the case but the non-applicability of S. 144 would not prevent a Court from granting restitution in the exercise of its inherent powers and this is eminently a fit case wherein the Court should exercise its inherent powers. It is a well-settled principle of law that where a Court has wrongly paid the money to a person not entitled thereto, it has not only the power but it is also its duty to recover it from him. In O. S. No. 657 of 1928 when the Court appointed a receiver and he deposited the money into Court, the moment the plaintiff succeeded in the suit it was the duty of the Court to pay over the said money to the plaintiff. The said fund was held in trust for the plaintiff by the Court but owing to an erroneous view, it parted with the said fund to a person who was not entitled thereto. When it was found that the view taken by the Court was wrong, there is inherent jurisdiction in the Court to call back the said money. Curgenven, J. in 57 Mad 849[1] at p. 854, after referring to the observations of Cairns, L. C. in (1809) 2 P. C 393,[2] viz., "one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors," observed thus:

> This statement of the law would appear general enough to cover a case where the executing Court has been made to take a wrong step by an erroneous decision passed by another Court.

It seems to me that this principle would cover the present case. The District Munsif would not have made the order he did directing the attachment in O. S. No. 295 of 1929 but for the order he made in O. S. No. 657 of 1928 negativing the title of the plaintiff to the fund to the credit of that suit. It is contended by Mr. Satyanarayana that the appellant was not a party to the appeal preferred by the plaintiff-respondent 1 against the order made on his petition in O. S. No. 657 of 1928 and therefore he cannot be said to be bound by any order made therein. It has been found that the order passed in appeal was made after contest and there was no collusion between the plaintiff-respondent 1 and the judgment-debtors. The claim of the appellant to the said fund was in the right of the judgment-debtors and the said right was actively asserted by them in appeal and when the fund was taken by the appellant, the title of the judgment-debtors was the subject matter of the pending appeal. The appellant must therefore be deemed to have taken subject to the result of the decision in the said appeal. Once the title of the judgment-debtor was negatived he had no right to the said fund and a case in point is 55 All 221.[3] In that case a decree-holder *A* in execution of a decree against his judgment-debtor attached certain property as belonging to him and in execution purchased it himself. The said property at the date of the attachment and sale was allotted to the share of the judgment-debtor in a partition suit with his brothers. The sale proceeds of the

1. Palaniappa Chetti v. Ramanathan Chettiar, A I R 1934 Mad 320=150 I C 934=67 M L J 49=57 Mad 849.
2. Rodgers v. Comptoird Escompte de Paris, (1809) 2 P C 393=5 Moo P C (NS) 538=38 L J P C 30=21 L T 33=17 W R 468.
3. Amba Lal v. Ramgopal Madho Prasad, A I R 1933 All 218=144 I C 492=55 All 221=1933 A L J 60.

property purchased had to be deposited in Court because it had to be distributed between *A* and two other rival decree-holders *B* and *C*, and the sale proceeds were accordingly rateably distributed. Subsequently in a litigation between the judgment-debtor and his brothers, it was found that the greater portion of the property purchased by the decree-holder *A* was found not to belong to the judgment-debtor. Thereupon *A* applied for refund from the rival decree-holders of so much of the money taken in excess of their legitimate share on the grounds that so much of the money which represented the property that was found not to belong to the judgment-debtor was wrongly distributed and a share thereof taken by them and when once the title of the judgment-debtor was found against they must bring back the said money to Court. It was held that the rival decree-holders were bound to bring the said amount to Court and the Court had jurisdiction to grant restitution in the exercise of its inherent power though S. 144, Civil P. C., would not apply to the case. The only difference between that case and this is that in the one case a portion of the property was found to belong to the judgment-debtor and in the other no portion has been found to belong to the judgment-debtor. Therefore the lower Courts have properly granted restitution. In the result this appeal fails and is dismissed with costs. Leave refused.

C.R.K./B.D. *Appeal dismissed.*

A. I. R. 1937 Madras 97

CORNISH, J.

Thirunavakkaru Pandaram and *another*—Appellants.

v.

Parasurama Ayyar and *another* — Respondents.

Appeal No. 5 of 1934, Decided on 17th September 1936, against order of Sub-Judge, Tinnevelly, D/- 21st July 1933.

Foreign Court—Submission to jurisdiction—Ex parte personal decree of foreign Court against defendants who were neither subjects nor residents— Previous litigation in same Court by defendants but then as plaintiffs—Submission held could not be inferred from previous litigation—Decree held not executable in British India.

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If a party has once appeared before a foreign Court in the character of the plaintiff it does not mean that he is for ever afterwards to be regarded as having submitted to the jurisdiction of the foreign Court in any subsequent action, by any person or upon any cause of action, which may be brought against him. [P 99 C 1]

An ex parte personal decree was passed by Cochin Court against defendants, who were neither subject nor residents of that state. There was some previous litigation in the same Court in respect of some business carried on in Cochin by the defendants but who in that litigation figured as plaintiffs. The ex parte personal decree was transferred to British India Court for execution:

***Held*: that the submission by the defendants to the jurisdiction of Cochin Court could not be inferred from previous litigation and hence the decree was not executable in British India.** [P 99 C 1]

P. N. Appaswami Iyer—for Appellants.

K. Venkateswaran—for Respondents.

Judgment.—The appellants have appealed against the order of the lower appellate Court which has held them liable to execution of a personal decree passed against them in a Cochin Court. The appellants were defendants 1 and 2, and were minors at the time when the suit was filed. Defendant 3 was the executor appointed by their father's will and was also the testamentary guardian. Defendant 3 was sued in that capacity. None of the defendants appeared in the suit. An ex parte decree was made, the Court appointing the Nazir as the guardian in the suit of the two minor defendants. In pursuance of S. 44, Civil P. C., the decree was transmitted to the Tinnevelly District Munsif's Court for execution by attachment and sale of certain moveable property of the first two defendants within the jurisdiction of the Tinnevelly Court. Objection to execution was made by the appellants that they were not subject at the time of the suit to the jurisdiction of the Cochin Court and that therefore this ex parte decree was not executable against them in British India. Both the lower Courts have held that the defendant had submitted to the jurisdiction of the Cochin Court. The ground of this decision was that suits had previously been brought in Cochin by defendant 3, executor, suing as guardian of the two minor defendants in respect of a business carried on in Cochin, and that moneys due to the estate had been recovered in those litigations. The lower appellate Court seems to have thought that the circum-

stance that the minors had a business in Cochin would make them liable to the jurisdiction of the Cochin Court. No doubt any moveable or immoveable property within the limits of the Cochin Court would be subject to that Court's jurisdiction: (1894) A C 670[1] at p. 683. But the question here is whether a personal decree can be executed against the defendants in respect of their moveable property outside the limits of the Cochin Court's jurisdiction.

In (1908) 1 K B 302[2] Buckley, L. J. stated the five cases in which in an action in personam the Courts will enforce the judgment of a foreign Court. They are: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained. It is, I think, clear, upon the evidence that the defendants were neither subjects of the Cochin State nor residents therein at the time when the present suit was filed. In fact in the execution petition they are all described as residents of Travancore. There is some evidence that they had a residence in Travancore; but the evidence goes to show that Tinnevelly was the permanent place of residence of defendants 1 and 2. It is obvious that even if a business or a place of business ever existed in Cochin at the time of the suit this circumstance would not make the defendants either subjects of or residents in the Cochin State. The only question, therefore, is whether there can be said to have been a submission by the defendants to the jurisdiction of the Cochin Court, and can this submission be inferred from the fact that litigation has been previously carried on in the Cochin Courts by defendant 3 on behalf of the other defendants. The solution would seem to depend upon the proper application of the third of the cases stated in Buckley, L. J.'s judgment, supra. The Lord Justice repeats what was said by Fry, J. in 14 Ch D 351.[3] Fry J.'s statement in turn is founded upon what Blackburn, J. stated in delivering the judgment of the Court in (1871) 6 Q B 155[4] at p. 161, where it was said:

> We think it clear upon principle that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.

This rule has been interpreted by a Bench of this High Court in an unreported case cited in 22 M L W 820,[5] and apparently approved there, as meaning that if a party in a suit in a foreign Court has, on some previous occasion, invoked the jurisdiction of the foreign Court as plaintiff, he must by that previous conduct be bound to the jurisdiction in any subsequent litigation in that foreign Court to which he is made a party. In 71 M L J 93[6] another Bench has expressed the opinion that if a person has filed suits in a Court having jurisdiction he cannot thereby by implication be taken to submit himself to the jurisdiction of the same Court when that Court has no jurisdiction. But in the last case it was held that there was evidence that the defendant had submitted to the Court's jurisdiction. I think the difficulty disappears if it is borne in mind that the principle has reference to a suit upon a foreign judgment. There is not in the English rules of procedure any process corresponding to S. 44, Civil P. C., enabling a foreign decree to be transmitted to an English Court for execution. A foreign judgment for a liquidated sum of money, such as was the judgment in the present case, creates a debt between the parties, and a party in whose favour judgment has been given may either sue in the English Court on the debt, the original cause of action, or he may sue upon the judgment. In such a suit the unsuccessful plaintiff in the foreign Court having chosen his forum is estopped in the event of his being sued upon that judgment in the English Court, as he might very well be in respect of a counter-claim, from contending that the foreign Court

1. Sirdar Gurdyal Singh v. Rajah of Faridkote, (1894) A C 670 = 11 I A 340 (P C).
2. Emanuel v. Symon, (1908) 1 K B 302=77 L J K B 180=98 L T 304=24 T L R 85.
3. Rousillon v. Rousillon, (1880) 14 Ch D 351= 49 L J Ch 338=42 L T 679=28 W R 623= 44 J P 663.
4. Schibsby v. Westenholz, (1871) 6 Q B 155=40 L J Q B 73=24 L T 93=19 W R 587.
5. Nagoor Meera v. Mahadu Meera, A I R 1926 Mad 259=92 I C 491=22 M L W 820.
6. Oomer Hajee Ayoob Sait v. Thirunavakkarasu Pandaram, A I R 1936 Mad 552=162 I C 904=71 M L J 93.

had no jurisdiction. That, in my opinion, is the meaning of the passage from the judgment of Blackburn, J. in 6 Q B 155[4] already quoted. Similarly, if the defendant in the foreign suit has appeared in the suit, thus recognising the jurisdiction of the Court, he cannot in a subsequent action upon the judgment be heard to say that the Court had no jurisdiction. As stated by Buckley, L. J. in (1915) 2 K B 580[7] at p. 588:

The doctrine applicable to these cases is that if the defendant has placed himself in such a position that it has become his duty to obey the judgment of the foreign Court, then the judgment is enforceable against him in this country;

and (1871) 6 Q B 155[4] is cited as the authority for that doctrine. The proposition that if a party has once appeared before a foreign Court in the character of the plaintiff he is for ever afterwards to be regarded as having submitted to the jurisdiction of the foreign Court in any subsequent action, by any person or upon any cause of action, which may be brought against him, seems to me to go far beyond the principle stated by Blackburn, J. and to be entirely outside the doctrine upon which that principle is founded. In my judgment there was no submission by the defendants to the jurisdiction of the Cochin Court, and consequently the decree passed against them in that suit ex parte is not executable against them in British India. The appeal therefore succeeds and is allowed with costs throughout. (No leave to appeal).

C.R.K./M.D. *Appeal allowed.*

7. Harris v. Taylor, (1915) 2 K B 580=84 L J K B 1839=113 L T 221.

A. I. R. 1937 Madras 99

HORWILL J.

Kavuri Anjayya—Appellant.

v.

Alapati Ankamma and *others*—Respondents.

Second Appeal No. 629 of 1935, Decided on 7th September 1936, against decree of Sub-Judge, Tenali, in A. S. No. 25 of 1935.

(a) Administration—Suit for—Suit by creditor of deceased undivided father in joint Hindu family for administration of such part of son's estate as is liable for his father's debt is maintainable — Ss. 211 and 218, Succession Act, do not apply to such suit.

Although administration suits are primarily intended for the administration of the assets of a deceased person in the hands of an heir or administrator or executor, still a suit by a creditor of a deceased undivided father in a joint Hindu family for an administration of such part of the debtor's minor son's estate as is liable for his father's debt is maintainable for the very reasons which make it equitable and desirable to enable a creditor to file an administration suit inasmuch as the obligations of the son are previously those of an heir, he being liable for his father's debts not being immoral or illegal to the extent of the assets of the joint family property that has come into his hands. Ss. 211 and 218, Succession Act, do not apply to such a suit. [P 99 C 2; P 100 C 1]

(b) Administration—Suit for—Creditor can bring administrative suit merely on his behalf against son of deceased debtor — Mere fact that other creditors put forward objection is no bar to suit.

A creditor is entitled to bring an administration suit merely on his own behalf against the son of his deceased debtor and the mere fact that other creditors put forward objections to the suit in their own interests is not a sufficient ground for not permitting the plaintiff to pursue his remedies in the administration suit. [P 100 C 1]

P. Satyanarayana Rao—for Appellant.

V. Satyanarayana and *M. S. Ramachandra Rao*—for Respondents.

Judgment.—The plaintiff was the creditor of the deceased undivided father of defendant 1. He has brought this suit for an administration of such part of the mother's estate as is liable for his father's debts. The trial Court held that such a suit lay. In appeal the Subordinate Judge of Tenali, interpreting S. 218, Succession Act, held that the suit was not maintainable. Two questions have been discussed in second appeal. One is whether, in view of the fact that defendant 1 was undivided from his father, an administration suit would be maintainable, and, secondly, even if it were, would the plaintiff, against the interest of a number of other creditors, be able to maintain the suit.

With regard to the first point, there can be no doubt that although, for the purpose of the execution of decrees, decrees already passed against a deceased father can be executed against the son by virtue of S. 53, Civil P. C., yet defendant 1 is not the legal representative of the deceased debtor. Nevertheless, unless the debts have been incurred for illegal or immoral purposes, the obligations of defendant 1 are precisely those of an heir; for defendant 1 is liable for his father's debts, not otherwise being immoral or illegal, to the extent of the assets of the joint family property that has come into his hands. Although there-

fore administration suits are primarily intended for the administration of the assets of a deceased person in the hands of an heir or administrator or executor ; yet the very reasons that would make it equitable and desirable to enable a creditor to file an administration suit would make it equitable and desirable that a creditor should be allowed to bring an administration suit against an undivided son of the debtor. The learned Munsif was therefore right in holding that such a suit was maintainable. The learned Subordinate Judge has not considered this question at all ; but has allowed the appeal and dismissed the suit, because of his interpretation of Ss. 211 and 218, Succession Act, which have no application to the matter in hand.

It has been pointed out that many of the defendants are against an administration suit, and for the very obvious reason that they have already obtained decrees and are actually executing them ; so that if the plaintiff is non-suited, they will be able to realise their decrees much more fully than would be possible if the assets were fairly divided among the creditors. I do not think however that the interested objections of certain defendants is a sufficient ground for not permitting the plaintiff to pursue his remedies in an administration suit. In 14 Halsbury 442 (Art. 843) it is pointed out that a creditor, merely on his own behalf, can bring an administration suit. Although the present suit differs from the ordinary administration of an insolvent's or a deceased man's estate ; yet the same principles of equity will apply. I therefore set aside the decree of the lower appellate Court and restore that of the District Munsif. Respondents 1 to 4 and 6 to 18 will pay the costs of the appellant in this Court and in the lower appellate Court. (Leave to appeal refused).

C.R.K./R.M. *Decree set aside.*

A. I. R. 1937 Madras 100

PANDRANG ROW AND MENON, JJ.

Marina Mangamma and *others* — Appellants.

v.

Mutyala Dorayya and *others*—Respondents.

Letters Patent Appeal No. 100 of 1935, Decided on 4th September 1936, against judgment of Varadachariar, J., D/- 28th March 1935, as reported in *A. I. R. 1936 Mad 130.*

Hindu Law—Widow — Nature of estate—Gift—Grant to female—Grant ambiguous—No presumption as to quantum of estate to female — Question should be decided independently of any presumption, taking into account surrounding circumstances.

When a grant is made to a Hindu female and the grant is ambiguous, there is no presumption as to whether the female takes limited rights or absolute rights. This question of quantum of interest should be decided taking into account surrounding circumstances and the notions and dispositions of the parties to the transaction in the course of which the properties came to the female, independently of any presumption or burden of proof. [P 100 C 2; P 101 C 1]

V. Govinda Raja Chari and *N. Vasudevarao*—for Appellants.

G. Lakshmanna and *G. Chandrasekhara Shastri*—for Respondents.

Pandrang Row, J. — In this Letters Patent appeal the only question for us to decide is whether the view adopted by Varadachariar, J., namely, that in the absence of direct evidence one way or the other, there is no presumption as to the quantum of interest which a Hindu female takes in respect of immoveable property given to her, is right or not. The case is one in which during the partition in the lifetime of the father one of the shares was given to the widowed daughter who had no children. The plaintiffs claim that the properties were given to her for life only as maintenance and the daughter claims that they were given to her as an absolute estate with full powers of alienation. The suit was one to declare that the deed of gift executed by the widow in favour of certain of her nephews is not valid and binding on the plaintiffs after her death. It would appear that the lower appellate Court, that is, the Subordinate Judge, was under the impression that there was a presumption in favour of the widow in a case like this and that the burden of proving that the properties were given to defendant 1 only for her life was upon the plaintiffs. Varadachariar, J. however, thought that though in a sense there is no presumption that properties given to a female are given only with limited rights and not with absolute rights, nevertheless, in a case of this kind the question of the quantum of interest has to be decided independently of any particular presumption or any particular view as regards onus of proof. In other words, he was of opinion that the decision must take into account the surrounding circumstances and the notions and disposi-

tions of the parties to the transaction in the course of which these properties came to the widow. The general rule in the case of a gift made to a Hindu female by her male relations is that in construing a deed of such gift the Court is entitled to assume that the donor intended the donee to take a limited estate only, unless the contrary appears from the deed.

The basis of the rule, as stated in Mulla's Principles of Hindu Law, Edn. 8, p. 467 is that females as a rule take only a limited estate in property inherited by them from male relations, and the donor must be presumed to have made the gift with that fact present to his mind. The learned author then refers to the leading case on the subject, namely, 2 I A 7,[1] and goes on to observe that though the rule thus laid down by the Privy Council applies alike to all females who take a limited estate in property inherited by them, the Courts in India have, following the spirit of the texts referring to stridhana, drawn a distinction between cases where a gift of immoveable property is made by the husband to his wife, and those where it is made by a Hindu to other female relations.

The learned author observes that there is nothing in 2 I A 7[1] to justify this distinction, the rule laid down there being one which purports to apply to all females who take a limited estate in property inherited by them, and he refers to the fact that in a subsequent case the Judicial Committee applied the rule where a bequest had been made to a daughter and he concludes that it is therefore difficult to support the distinction made by the High Courts in India. Apart from these observations of the learned author which are entitled to much weight, nothing has been brought to our notice from which it can be gathered that the Judicial Committee has in any way confined the rule laid down in 2 I A 7[1] to gifts or bequests made by a husband to his wife or held that it would not apply to gifts or bequests by other relations.

The rule itself is based on the general principle that, where the terms of a grant are ambiguous or where there is no grant in writing it is permissible, in order to find out the intention of the grantor to look to the surrounding circumstances of the transaction; and the notions and ideas of the grantor would be one of such circumstances to be taken into consideration. It is not seriously contended that the rule if applicable when there is a grant in writing is inapplicable when there is no grant in writing as in this case. If that rule is to be applied to the present case there can be no doubt that the conclusion arrived at by our learned brother is right. All the circumstances point to the conclusion that it could not have been intended to give an absolute estate to a childless widow and that the properties must have been given to her only for her life. We therefore see no reason to interfere in appeal with the decision of Varadachariar, J., in this case. The Letters Patent appeal is accordingly dismissed with costs.

C.R.K./M.D. *Appeal dismissed.*

1. Mohammad Shumesal v. Shewukram, (1874) 2 I A 7 (P C).

A. I. R. 1937 Madras 101

MENON, J.

O. A. O. K. C. T. Chidambaram Chettiar and *others*—Appellants.

v.

Swaminathan and *others*—Respondents.

Second Appeal No. 680 of 1932, Decided on 7th May 1936, against decree of Dist. Judge, East Tanjore, in A. S. No. 84 of 1931.

(a) Civil P. C. (1908), O. 22, R. 9—Fresh suit—Suit to recover possession by benamidar for owner—Benamidar dying pending suit—No legal representative brought on record—Fresh suit by owner—Abatement of previous suit is bar to fresh suit on same cause of action.

The benamidar for the real owner brought a suit for recovery of possession and died during the pendency of suit. No legal representative was brought on record and the suit abated. The owner thereupon brought a fresh suit on the same cause of action:

Held: that the abatement of the previous suit was a bar to fresh suit on the same cause of action under O. 22, R. 9. [P 103 C 1]

(b) Legal Representative — Benamidar, trustee for real owner—His son has enough interest to become his legal representative.

A benamidar is in some sense a trustee for the real owner and his son who has some interest can succeed to the trusteeship and he can be considered to be his legal representative within the meaning of S. 2 (11), Civil P. C. : *A I R 1918 P C 35* and *A I R 1933 Mad 635, Rel. on; A I R 1927 Mad 903, Disting.* [P 103 C 1]

K. S. Champakesa Iyengar—for Appellants.

K. S. Jayarama Iyer—for Respondents.

Judgment.—The suit is to recover possession of the plaint lands with past and future mesne profits. It is alleged that that property was purchased in Court auction by one Ramaswami Chettiar in 1923, that the said Ramaswami Chettiar was merely a benamidar for Chidambaram Chettiar, the father of the plaintiff, that on the defendant obstructing the said Ramaswami Chettiar in taking possession of the property the latter filed O. S. No. 88 of 1925 on the file of the District Munsif of Tiruthuraipundi, that as he died during the pendency of the suit and no legal representative of his was brought on record the suit abated, and that in spite of it the plaintiffs, being the beneficial owners, are entitled to maintain the suit. The defendants contended that the suit is barred by O. 22, R. 9, Civil P. C., as the cause of action is the same as that in O. S. No. 88 of 1925. That plea of the defendants was upheld by both the lower Courts; hence this second appeal by the plaintiffs. The only question for decision is whether the suit is barred by limitation under O. 22, R. 9, Civil P. C. It is not disputed that the cause of action in this suit is the same as that on which O. S. No. 88 of 1925 was based, viz., the right of the plaintiffs or their benamidar Ramaswami Chettiar to get possession of the property and the infringement of that right by the defendant. It is also not disputed that on the death of Ramaswami Chettiar his representatives were not brought on record and an application filed by the plaintiffs to bring them on record as legal representatives was ultimately dismissed by the High Court. The result was that no one was brought on record as the representative of Ramaswami Chettiar and that an order was made that the suit abated. Now under O. 22, R. 9, Civil P. C. :

> Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.

The contention of the defendants therefore is that as O. S. No. 88 of 1925 abated and as the cause of action for that suit and this is the same, this suit is incompetent. The learned advocate for the appellant answers that there was no legal representative for Ramaswami Chettiar in respect of the right litigated by him in O. S. No. 88 of 1925 and that therefore the suit never abated by reason of such legal representative not having been brought on record and that the order that the suit abated is wrong. The question therefore for decision is whether Ramaswami Chettiar had any legal representative in respect of the right litigated by him in O. S. No. 88 of 1925. Admittedly, he has sons who, the plaintiffs allege, declined to come on record. The question is whether they could be regarded as his legal representatives. By "legal representatives" is meant a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued : *vide* S. 2 (11), Civil P. C. It cannot be denied that if Ramaswami Chettiar was benamidar for the plaintiffs he is in some sense of the term a trustee for the plaintiffs and his sons could succeed to that trusteeship. This position is clear from the following observations of the Judicial Committee in 45 Cal 909[1] at pp. 918 and 919 :

> When, therefore, the Lajjadhari executed the conveyance in favour of Rajeswari at the instance of Rajah Bhikham, he (the Raja Bhikham) was the true owner. Kasinath was a trustee for Rajah Bhikam, and Lajjadhari could only succeed to his father's trusteeship.

Relying on these observations, this Court (Sundaram Chettiar, J.) held in A I R 1933 Mad 635,[2] that the transferee from the heirs of a benamidar mortgagor had some interest entitling him to maintain a suit to redeem. It was observed :

> But here the suit was filed by the transferee from the heirs of the alleged benamidar. The question is whether anything survives to the heirs or their assigns after the death of the benamidar. In the decision of the Privy Council in 45 Cal 909[1] their Lordships dealing with the status of a benamidar have observed in 45 Cal 909,[1] at pp. 918 and 919, that he would be trustee for real owner and his son could succeed to the trusteeship. This shows that the heirs of the benamidar would by reason of some interest devolving on them be entitled to maintain a suit of this kind.

It is however pointed out for the appellant that in another case, viz. 53 M L J 568,[3] Mr. Odgers, J., was not inclined to consider the decision of the Privy Council referred to above as laying down that a trusteeship devolved on the deceased

1. Jagannath Prasad Singh v. Abdullah, A I R 1918 P C 35=45 I C 770=45 I A 97=45 Cal 909 (P C).
2. Mohammed Sheriff v. Syed Kasim, A I R 1933 Mad 635=145 I C 230=38 M L W 266.
3. Bala Krishtam Naidu v. Durvada Patrudu, A I R 1927 Mad 903=105 I C 405=53 M L J 568.

benamidar's legal representative. But the question of decision there was whether, when a benamidar dies after obtaining a decree, his legal representatives are entitled to come on record in preference to the beneficiary. There was no question there whether the legal representative had any interest entitling him to come on record before the decree was obtained. If, as their Lordships of the Privy Council observed, the benamidar is a trustee and his son could succeed to the trusteeship, it is clear that Ramaswami Chettiar's sons had some interest by virtue of which they could have been brought on record as legal representatives, though it may be that when the question is considered under S. 47 (3) they may not have such a right in preference to the real beneficiaries. Having regard to the dictum of the Judicial Committee and the decision of this Court in A I R 1933 Mad 635,[2] I am inclined to hold that the sons of Ramaswami Chettiar can be considered as his legal representatives in respect of the right litigated in the previous suit and that they, not having been brought on record within the time allowed, the suit abated. It follows that O. 22, R. 9 is a bar to this suit. The decree of the lower Court is therefore confirmed and the Second Appeal is dismissed with costs. (Leave to appeal applied for is granted).

C.R.K./P.R. *Appeal dismissed.*

A. I. R. 1937 Madras 103

MENON, J.

Sri Mariamman Koil Devasthanam, Irrukkangudy—Petitioner.

v.

Madras Hindu Religious Endowments Board—Opposite Party.

Civil Misc. Petn. No. 1369 of 1936, Decided on 28th August 1936.

(a) Certiorari—Writ of—Writ does not lie to quash merely ministerial order — Assessment of costs by Board—Assessment is not judicial act—No writ of certiorari could be issued.

A writ of certiorari does not lie to quash an order, merely ministerial, and it is intended for the purpose of adjudicating on the validity of acts judicial. [P 104 C 1]

Where the Madras Hindu Religious Endowment Board, acting under S. 70, Madras Hindu Religious Endowments Act, assessed the amount of costs and expenses incurred by them in connexion with the proceedings taken for the removal of person from the trusteeship and made a demand of that amount, those proceedings were sought to be quashed by an application for writ of certiorari :

Held : that the proceedings were purely administrative or ministerial, and not judicial because the determination of assessment of costs could not be said to be a determination of any question affecting the rights of subjects, much less could it be said that it was a judicial act and hence no writ of certiorari could be issued : *A I R 1930 Mad 896* ; *A I R 1932 Mad 33* and *A I R 1934 Mad 190*, *Rel. on.* [P 104 C 2]

Held further : that the Board had not in any way exceeded the authority given to them by law in assessing the amount and making a demand for it. [P 104 C 2]

(b) Madras Hindu Religious Endowments Act (2 of 1927), S. 70 (2)—Remedy provided by S. 70 (2) is not of nature of review but separate proceeding and remedy.

Remedy provided by S. 70 (2) of the Act against the decision of the Board is not in the nature of a review because it is not the Board, but only the President of the Board who, under the Statute, has the right to hear and determine the objections to the assessment and the demand, and he is entirely a different person from the Board whereas in case of a review, it is the same Court that rehears. [P 105 C 1]

(c) Certiorari—Writ of— Another remedy provided in statute—Writ cannot be granted.

A writ of certiorari should only be granted when no other suitable remedy exists. Hence where another remedy is provided by the Statute writ of certiorari cannot be granted : *A I R 1919 P C 31* and *A I R 1932 Mad 321*, *Rel. on.* [P 105 C 2]

(d) Madras Hindu Religious Endowments Act (2 of 1927), S. 68—Scope.

The words " all costs and expenses incurred in connexion with legal proceedings . . . . . " are wide enough to cover not only the amounts which the Board had to spend but also which they had to pay to others. [P 105 C 2]

A. Viswanatha Ayyar and *V. Meenakshisundaram*—for Petitioner.

K. Subba Rao—for Opposite Party.

Order.—This is an application to issue a writ of certiorari to the Madras Hindu Religious Endowments Board, to call for the records in connexion with their proceedings dated 1st August 1935, and to quash the same. The petitioner is the managing trustee of Sri Mariamman Koil Devasthanam. By an order dated 17th July 1934 he was removed from the office of trustee by the Madras Hindu Religious Endowments Board. The petitioner questioned the correctness of the order and applied for the issue of a writ of certiorari to quash the said order in C. M. P. No. 3053 of 1934, and this Court held that that order of the Board was ultra vires, and directed the Board to pay the petitioner Rs. 200 for his costs. The

Board appears to have paid the amount of costs. On 1st August 1935, the Board, acting under S. 70, Madras Hindu Religious Endowments Act, assessed the amount of costs and expenses incurred by them in connexion with the said proceedings at Rs. 560-14-0, and made a demand of the petitioner for that amount. It is those proceedings of 1st August 1935 that the petitioner wants to get quashed by this application.

The contention of the Board is that a writ of certiorari is incompetent in this matter, firstly, because the proceedings of 1st August 1935 were purely administrative or ministerial, and not judicial, and secondly, because the petitioner has a remedy provided by S. 72 (2) of the Act for questioning the correctness of these proceedings. It is also contended that the Board did not exceed the jurisdiction conferred on it by Ss. 68 and 70 of the Act in assessing the amount due by the petitioner and making a demand for it. It has been held in numerous cases that a writ of certiorari does not lie to quash an order, merely ministerial, and that it is intended for the purpose of adjudicating on the validity of acts judicial. And what are included in the term 'judicial' has again been the subject of numerous decisions. In (1878-79) 2 L R Ir 371,[1] at p. 376, May, C. J., observed as follows :

> It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connexion, the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing a liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequence would be judicial acts.

In (1931) 2 K B 215,[2] Slesser, L. J. analysing and explaining the dictum of Atkin, L. J. observed :

> Atkin, L. J. (as he then was) in *Rex* v. *Electricity Commissioners*[3] lays down four conditions under which a rule for certiorari may issue. He says : "Wherever any body of persons" (first) "having legal authority" (secondly) "to determine questions affecting rights of subjects, and" (thirdly) "having the duty to act judicially," (fourthly) "act in excess of their legal authority"—the sub-divisions are my own—"they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

In the same case Scrutton, L. J., put it as follows :

> It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition.

These decisions have been followed in this Court in numerous cases, 60 M L J 25,[4] 61 M L J 479,[5] and 57 Mad 791,[6] etc. Applying these tests to the facts of this case, it has to be seen whether this is a case in which a writ can be issued. S. 68, Madras Hindu Religious Endowments Board Act, provides that :

> All costs and expenses incurred in connexion with legal proceedings in respect of any religious endowment to which a Board or committee is a party shall, notwithstanding anything contained in S. 74, be payable out of the funds of such endowment.

Section 70 provides that :

> The costs, expenses and contributions payable under S. 68 and 69 shall be assessed on and notified to the trustee of every math and temple in the prescribed manner.

It is under these sections that the Board purported to act when it assessed the amount due by the petitioner and made a demand on 1st August 1935. This cannot be said to be a determination of any question affecting the rights of subjects, much less can it be said that in doing so they were acting judicially or they had a duty to act judicially. There were no facts to be enquired with, there was no question of any "proposal" on one side or of "opposition" on the other, and not even a notice was necessary to be given to the petitioner before the amount was assessed or a demand made. Further, in view of Ss. 68 and 70 of the Act, it cannot at all be contended that the Board had in any way exceeded the authority given to them by law in assessing the amount and making a demand for it. The

1. Queen v. Corporation of Dublin, (1878-79) 2 L R Ir 371.
2. King v. London County Council, (1931) 2 K B 215=100 L J K B 760=144 L T 464=75 S J 138=95 J P 89=29 L G R 252.
3. (1924) 1 K B 171=93 L J K B 390=130 L T 164=88 J P 13.
4. Venkataratnam v. Secy. of State, A I R 1930 Mad 896=128 I C 851=53 Mad 979=60 M L J 25.
5. Muniswami Chetty v. The Board of Land Revenue and Settlement Madras, A I R 1932 Mad 33=135 I C 705 = 55 Mad 137=61 M L J 479.
6. Tirumala Chettiar v. Chellam Pillai, A I R 1934 Mad 190=148 I C 477=66 M L J 468=57 Mad 791.

proceeding of 1st August 1935 cannot therefore be said to be such that a writ of certiorari can be issued in respect of it. Another contention raised by Mr. Subba Rao is that, as the petitioner has another remedy provided for by the statute itself, a writ cannot be issued. S. 70 (2) (b) provides :

> On the receipt of a requisition under Cl. (a), the Collector shall issue a notice to the trustee concerned requiring him, within 15 days from the service of such notice, either to pay the amount mentioned in the requisition and specified in the notice or to state in writing his objections, if any, thereof.

Clause (d) provides :

> If, within the said period, an objection in writing is received by the Collector from the trustee with regard either to his liability or to the amount specified in the notice, the Collector shall transmit such objection to the President of the Board.

And Cl. (e) provides :

> The President of the Board shall consider the objection so transmitted and communicate to the Collector his decision confirming, withdrawing or modifying the original demand.

If therefore the petitioner had any valid objection to the assessment and demand made by the Board, he had a right to object to it, and such objections would have been heard and determined by the President of the Board. Mr. Viswanatha Ayyar for the petitioner contends that this remedy, being more or less, in the nature of a review, cannot be said to be a separate remedy. I am unable to agree with him; it is not the Board but only the President of the Board who, under the statute, has the right to hear and determine the objections to the assessment and the demand, and he is entirely a different person from the Board. It would also appear that the petitioner availed himself of the remedy provided by the Act under S. 70 (2) (d) and filed an objection petition and that it had been heard and decided by the President of the Board and the original demand confirmed on a subsequent date, viz., 10th February 1936. Mr. Subba Rao pointed out that, if at all, it is that order alone that could be the subject of a writ. Mr. Viswanatha Ayyar therefore made an oral application that he should be allowed to amend this application so as to make it refer to the proceedings of the Board dated 10th February 1936. That was opposed by the respondent. As the petitioner was fully aware of the proceedings of 10th February 1936 before he filed this application on 23rd March 1936 and he chose to call into question the proceedings of 1st August 1935 only and not those of the latter date, I do not think he is entitled at this stage to convert this petition into one for quashing the proceedings of 10th February 1936, even if an amendment could be allowed in petitions of this kind. It is thus clear that the petitioner had another remedy provided for by the statute itself and that he availed himself of it. It is well settled that a writ of certiorari should only be granted when no other suitable remedy exists; *vide* 43 Mad 146[7] at p. 160 and 35 M L W 360.[8] For this reason also, it must be held that this is not a case in which a writ should be issued.

Even assuming that the proceedings of 1st August 1935 should be considered to be judicial and that the petitioner had no other remedy, the question is whether the petitioner had a good case on the merits. The amount for which demand was made included not only the expenses incurred by the Board but also the amount of costs ordered to be paid by the Board to the petitioner. Mr. Viswanatha Ayyar contends that under S. 68 it is only the amount which the Board had spent and not what they had to pay to others that they could get from the endowment concerned. There would have been some force in this contention if S. 68 referred only to the costs incurred in connexion with legal proceedings to which the Board was a party, but the wording of S. 68 is "All costs and expenses incurred in connexion with legal proceedings . . . ." These words are wide enough to cover the amounts which the Board had to spend and also which they had to pay to others. There is therefore no substance in this contention also. It is clear from what has been said above that the Board did not exceed its jurisdiction in assessing and making a demand for the amount and that the proceedings which the petitioner wants to get quashed in this petition are not judicial at all but only ministerial or administrative, and that the petitioner had a remedy provided by the same statute to have his objections heard and decided and that he availed himself of it. It follows that no writ should be issued.

7. Annie Besant v. Advocate General of Madras, A I R 1919 P C 31=52 I C 209=20 Cr L J 593=46 I A 176=43 Mad 146 (P C).
8. Govindaswami Pillai v. Ramalinga Swami, A I R 1932 Mad 321=137 I C 868=62 M L J 644=35 M L W 360.

The petition is therefore dismissed with costs. Advocate's fee Rs. 100.

C.R.K./B.D. *Petition dismissed.*

A. I. R. 1937 Madras 106

VARADACHARIAR AND MOCKETT, JJ.

(*Sri Mahant*) *Sitaram Dass Bavaji*—Appellant.

v.

Madras Religious Endowment Board, Madras and *others*—Respondents.

Appeal No. 189 of 1931, Decided on 14th September 1936, against decree of Dist. Court, Ganjam, in O. S. No. 34 of 1928.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 63—Board has power to settle list of properties belonging to institution.

The power given by S. 63 to the Board of framing a scheme for the management of an institution carries with it the power to settle what the properties of the institution are, so that the authority framing the scheme may know what properties are to be governed by the scheme and what the resources are, whose disposal is to be provided for by the scheme. The Board is therefore entitled to settle the list of the properties belonging to the institution : *A I R 1921 Mad 563*; *A I R 1924 P C 221* and *A I R 1936 Mad 449, Rel. on.* [P 106 C 2]

(b) Madras Hindu Religious Endowments Act (2 of 1927), S. 63—Board can appoint associate trustee under S. 63—But S. 63 does not contemplate that person so appointed is in effect to supersede existing trustee—Provisions of scheme resulting in substantial supersession of existing trustee are not warranted by Act.

Although the Board can under S. 63 make the appointment of an associate trustee, S. 63 does not contemplate that the person so appointed is in effect to supersede the existing trustee. [P 107 C 1]

Where the scheme provides that the new trustee is to have the management of the institution, with a vague direction that, in so managing it, he may avail himself of the help and advice of the mahant in all important matters and that in matters in which the mahant might not co-operate with him, he (new trustee) should have the power to act independently of him, such a kind of substantial supersession of the Mahant is not warranted by the terms of S. 63 and there should be a general provision in the scheme that the new trustee will have the powers which a co-trustee will have under the general law. [P 107 C 1,2]

B. Jagannadha Dass—for Appellant.

P. V. Rajamannar—for Respondents.

Varadachariar, J.—This appeal arises out of a suit under S. 63 (4), Hindu Religious Endowments Act, impugning a scheme framed by the Board for the management of a group of mutts. Only two points have been pressed before us : (1) as to the propriety of giving the associate trustee overriding powers over the Mahant and (2) as to the power of the Board to settle a list of properties belonging to the institution. The latter point may be briefly disposed of. It does not appear from the record whether any objection was taken by or on behalf of the Mahant before the Board about the properties to be included in the list attached to the scheme of properties belonging to the mutt. We cannot agree with the contention advanced by Mr. Jagannadha Dass, on behalf of the Mahant, that the Board has no power to settle such a list. S. 63 undoubtedly gives power to the Board to frame a scheme for the management of the institution and this power carries with it the power to settle what the properties of the institution are, so that the authority framing the scheme may know what properties are to be governed by the scheme and what the resources are, whose disposal is to be provided for by the scheme. A question of this kind was raised before this Court in 41 M L J 20[1] and the learned Judges held that in a suit under S. 92, Civil P. C., asking for the framing of a scheme, the Court has the power to settle the question whether certain properties belong to the institution or not. This decision was confirmed on appeal by the Privy Council in 47 Mad 884,[2] and though the question of the Court's power was not specifically raised before their Lordships, the Judicial Committee did deal with the merits of the claim, thus clearly implying that this was within the legitimate scope of the Court's power when framing a scheme. Some observations on this question will also be found in 43 M L W 409.[3]

In the lower Court an attempt was also made to prove that some of the properties included in the list attached to the scheme (Ex. F) are the private properties of the Mahant and do not belong to the mutt. In support of that claim, reliance was placed on the circumstance that these pro-

1. Vaithinatha Iyer v. Tyagaraja Iyer, A I R 1921 Mad 563=68 I C 631=41 M L J 20,
2. Vaidhyanatha Iyer v. Swaminatha Iyer, AIR 1924 P C 221=82 I C 804=51 I A 282=47 Mad 884 (P C).
3. Anjaneya Sastri v. Kothandapani Chettiar, A I R 1936 Mad 449=164 I C 615=43 M L W 409.

perties came to the present Mahant under the will of his predecessor (Ex. D). As the learned Judge has pointed out, this will makes no distinction between the properties now claimed as the private properties of the Mahant and the other properties in respect of which no doubt has been raised as to the ownership of the mutt. From the few sale deeds filed in the case, it no doubt appears that some of those properties were purchased in the name of the prior Mahant; but it being admitted that he was an ascetic and celibate and the head of the institution, the probabilities are that they were purchased with the funds of the institution. At any rate, in the absence of anything to show any difference in his method of dealing with these properties, as compared with the other admitted properties of the institution, the Court is entitled to draw the inference that he purchased them for the benefit of the institution. We therefore see no reason to interfere with the lower Court's decision on this point.

Proceeding next to the objection taken to Cls. 2 and 3 of the scheme, we think that the appellant's objection to these clauses is well founded. We agree with the learned Judge that the circumstances justify the appointment of an associate trustee; but S. 63 does not contemplate that the person so added is in effect to supersede the Mahant. Cl. 2 of the scheme almost makes it clear that the new trustee is to have the management of the institution, with a vague direction that in so managing it he may avail himself of the help and advice of the Mahant in all important matters. We are not satisfied that this kind of substantial supersession of the Mahant is warranted by the terms of S. 63. Cl. 3 of the scheme gives further effect to the principle underlying Cl. 2 by declaring that in matters in which the Mahant might not co-operate with the paid trustee, the paid trustee should have the power to act independently of him. It is true that the scheme draws a distinction between religious matters and secular matters and leaves the Mahant comparatively free in religious matters. This distinction is more easily drawn on paper than worked in practice. But apart from that consideration, for the reasons we have already given, this kind of special power conferred on the new trustee is not warranted by the Act. We appreciate the necessity for some provision to ensure the working of the institution in the event of a deadlock between the two trustees; but the Board or other competent authority must devise some means of ensuring it in a form consistent with the provisions of the Act. We must accordingly direct that Cls. 2 and 3 of the scheme (Ex. F) must be omitted and a general provision inserted that the paid trustee appointed under Cl. 1 shall have the powers which a co-trustee will have under the general law.

We are informed that the locality in which the suit institution is situate has now ceased to form part of this Presidency and we do not know which authority will in the new state of things be competent to deal with this institution by way of supervision. All that we can do at this stage is to leave the matter with the above direction, so that any other authority competent to give further directions may do so when the contingency contemplated by Cl. 6 of the scheme is availed of. The appeal is accordingly allowed to the extent above indicated and in other respects dismissed. There will be no order as to costs because the parties succeed in part and fail in part.

Mockett, J.—I agree.

Under S. 63 (1) (c), Hindu Religious Endowments Act, provision is made for associating one or more persons with the trustee for the purpose of participating or assisting in the administration of the endowments. By that I understand that the person appointed is to participate with the trustee and to assist the trustee. What has happened in this case is that a paid trustee has been appointed who, as I understand Cl. 2 of the scheme, has the right to have his views and intended actions prevail over the present Mahant and the result seems to be that the position of the Mahant is virtually negligible. It is the paid trustee who is to manage the institution; he can ask for the advice and the help of the Mahant but nothing is said about the necessity for him to accept them and the whole of that part of the scheme is qualified by the most ambiguous words "in all important matters." Then in Cl. 3 "if the Mahant does not co-operate, the paid trustee can act independently." It seems to me the result is that the Mahant remains there as a mere cipher so far as secular matters are concerned and so far as the powers are concerned he might very well have been removed. In my view this position is not contemplated by any of the

relevant provisions of the Act. If the Board desire to remove the trustee, provision is made by S. 73. If they desire to retain him then provision must be made as indicated by my learned brother for a scheme by which he continues to function but in co-operation with somebody else nominated by the Board.

C.R.K./R.M. *Order accordingly.*

A. I. R. 1937 Madras 108

CORNISH, J.

V. K. K. Peer Bathummal Beevi — Appellant.

v.

Nagur Meerammal Beevi and *others* — Respondents.

Appeals Nos. 13 and 29 of 1934, Decided on 1st September 1936, against appellate order of Sub-Judge, Tinnevelly, in A. S. Nos. 18 and 17 of 1933.

Execution — Powers of executing Court — Party dismissed from suit as unnecessary party, subsequently brought on record in execution proceedings as legal representative of judgment-debtor — Property sold claimed by such party in his own right — Executing Court can decide claim under S. 47, Civil P. C.

No doubt, where a party has been dismissed from a suit as an unnecessary party, he is no longer a party to the suit and the executing Court has no power to decide a question of title regarding the property sold in execution which would be binding on him but where such party is subsequently brought on record as the legal representative of the judgment-debtor, he becomes a party to the execution proceedings and the executing Court has jurisdiction under S. 47, Civil P. C., to decide a claim to the property sold put forward by such party in his own right and not on behalf of some third person : *26 Mad 501* ; *A I R 1935 Mad 923* and *17 Cal 711 (F B)*, *Rel. on* ; *A I R 1918 Mad 911* ; *A I R 1930 Mad 817* ; *8 All 626* and *31 Mad 125*, *Ref.* [P 108 C 1, 2]

B. Sitarama Rao and *G. Jagadeesa Aiyar*—for Appellants.

S. K. Ahmed Meeran and *C. A. Mahomed Ibrahim*—for Respondents.

Judgment. — The appellant was the plaintiff in a mortgage suit against defendant 1 in the suit. Defendant 2 was made a party to that suit, but was dismissed as an unnecessary party. The appellant obtained a decree on his mortgage, and then defendant 1 died. Defendant 2 was brought on record as legal representative of defendant 1 and there is no doubt that she was properly brought on record as his legal representative. In execution the appellant purchased the property, but when he tried to get possession he was resisted by defendant 2 who claimed title to the property in her own right and independently of the judgment-debtor. The appellant then took proceedings under O. 21, R. 95. Parenthetically it may be observed that this rule had no application as defendant 2 was not claiming under a title created by the judgment-debtor. However, the Court decided that it could not determine the question of title, but made an order for symbolical possession in favour of appellant. This empty victory did not satisfy the appellant who appealed. His appeal was dismissed, and he has appealed to the High Court.

The learned advocate for the respondent (who is the original defendant 2 in the suit) has taken the preliminary objection that no appeal lies. That question of course depends on whether the disputed title could and should have been determined by the executing Court under S. 47. No doubt defendant 2, having been dismissed from the suit, was no longer a party to the suit, and if nothing more has happened the executing Court could have given no decision regarding title to the property sold which would have been binding on defendant 2. 40 Mad 964[1] and 54 Mad 81[2] are sufficient authority for that position. But defendant 2 had afterwards been brought on record as the legal representative of defendant 1, judgment-debtor. In that capacity she had become a party to the execution proceedings, and upon the authority in 26 Mad 501,[3] A I R 1935 Mad 923[4] and 17 Cal 711,[5] (to cite only a few of the cases brought to my notice), I think there can be no doubt that her claim to the property in her own right could be determined by the executing Court under S. 47.

The case is different, as illustrated by 8 All 626[6] and 31 Mad 125,[7] where a claim

1. Krishnappa v. Periaswami, A I R 1918 Mad 911=38 I C 297=40 Mad 964=32 M L J 532.
2. Abdul Sac v. Sundara Mudaliar, A I R 1930 Mad 817=127 I C 805=54 Mad 81=59 M L J 932 (F B).
3. Vengapayan v. Karimpanakal Parvati, (1903) 26 Mad 501.
4. Machamma v. Kanakamma, A I R 1935 Mad 923=158 I C 410.
5. Punchanum Bundopadhya v. Rabia Bibi, (1890) 17 Cal 711 (F B).
6. Bahorilal v. Gauri Sahai, (1886) 8 All 626= 1886 A W N 228.
7. Budrudeen Sahib v. Abdul Rahim Sahib, (1908) 31 Mad 125=18 M L J 21.

is advanced on behalf of some third person, as by a trustee on behalf of his trust or beneficiary. But where the party before the Court is there as legal representative of the judgment-debtor and claims to be entitled to the property in her own right, the authorities to which I have referred show that the executing Court can determine the question in dispute. For these reasons I think the preliminary objection fails, and that the appeal lies. It is obvious that the executing Court has failed to do what it should have done and the case must go back for it to determine the question of title raised by defendant 2. The costs of these appeals in this case as well as in lower appellate Court will abide the result of that determination. (Leave refused).

C.R.K./R.M. *Order accordingly.*

A. I. R. 1937 Madras 109

BURN AND LAKSHMANA RAO, JJ.

Delli Venkataramadass Pantulu — Appellant.

v.

Nippani Venkataramanayya Pantulu and *others*—Respondents.

Appeal No. 481 of 1934, Decided on 18th September 1936, against order of District Court, Ganjam, D/- 4th April 1934.

Execution—Jurisdiction—Powers of executing Court—Decree not providing for interest—Judgment-debtors denying alleged agreement to pay interest—Court cannot be compelled to hold enquiry into alleged agreement—No question of estopping judgment-debtors from denying liability for interest arises.

An executing Court, on an application for an execution of a decree in which no interest is provided, cannot be compelled to hold an enquiry into an alleged agreement to pay interest in execution, when the judgment-debtors deny the agreement. It amounts, in effect, to asking the Court in execution to modify the decree and the executing Court has no power to so modify it. [P 109 C 2]

Till this agreement to pay interest is established, the questions of estopping the judgment-debtors from denying the liability for interest and the decree-holder's right to recover interest in execution cannot arise: *15 Beng L R 383 (P C), Rel. on.* [P 109 C 2]

B. V. Ramanarasu—for Appellant.

C. Rama Rao—for Respondents.

Judgment..—In our opinion the decision of the learned District Judge is correct. We cannot agree with Mr. B. V. Ramanarasu that the question in dispute was res judicata. The learned advocate admits that there was no express adjudication, and in the face of the learned District Judge's order dated 21st April 1931 it is impossible to hold that the doctrine of constructive res judicata can be applied.

Mr. B. V. Ramanarasu's next contention is that the judgment-debtors are estopped by their own conduct in entering into an agreement with him for payment of interest, from denying their liability to interest. He relies on 48 M L J 121[1] and the Privy Council cases cited therein. But in all those cases there was a security bond in favour of the Court and an order of the Court accepting or sanctioning the arrangement made between parties out of Court; or at the least there was no denial, and no possibility of denial of the fact of the agreement. Here the agreement itself is denied by the judgment-debtors and nobody can suggest that they are estopped from denying it. Till the agreement is established, the question of estopping the judgment-debtors from denying the liability for interest and the decree-holder's right to recover interest in execution cannot arise. The real point is whether an executing Court, on an application made for execution of a decree in which no interest is provided, can be compelled to hold an enquiry into an alleged agreement to pay interest in execution, when the judgment-debtors deny the agreement. There is no authority for such a proposition. This is in effect asking the Court in execution to modify the decree. In our opinion the Court executing the decree has no power to modify it in the manner suggested, and cannot be compelled to enter upon such an enquiry. It is expressly recognized in 2 I A 219[2] by their Lordships of the Privy Council that:

All the High Courts of India have accepted as settled law these propositions first, that where the decree is silent as to interest or mesne profits the Court executing the decree cannot under the clause in question assess or give execution for such interest or mesne profits.

In that case the judgment-debtor's obligation to account for subsequent mesne profits arose out of proceedings in the

1. Subramania Pillai v. Corera, A I R 1925 Mad 457=86 I C 723=48 M L J 121.
2. Sadasiva Pillai v. Ramalinga Pillai, (1874) 15 Beng L R 383=2 I A 219=24 W R 193=3 Sar 519 (P C).

same suit subsequent to the decree (p. 233). This appeal is dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

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* A. I. R. 1937 Madras 110

SPECIAL BENCH

VENKATASUBBA RAO, VARADACHARIAR AND HORWILL, JJ.

P. Sivasuryanarayana Chetti—Appellant.

v.

P. Audinarayana Chetti and *another*—Respondents.

City Civil Court Appeal No. 11 of 1934, Decided on 20th October 1936, against decree of Court of City Civil Judge, Madras, in O. S. No. 52 of 1933.

*** Hindu Law—Adoption — Widow — Consent of sapindas — Revocation of—Sapinda, upon dispassionate consideration and without any fraudulent or corrupt motive giving consent to adoption by widow — Sapindas cannot revoke it arbitrarily or capriciously.**

The assent of the sapinda is presumptive evidence of the bona fides of the widow's acts. That being the essence of doctrine of consent, a sapinda cannot at his pleasure withdraw his consent. The discretion in the exercise of his consent does not necessarily carry with it the power to revoke. This is contrary to the spirit of Hindu law, which treats a sapinda's consent as amounting to an expression of his opinion that the adoption conduces to the spiritual benefit of the deceased person. Therefore where a sapinda upon a dispassionate consideration of the question, and with the honest motive of conferring spiritual benefit on the soul of the deceased and without any fraudulent or corrupt motive, once gives his consent, he cannot arbitrarily or capriciously withdraw it : *A I R 1919 Mad 1077, Approved.* [P 111 C 2]

Quaere.—Whether sapinda can revoke his consent so given for justifiable reasons. [P 111 C 2]

T. M. Krishnaswamy Ayyer — for Appellant.

Radhakrishnayya, Y. Venkatasubramaniam and *R. Venkatasubba Rao*—for Respondents.

Venkatasubba Rao, J.—This appeal was directed to be posted before a Bench of three Judges, as it was thought it would become necessary to examine conflicting decisions on the points raised. The facts have been fully and lucidly set out by Mr. Ramappa in his judgment and we shall therefore refer only to such of them as have an immediate bearing on the questions at issue. There were three brothers Audinarayana, Venkatasubbayya and Subbaroya. Venkatasubbayya died in 1926 and his minor son is the plaintiff. Defendant is the widow of Subbaroya, who died in 1931. Audinarayana, the surviving brother is, defendant 1. The plaintiff alleged in his plaint that on the strength of defendant 1's consent, which he attacked as being fraudulent and corrupt, defendant 2 proposed to take in adoption, a boy by name Radhakrishna, her brother's son, and the suit was brought for a declaration that the consent was invalid and for an injunction restraining the widow from making the intended adoption.

We must at the outset state that in the lower Court it was objected on behalf of the defence, that a suit such as the present, asking for a declaration of the sort claimed, is not legally maintainable. This objection was expressly abandoned before us and therefore we have not had to consider the question whether the present suit does lie or not. We refer to this, in order to guard against our decision being understood as involving any pronouncement on that point. Now to return to the facts, defendant 1's consent was given by a deed dated 26th January 1933, which was registered. The suit was filed on the following day, i. e., 27th January, and on 24th July, when the action was pending, defendant 1 sent a notice to the widow revoking his consent.

Two questions have been raised: first, whether defendant 1's consent was given with a fraudulent or corrupt motive and was therefore not sufficient to validate the adoption, and secondly, whether the subsequent revocation was proper and valid. It is suggested that three motives influenced defendant 1 in giving his consent. He had a grand-daughter (daughter's daughter) and he is alleged to have favoured the adoption with the view of getting this girl married to the boy taken in adoption. This argument, if valid, would affect not the adoption of any particular boy but any adoption whatsoever. The parties in question belong to a family known as Bokkali and Radhakrishna is a member of the Seruepalli family. It was hinted with reference to this contention, that if the adoption was of a Bokkali boy, such a marriage as the one that was contemplated, could not take place. It is hardly necessary to remark that this is an assumption totally wrong, as the boy to whatever family he originally belonged, would upon adoption be a Bokkali boy. Then the question resolves itself into: did

defendant 1 consent to the adoption with the view of getting his grand-daughter married to a boy of this very family? This argument does not seem to have been pressed in the lower Court, as there is no reference to it in the judgment of the learned City Civil Judge. Moreover, granting for a moment that such an idea was entertained by defendant 1, the argument seems to treat a mere hope or a bare expectation as amounting to an inducing motive. That defendant 1 formed an honest judgment and was not actuated by any fraudulent motive appears clearly from his own evidence. Such idea as he had in regard to the marriage, he does not suggest he communicated to the widow, nor does he say that there was any sort of understanding between them in regard to it. He certainly was not over-friendly to the widow and yet was constrained to admit that when he gave his consent, what influenced him was the spiritual benefit that would be conferred upon his deceased brother's soul.

Secondly, it is urged that from certain circumstances it ought to be inferred that defendant 1's consent was bought. It is unnecessary to set forth in any detail the circumstances that led to the filing of the two suits referred to in the judgment of the Court below. The argument is, that the widow agreed to forego a substantial part of her claim in C. S. No. 257 of 1932 and the obtaining by her of defendant 1's consent, was a part of this corrupt bargain. It was on 10th January 1933 that the widow and defendant 1 agreed to settle their disputes. This agreement was reduced in writing and it contains a clause which distinctly provides that the adjustment of the widow's suit as mentioned above is conditional upon defendant 1 withdrawing his counter-suit and the present plaintiff assenting to that course. The plaintiff was a party to the last mentioned action and it was contemplated that his next friend's consent was to be obtained for its withdrawal. The agreement therefore between defendant 1 and the widow was perfectly open and above board, and the plaintiff's next friend, when informed of it, refused to accede to the withdrawal of defendant 1's suit; indeed the action was kept alive at his instance to be actively prosecuted. Thus the intended settlement between the widow and defendant 1 fell through and it was subsequent to this that the latter gave his consent to the adoption. There is thus no substance in the contention that the giving of the consent was a part of any corrupt bargain.

Thirdly, it is stated that it was with a view to spite the plaintiff that defendant 1 gave his consent. It is suggested that as the conduct of the plaintiff's next friend prevented the settlement of the pending disputes, defendant 1 with the object of retaliating on the plaintiff gave his consent. There is not a shred of evidence in support of this and even defendant 1 repudiates in his evidence, any connexion between his consent and the proposed withdrawal of the suit. Then we pass on to the question whether a sapinda's consent is revocable and, if so, whether the revocation here, is valid. As the lower Court points out, defendant 1, in revoking his consent, acted arbitrarily. As already mentioned, he gave his consent on 26th January 1933; in his written statement filed on 23rd March there is a re-affirmation by him of his previous consent, which he wishes should remain in force. But within a few months, he changed his mind and purported to cancel it, but had the honesty to admit in the witness-box that his revocation was due to "family misunderstandings," though he would add that he would prefer a Bokkali boy.

On this evidence the learned Judge's conclusion that the revocation was arbitrary is perfectly justified. As Seshagiri Ayyar, J. points out in 41 Mad 604,[1] the assent of a sapinda is presumptive evidence of the bona fides of the widow's act. That being of the essence of the doctrine of consent, it is impossible to uphold the contention that a sapinda may at his pleasure withdraw his consent. It has been faintly argued that the discretion in the exercise of which a sapinda gives his consent necessarily carries with it a power to revoke it. This is contrary to the spirit of the Hindu law, which treats a sapinda's consent as amounting to an expression of his opinion that the adoption conduces to the spiritual benefit of the deceased person. We without hesitation concur in the view of Seshagiri Ayyar, J. that when a sapinda upon a dispassionate consideration of the question once gives his consent he cannot arbitrarily or capriciously withdraw it. Whether he can do so for justifiable reasons is a matter we need not go into,

1. Suryanarayana v. Ramdoss, A I R 1919 Mad 1077=43 I C 526=41 Mad 604=34 M L J 87.

for, in the present case, there is not a shadow of justification for suggesting that such reasons exist.

Some analogy was suggested between a husband's authority and a sapinda's consent, but it is hardly necessary to remark that in this respect they are entirely dissimilar. That a husband can revoke his authority can admit of no doubt, although the statement by Sirkar that he may revoke it "at any time before adoption" is somewhat misleading, as any adoption by the widow must necessarily be only after the husband's death and at that time no question of revocation by him can possibly arise (Sirkar's Hindu Law of Adoption, Edn. 2, p. 237). In the result, the appeal is dismissed with costs of respondent 2.

C.R.K./M.D. *Appeal dismissed.*

A. I. R. 1937 Madras 112

PANDRANG ROW, J.

M. Ramaswamiah—Appellant.

v.

Proddatur Co-operative Building Society—Respondent.

Appeal No. 86 of 1933, Decided on 24th April 1936, against appellate order of Dist. Court, Cuddapah, in A. S. No. 66 of 1932.

Jurisdiction—Pecuniary and territorial—Objection to—Provisions of S. 21, Civil P. C., do not apply to objections to pecuniary jurisdiction.

The provisions of S. 21, Civil P. C., to the effect that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice, do not apply to a case where the objection is to the pecuniary jurisdiction of the Court.

[P 113 C 1]

Advocate-General and *Ch. Raghava Rao*—for Appellant.

B. Somayya and *D. R. Krishna Rao*—for Respondent.

Judgment.—This is an appeal from the decree of the District Judge of Cuddapah, dated 13th March 1933, confirming on appeal the order of the District Munsif of Proddatur, dated 19th July 1932 in E. P. No. 984 of 1931, which was an application made under Rule XIV-5 (b) of the Rules framed by the Local Government under S. 43, Co-operative Societies Act of 1912, The Deputy Registrar of Co-operative Societies made an award or decree for the amount claimed against one M. Ramaswamiah for a sum of Rs. 4,400 odd and application was made to the District Munsif of Proddatur for the purpose of its being enforced. Rule XIV-5 (b) is to the following effect:

> The decision or award (of a Registrar) shall be enforced on application to the civil Court having jurisdiction over the subject matter of the decision or award. That Court shall then enforce the decision or award as if it were a decree of the Court.

It is clear that the subject matter of the decision or award was the liability of the appellant to pay a sum of Rs. 4,400 odd to the Co-operative Building Society who made the application. The subject matter was thus beyond the pecuniary jurisdiction of the District Munsif of Proddatur which is limited to Rs. 3,000. It is clear therefore that the District Munsif to whom the application was made had no jurisdiction to enforce the decision or award which was in excess of his pecuniary jurisdiction. The point is very clear, and it is a matter of surprise that this was not perceived by the District Munsif of his own accord. Objection was taken to his jurisdiction but it was not made very clear that the objection was on the ground that the subject matter of the decision or award exceeded the pecuniary jurisdiction of the District Munsif. Some misunderstanding arose because objection was also taken at the same time to the jurisdiction of the Deputy Registrar to make the award. The contention of the appellant was put in the following words:

> As the decree in question was passed when no reference was or could be pending before the Deputy Registrar, it was passed without jurisdiction. It is therefore null and void. The decree is therefore not executable, nor is it executable by this Court.

The last few words appear to adumbrate an objection to the pecuniary jurisdiction of the Court. But the significance of those words was not perceived, and the District Munsif only dealt with the question whether Deputy Registrar had jurisdiction to pass the decision or award or make the decree in question, and having answered this question in the affirmative, he came to the conclusion that he had nothing else to do but to enforce it. Objection on the score of pecuniary jurisdiction was taken expressly in the lower appellate Court, and in fact that was the only point taken during the appeal and argued before the lower appellate Court. That objection was overruled on the curious ground that the

objection was one which came within the provisions of S. 21, Civil P. C., and could not therefore be entertained because it was not made in the first Court, that is to say, at the earliest possible opportunity. Even assuming that the objection had not been made in the first Court, it is obvious that S. 21, Civil P. C., relates to objections as to place of suing and it has nothing to do with any objection to the pecuniary jurisdiction of the Court. It is therefore clear that the provisions of S. 21, Civil P. C., to the effect that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice, do not apply to the present case. The learned District Judge has dealt with the objection on an entirely unsustainable ground under the belief that the objection was one to which S. 21, Civil P. C., applied. The objection really was to the pecuniary jurisdiction of the Court, and as the objection was clearly well founded it ought to have been allowed. The objection is one which goes to the root of the jurisdiction of the original Court to whom the application was made, and the objection which has to be allowed has the result that the Court to which the application was made was not competent or had no authority to deal with it. That being the case the application should have been dismissed in limine on this ground, if not by the first Court, at least by the lower appellate Court. This civil miscellaneous second appeal must therefore be allowed with costs in this Court and in the Courts below, and the application of the Co-operative Building Society dismissed. (Leave to appeal refused).

C.R.K./B.D. *Order accordingly.*

A. I. R. 1937 Madras 113

CORNISH, J.

Sriredddi Venkataraju and *others* — Appellants.

v.

Allam Gangaraju and *others*—Respondents.

Appeal No. 47 of 1934, Decided on 24th September 1936, against appellate order of Sub-Judge, Narasapur, D/- 17th October 1933.

1937 M/15 & 16

Execution—Limitation—Execution application filed within 12 years from date of decree—Notice to party representing one defendant served after expiry of 12 years—Application held within time.

Execution application was filed within 12 years from the date of decree, but notice to a party representing one of the defendants was served after expiry of 12 years:

Held: that the application was not barred unless it was in the nature of a fresh application after 12 years' limit; [P 113 C 2]

Held further: that the application having been made within the prescribed time limit, the notice required to go to somebody representing one of the defendants was only ancillary to that application and could not be treated as a fresh application; [P 113 C 2]

Held also: that an application made within 12 years' limit does not preclude an order being made on it after that period: *6 Mad 359, Rel. on.* [P 113 C 2]

P. Somasundaram—for Appellants.

V. Suryanarayana—for Respondents.

Judgment. — The appellants are the legal representatives of the decree-holder. He obtained his decree on 15th October 1918. On 7th November 1929 the appellants made an application to have the decree transmitted to another Court for execution. In the meanwhile there had been protracted attempt to serve defendant 3 with notices. Defendant 1 had been served and defendant 5 had been served; but defendant 1, the father and guardian of defendant 3, refused service on his behalf, and when the appellants got defendant 3's mother appointed his guardian, that woman was never at the address to which the notice was sent. At long last on 30th October 1930 a Court clerk was appointed guardian. By that time, of course, 12 years from the date of the decree had passed. The Court to which the decree was transmitted returned it to the transmitting Court to determine question of limitation. And upon this both the lower Courts have held that the execution application is barred. It was not barred unless it was in the nature of a fresh application after the 12 years' limit laid down by S. 48. The application itself, having been made on 7th November 1929, was within the prescribed time limit, and it seems to me that the notice required to go to somebody representing defendant 3 was only ancillary to that application and could not be treated as a fresh application. It is settled that an application made within the 12 years' limit does not preclude an order being made on it after that period: 6 Mad 359.[1] In my opinion,

1. Virarama v. Annaswami, (1883) 6 Mad 359.

therefore S. 48 did not bar the application. On this conclusion it is not necessary to consider the question of fraud. The appeal is allowed and the matter will be remanded for disposal. But in view of the dilatoriness of the appellants in pursuing their remedies I make no order for costs in this appeal. The appellants will have their costs in the lower Courts.

C.R.K./K.B. *Case remanded.*

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* A. I. R. 1937 Madras 114

VENKATARAMANA RAO, J.

(*Sivapuram*) *Kotayya* and *another* — Appellants.

v.

(*Sivapuram*) *Subbaya*—Respondent.

Appeal No. 198 of 1935, Decided on 2nd September 1936, against order of Sub-Judge, Kurnool, D/- 27th September 1934.

*** Res judicata — Suit by landlord to eject tenant and recover possession—Tenant denying lease and title of landlord and claiming adverse possession — In previous litigation between them, finding by trial Court as regards title and lease, in favour of landlord but suit and appeal there-from dismissed on ground of failure to give notice to quit to tenant — Tenant disallowed costs for failing to prove his title — Appeal by tenant in which title again raised, dismissed— Findings as regards title, lease and adverse possession are res judicata in subsequent suit.**

Though a finding on an issue may not be necessary for disposal of the suit, yet if a party invites the decision of the Court on that issue and the Court also considers it necessary to go into it and gives findings thereon, the decision on that issue will constitute res judicata in a subsequent suit, provided that the party against whom there was a finding on that issue, would be in a position to carry the matter in appeal. [P 115 C 1, 2]

A landlord instituted a suit against his tenant for ejectment and recovery of possession. The tenant denied the lease and title of the landlord and claimed adverse possession. In the previous litigation between them Court found in favour of landlord as regards lease, title and adverse possession but dismissed the suit and appeal therefrom on ground that the landlord failed to serve a notice on the tenant to quit but disallowed costs of defendant. Tenant's appeal as to costs was also dismissed as he set up false pleas :

Held : that the tenant by his appeal invited the appellate Court to give decision on the question of title and of the lease and that the finding as regards the title, lease and adverse possession and the order relating to costs were related to each other as cause and effect and hence the findings in the previous suit operated as res judicata in the subsequent suit by landlord against the tenant for ejectment and recovery of possession : *Case law discussed.*

[P 115 C 1 ; P 116 C 1 ; P 117 C 1]

L. S. Veeraraghava Ayyer and *M. V. Venkatesan*—for Appellants.

B. Somayya—for Respondent.

Judgment.—The question raised in this appeal is one of res judicata. The facts necessary for the disposal of this may be shortly stated. The suit is in ejectment against the defendant and for recovery of possession of certain lands on the ground that the defendant is in occupation thereof as a tenant under a lease given by the plaintiffs. The defence is a denial of the lease as well as the title of the plaintiffs. Previous to the institution of this suit the plaintiffs filed a suit, O. S. No. 4 of 1925, on the file of the District Munsif's Court of Markapur for recovery of possession of the lands from the defendant alleging that they are the owners thereof, that they leased the land to the defendant, that the defendant was unlawfully setting up title thereto and prayed that the right of the plaintiffs in the suit land may be declared and possession be delivered to them free of any objection by the defendant. The defendant filed a written statement in that suit stating that he had a right to a half-share in the said property and that the plaintiffs had no right to possession or enjoyment of the entire land, that the plaintiffs never leased the land to him and so far as his half-share was concerned he was entitled to enjoy the same with absolute right. He also set up enjoyment by adverse possession. The following issues were raised in the case :

(1) Whether the alleged lease is true ? (2) Whether the defendant has been in adverse possession of the suit land for over 12 years ? and (3) Whether the suit is bad for want of notice ?

The learned District Munsif who tried the suit went fully into the question and held that the plaintiffs' title as alleged in the plaint should be found in their favour, that the lease is true and that the defendant had not made out a case of adverse enjoyment for over 12 years but as the plaintiffs had not given notice to quit, the suit for possession is bad without notice. Accordingly on the said findings he dismissed the suit. But he disallowed the costs of the defendant. The ground on which he did so was stated thus :

The defendant having set up title and adverse possession failed to prove both. He will therefore bear his own costs.

Thus it will be seen that the order disallowing costs was based on the express finding by the District Munsif regarding the title of the defendant which was negatived. Both parties preferred appeals to the District Court; the appeal of the plaintiffs was against the order of dismissal and

the appeal of the defendant against the order disallowing costs and the memorandum of the grounds of his appeal would clearly show that the findings of the District Munsif in regard to title and adverse possession were attacked. Both the appeals were heard by the learned Subordinate Judge of Kurnool and the points for determination which he set to himself were as follows : (1) Whether the plaintiffs are entitled to the suit land ? (2) Whether the lease set up is true ? (3) Whether the suit is bad for want of notice to quit ? and (4) What is the right order to be made as regards costs ? The learned Judge found in favour of the plaintiffs both as regards title and adverse possession and he further found that the lease in favour of the plaintiffs is true. But he also concurred with the District Munsif in regard to want of notice to quit. In regard to point No. 4 as regards costs the judgment ran thus :

> The lower Court has disallowed the defendant's costs. I think that order is quite correct. All the pleas set up by the defendant have been held to be false. It is only on a technical point that the plaintiffs' suit has failed. So the defendant is not entitled to claim his costs. In the result both the appeals are dismissed with costs.

It will thus be seen that the learned Subordinate Judge affirmed the finding as regards disallowance of costs by the District Munsif on the very same ground as the learned District Munsif did, namely that all the pleas set up by the defendant have been held to be false and he also gave costs against the defendant in favour of the plaintiffs in regard to the appeal filed by him. The question in this appeal is whether the findings in regard to title, adverse possession and the lease are res judicata. The learned District Munsif was of opinion that they will be res judicata. But the learned Subordinate Judge took a different view. It is contended before me by Mr. L. S. Veeraraghava Ayyer that this view of the learned Subordinate Judge is unsound. There are two principles which have to be kept in view in dealing with this question. If the suit results in a decision in favour of a party, a finding against him on any issue will not be res judicata in a subsequent suit. This is laid down by the Privy Council in 48 Cal 460,[1] which has been followed by our High Court in a number of cases. Though a finding on an issue may not be necessary for the disposal of the suit, yet, if a party invites the decision of the Court on that issue and the Court also considers it necessary to go into it and gives a finding thereon, the decision on that issue will constitute res judicata, in a subsequent suit, provided that the party against whom there was a finding on that issue would be in a position to carry the matter in appeal. This follows from the decision of the Privy Council in 51 Cal 631.[2] In that case their Lordships of the Privy Council affirmed the decision of the Calcutta High Court on a question of res judicata. The learned Judges of the Calcutta High Court dealt with the matter thus :

> It was contended before us that whatever the appellants might have done in this respect, the issue in fact was not a necessary or proper one to be tried in that suit, and that it is open to us to say so. But we must see first whether this Court adjudged otherwise, that is, whether this Court having the question before its mind decided that the issue did arise. If so, that decision would be as much res judicata as the final determination of the issue on the merits. If we are of opinion that the Court did so decide, we are not concerned to see whether it did so rightly or not, and indeed cannot do so. * * * The defendant, the present appellant, has expressly urged that the Judge was wrong in not deciding this question even though his action was based on the plaintiff's adviser's statement and he asked this Court expressly to decide it.

I might in this connexion usefully refer to the case of the Privy Council in 62 M L J 221.[3] In that case the landlord sued the tenant for a declaration that the settlement of rent made by the Court of Wards during the time they were in management of the estate is not binding and that the defendants were bound to pay rent in kind instead of cash according to the settlement made by the Court of Wards. Therefore the only question raised by the prayer was whether the plaintiff was entitled to have the rent in kind instead of money rent, but the defendants set up a title of permanent occupancy and an issue was raised thereon and that question also was decided. The District Judge found in that case that the plaintiff was entitled to take only cash rent and not rent in kind. But he held that the defendants had not proved occupancy rights.

1. Midnapore Zamindari Co. v. Naresh Narayana Roy, A I R 1922 P C 241=64 I C 231=48 I A 49=48 Cal 460 (P C).

2. Midnapore Zamindari Co. v. Naresh Narayana Roy, A I R 1924 P C 144=80 I C 827=51 I A 293=51 Cal 631 (P C).

3. Krishna Chandra Gajapati Narayana Deo v. Challa Ramanna, A I R 1932 P C 50=136 I C 412=62 M L J 221 (P C).

But the High Court reversed the finding as to occupancy rights ultimately dismissing the appeal concurring with the finding of the lower Court on the question as to payment of rent. Dealing with the question how far the finding as to the permanent occupancy rights was binding on the parties. Their Lordships made the following observation :

As their Lordships have pointed out, all this enquiry about occupancy rights and as to whether the settlement of 1869 was a permanent one, was not properly raised by the plaint, but as both parties have without protest chosen to join issue upon these points, their Lordships see no reason why these matters in dispute should not be res judicata between them.

But in both these cases it will be seen there was a decision in favour of the defendant and against the plaintiff who was entitled to prefer an appeal. In this case, though the ultimate decision of the suit was in favour of the defendant, there was a decree disallowing costs to the defendant. The defendant chose to prefer an appeal, invited the appellate Court to give a decision on the question of title and of the lease and the appellate Court did go into them and gave findings. It seems to me that these findings will be res judicata against the defendant and would clearly come within the principle of the decision in 51 Cal 631.[2] But it is argued by Mr. Somayya that as the suit was dismissed and the ultimate decision was in the defendant's favour the finding could not be res judicata in view of the decision in 48 Cal 460.[1] It seems to me that 48 Cal 460[1] is distinguishable. Here there was an order of the first Court disallowing costs against which he did prefer an appeal. There was also the decree of the appellate Court giving costs to the plaintiff against the defendant and the defendant could have preferred an appeal against the said decree. A case in point is 46 M L J 515.[4] That was a suit between landlord and tenant. There was originally a suit by the landlord against the tenant for eviction and there was dismissal of the suit on the ground that there was no notice to quit, but there was a finding against the defendant in regard to the question of occupancy right and the plaintiff was awarded costs and there was this decree against the defendant in regard to costs though the suit was ultimately dismissed. The defendant did prefer an appeal as to costs and the learned District Judge upheld the decision of the District Munsif on that point and in regard to costs in the appeal the defendant was asked to bear his own costs. The learned Judges held that the finding as to occupancy right would constitute res judicata. Ayling, J. in the course of the judgment observed thus :

It is argued that the determination of the issue was unnecessary. But the order awarding plaintiff his costs in the first Court which is expressly based upon it, is as much a part of the decree as the order dismissing plaintiff's prayer for possession. The District Judge in effect decided all the points in dispute, and found that the plaintiff was entitled to recover possession of the land, conditionally on his giving defendants a proper notice to quit. Defendants are not entitled to reagitate the points then decided against them.

Odgers, J. who took the same view says :

Here the plaintiff's title was the first issue in the case and a decision was given upon it by both Courts. It was not until the appeal that the point of the notice to quit was taken and decided against plaintiff. Moreover the defendants might have appealed against the decree in so far as costs were awarded against them which award was expressly made on the ground that the finding as to title was against them. This is as much a part of the decree as anything else.

But Mr. Somayya contended that this case is inconsistent with the decision of the Privy Council in 48 Cal 460.[1] He pointed out that in that case also there was a cross-appeal by the defendant in respect of the finding against him to the High Court. Though the ultimate decision was in his favour and there was a dismissal of that appeal by the High Court affirming the said finding of the first Court, still the Privy Council held that the adverse finding would not constitute res judicata in a subsequent suit. It will be seen however that the cross-appeal was incompetent because there could be no appeal against the finding. It does not appear from the judgment whether there was a decree awarding costs against the defendant or disallowing costs to him which he could have appealed against. Odgers, J. in 46 M L J 515[4] distinguished the Privy Council decision thus:

This order as to costs against the defendants appears to me to effect a radical distinction between this case and those cited above for the respondent; and the costs were awarded on the ground that the question of title had been found in plaintiff's favour. I therefore agree that the matter is covered by S. 11, Civil P. C., and the respondents are not entitled to have the matter re-opened.

The decision in 46 M L J 515[4] was considered by the Officiating Chief Justice in

4. Veerasami Mudali v. Palaneappan, A I R 1924 Mad 626=84 I C 799=46 M L J 515.

a recent decision reported in A I R 1935 Mad 701=1935 M W N 871[5] wherein he remarked as follows :

That decision, whether right or wrong, is easily distinguishable, as there the adverse finding was made explicitly the ground for directing the defendants to bear their costs.

He distinguished the case before him on the ground that "the adverse finding was not made the ground for depriving the defendants of their costs." He further observed as follows :

The distinction is important, for the principle of the decision in 46 M L J 515,[4] is that the defendants could have attacked the adverse finding by filing an appeal against the order as to costs. But in this case that requisite is wanting, the adverse finding and the order regarding the costs not being related to each other as cause and effect.

But in the present case it is clear from the decision of both the learned District Munsif and the learned Subordinate Judge in the prior suit that the findings as to title and the lease and the order relating to costs are clearly related to each other as cause and effect. I am therefore of opinion that the findings in the previous suit would constitute res judicata. I therefore reverse the decree of the learned Subordinate Judge and restore that of the District Munsif with costs throughout. Leave to appeal refused. The appellant is entitled to a refund of the court-fee paid in appeal.

C.R.K./M.D. *Appeal allowed.*

5. Venkatachala Padayachi v. Velayuda Padayachi, A I R 1935 Mad 701=161 I C 103=1935 M W N 871.

A. I. R. 1937 Madras 117

CORNISH, J.

Commissioner, Salem Municipality — Petitioner.

v.

S. G. Bakthavatsalu Naidu—Opposite Party.

Civil Revn. Petn. No. 1275 of 1935, Decided on 18th September 1936, from order of Dist. Munsif, Salem, D/- 15th July 1935.

Madras District Municipalities Act (5 of 1920), S. 350 (2)—Words 'continuing injury or damage' do not refer to damage inflicted once and for all which continues unrepaired — Illegal seizure of cart is not continuing injury—Cause of action arises on date of seizure.

The words "continuing injury or damage" do not mean or refer to a damage inflicted once and for all which continues unrepaired but a new damage recurring day by day in respect of an act done, it may be, once and for all, at some prior time, or repeated, it may be, from day to day. [P 118 C 1]

Where the Municipality illegally seized a cart of a person and the person brought a suit against the Municipality for damages :

Held* : that the illegal seizure of the cart was not a continuing injury continuing from date of seizure till the date of restitution and hence the cause of action arose on date of seizure and the suit brought more than six months after the seizure was barred : *Harrington (Earl) v. Derby Corporation, (1905) 1 Ch 205, Rel. on. [P 118 C 1]

P. Chakrapani Iyengar—for Petitioner.

Order.—The petitioner is the Salem Municipality. On account of some arrears of tax the Municipality distrained a cart belonging to the respondent. The distraint was made on 16th April 1934. This distraint was declared illegal in some proceedings before a Magistrate on 7th July 1934, and the cart was returned to the respondent on 7th November 1934. The respondent brought a suit to recover damages for illegal distress. He gave notice of the suit on 18th October 1934, and the plaint was filed on 18th January 1935. The question is whether the suit is or is not barred by S. 350, Madras District Municipalities Act. The lower Court held that it was not barred, and that the respondent was entitled to damages.

Section 350 enacts that no suit for damages shall be instituted against a Municipal Council in respect of any act done in pursuance of the act until the expiration of one month after a notice has been delivered at the Municipal Office stating the cause of action, the relief sought, and the name and the place of abode of the intending plaintiff; and the plaint shall contain a statement that such notice has been so delivered. Sub-s. 2 provides that every such suit shall be commenced within six months after the date on which the cause of action arose or, in case of a continuing injury or damage, during such continuance or within six months after the ceasing thereof. If the cause of action was the act of illegal distress, as I think it was, the suit was out of time. The plaintiff however has sought to get over this obstacle by alleging in his plaint that the cause of action arose when the illegal seizure was made, and "subsequent days when it was illegally and wrongfully distrained without being returned." In other words, he sought to make the act of illegal seizure a continuing injury

until the return of the cart on 7th November 1934. Upon the meaning of the words in sub-s. 2, S. 350 "in a case of a continuing injury or damage" there are available authorities on the meaning of the words "in case of continuance of injury or damage" in the Public Authorities Protection Act, 1893. It is obvious that the language of sub-s. 2, S. 350 of the Madras Act was modelled upon the English Act, and therefore any authoritative interpretation of the words occurring in the English Act is of great assistance in the interpretation of the words in S. 350, of the Madras Act. In (1903) 67 J P 447,[1] the Lord Chancellor, Lord Halsbury said that the words "continuing injury or damage" meant the continuance of the act which caused the damage; and in (1905) 1 Ch 205[2] at p. 227, Buckley, J. observed :

> The words do not mean or refer to a damage inflicted once and for all which continues unrepaired, but a new damage recurring day by day in respect of an act done, it may be, once and for all at some prior time, or repeated, it may be, from day to day.

In my judgment the act which caused injury to the respondent was the Municipality's illegal seizure of his cart. His cause of action was that illegal act. It was not an injury which continued from the date of the seizure till the date of restitution. It follows that the respondent's suit not being commenced within six months after his cause of action arose, it ought to have been dismissed. It is accordingly dismissed, and this civil revision petition is allowed with costs throughout.

K.B./D.S. *Petition allowed.*

1. Carey v. Metropolitan Borough of Bermondsay, (1903) 67 J P 447.
2. Harrington (Earl) v. Derby Corporation, (1905) 1 Ch 205=74 L J Ch 219=92 L T 153=69 J P 62=3 L G R 321=21 T L R 98.

A. I. R. 1937 Madras 118

HORWILL, J.

(*Manda*) *Appa Rao Pantulu Garu* and *another*—Appellants.

v.

Budankayala Vignesam Subudhi and *others*—Respondents.

Second Appeal No. 910 of 1932, Decided on 25th August 1936, against decree of Dist. Court, Ganjam, in A. S. No. 468 of 1930.

(a) Hindu Law — Religious endowment — Position of mahant—He is trustee in general sense though not in strict legal sense—He has power of alienation of mutt property without detriment to the mutt.

The mahant has very large powers of disposal over mutt property and is not restricted in his dealing with the property as he would be if he were a trustee in the legal sense of the word; yet he is a trustee in general sense for the proper administration of the mutt and its property. The head of a mutt has power to alienate some part of the mutt property without question but it is always subject to restrictions that he must not mismanage the property or allow the institution to suffer from any of the alienation made by him: *Case law discussed.* [P 119 C 2; P 120 C 2]

(b) Hindu Law — Religious endowment — Income from mutt property—No distinction exists between liquid assets or income of property and corpus itself—Income from mutt property is mutt property until mahant spends it.

No distinction can be drawn between liquid assets or the income of the property and the corpus itself. All money arising out of the mutt property becomes itself mutt property the moment it is received on behalf of the mutt; and no special act of appropriation is necessary to convert it into mutt property. Such receipts remain mutt property unless and until the mahant chooses to spend them in pursuance of the large powers given to him. Admittedly, upon a mahant's death the property vests in his successor and such liquid assets as are available and have not been otherwise disposed of by the late mahant, pass immediately to his successor : *A I R 1918 P C 37* and *A I R 1919 P C 62, Rel. on.* [P 121 C 1]

(c) Hindu Law — Religious endowment — Money borrowed by late mahant for purposes not found to be binding on mutt—Decree against personal property of late mahant—Arrears of rent due in lifetime of late mahant, though collected afterwards, are not liable under the decree inasmuch as they are not his personal property.

The creditor lent money on a promissory note to the late mahant and brought a suit for recovery against the present holders of the mutt. The lower Courts having found that it was not binding on mutt gave a decree against personal property of the late mahant, holding that the arrears of rent due in lifetime of the late mahant but collected afterwards were his personal property:

Held: that the property was not personal property, that the property had never passed into the hands of the late mahant and could not be considered as the property of one who was dead before the property came into existence. [P 121 C 1, 2]

B. Jagannadha Das and *S. Subramania Shastri*—for Appellants.

G. Lakshmanna and *G. Chandrasekhara Shastri*—for Respondents.

Judgment.—The plaintiffs lent a sum of money on a promissory note to the late mahant of the Lakshminarasimha Swami Mutt at Haradakhandi and have brought this suit against the present holders of the

mutt for the recovery of the amount due. Both the lower Courts have found that the debt was not for the necessity of the mutt and was therefore not binding on the present mahant. In giving a decree against the personal property, if any of the late mahant, both Courts have held that the arrears of rent due during the lifetime of the late mahant and since collected are the personal property of the late mahant and therefore liable in satisfaction of the decree. An appeal has been filed against this incidental finding, while a memorandum of cross-objections has been filed with regard to the main finding that the debt is not binding on the mutt. Both Courts held that arrears of rent due before the late mahant's death but not collected by him were his personal property, because of a dictum of Ramesam, J. reported in 44 M L J 187.[1] That too was a suit against a mutt and it was held that the debt was not binding on the mutt. No issue was raised on the question whether rents uncollected would be liable for the debt and no discussion before the learned Judges seems to have taken place. Krishnan, J. makes no reference to the matter. Ramesam, J., at the very end of his judgment, says:

> In the result the appeal is allowed so far as the mutt properties are concerned, but the plaintiff will be entitled to a decree for the suit sum against the assets of the late Swamiar in the hands of the defendant, such as uncollected arrears since collected or investments of the late Swami which have not been incorporated with the mutt properties.

It is contended in appeal that this dictum is not in accordance with the law on the point. Whether or no arrears not collected were the property of the late mahant depends upon the larger question as to the powers of the mahant to dispose of mutt property. This question has been considered in a very large number of cases and many of the older decisions are no longer good law. The first case that may be considered as bearing on this question is 43 Cal 707,[2] which case came up for consideration in 14 Pat 379.[3] The latter was a case in which the applicability of S. 92, Civil P. C., to the management of a mutt was considered and it was held that this section did apply and that although the mahant was not a trustee in the legal sense of the word; yet he was a trustee in a general sense for the proper administration of the mutt and its property. At p. 385 is an extract taken from the earlier case, 43 Cal 707[2]:

> This practice (of succession by chela to mahant) is ascetic; it involves a separation from all worldly wealth and ties, and a self-dedication to the services and rites of the asthal . . . . this property is held by the mahant as its owner, and the succession to him in such property follows with the succession to the office. The nature of the ownership is, as has been said, an ownership in trust for the mutt or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning mahant, this trust does exist, and that it must be respected.

This reference to the ownership of the property by the mahant had given rise to some misunderstanding and their Lordships had to point out that the mahant had no proprietary ownership of the mutt property nor did the property rest in him in trust (in the English sense) for the mutt. In 44 Mad 831[4] the law on the subject was very fully and elaborately discussed, the Board there confining itself to the question whether a mahant was a trustee in the English sense. Their Lordships concluded from the cases cited before them that the mahant had very large powers of disposal over his property and was not restricted in his dealing with the property as he would be if he were a trustee in the legal sense of the word. The cases were summed up at p. 847 in these words:

> From the above review of the general law relating to Hindu and Muhammadan pious institutions, it would prima facie follow that an alienation by a manager or superior, by whatever name called, cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law.

Nowhere in this very long judgment did their Lordships give countenance to any suggestion that the head of a mutt had any proprietary interest in the mutt property or its income, nor does such a contention seem to have been put forward before their Lordships. Mr. Lakshmanna for the respondents has drawn my atten-

1. Lakshmindra Thirthaswamiar v. Vibhudapriya Thirthaswamiar, A I R 1923 Mad 288 =72 I C 109=44 M L J 187.
2. Ram Prakash Das v. Anand Das, A I R 1916 P C 256=33 I C 583=43 I A 73=43 Cal 707 (P C).
3. Ram Parkash Kesho Das, v. Amar Dasji, A I R 1935 Pat 111=156 I C 1099=14 Pat 379=16 P L T 35.
4. Vidya Varuthi v. Balauswami Iyer, A I R 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).

tion to the passage set out at the bottom of p. 850:

> Ordinarily speaking, the sajjadanashin has a larger right in the surplus income than a mutavali, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the mahant of a Hindu mutt, has full power of disposition over it.

This sentence does not help the plaintiff, for it shows that although alienations by a mahant cannot ordinarily be questioned, yet he cannot spend money entirely as he pleases on objects of vice or even on objects wholly alien to his office: 50 Mad 567[5] is another case under S. 92, Civil P. C. and contains the same finding that the mahant holds his property under a kind of constructive trust. The only case to which my attention has been drawn and which contains anything which might suggest that the mahant has a personal interest in the property is 45 Mad 565[6] at p. 581. This was a case of a dharmakartha and their Lordships were careful to distinguish his position from that of the head of a religious institution. They say:

> The position of dharmakartha is not that of a Shebait of a religious institution, or of the head of a mutt. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character.

Their Lordships were not concerned at all in that case with the powers of a mahant; but the passage does not necessarily mean more than that he may use mutt property to a reasonable extent for purposes that are not strictly speaking for the benefit of the mutt. There is no reason to think that any principle was here laid down that would conflict with the very many cases in which the fiduciary nature of the office of the head of a mutt has been emphasized: 6 Pat 139[7] has been quoted to show the large powers of the mahant to alienate property, even for purposes that may be considered to be extravagant; but in that case it was found that the immediate cause of the borrowing was the mutt's need for money to carry out and pay for its services; and it was therefore held that it was only right that as the money was needed by the mutt, the money should be repaid out of the mutt properties. A receiver was therefore appointed to manage the properties and make the mahant an allowance. The mutt properties were certainly not attached on the ground that the mahant had a free power to dispose of the income of the mutt as he chose. A number of cases have also been quoted to me in which the well-accepted principle was reiterated that for the purpose of limitation, time does not begin to run against the mutt for alienations made by a mahant, until his death; the reason being that a mahant has power to alienate even though the alienation may not be strictly necessary. In 12 Pat 251[8] it was held that if the whole property was alienated, such an act would be void ab initio: but that the alienation of one item would be valid for the mahant's lifetime. Although, therefore, the head of a mutt has power to alienate some part of the mutt property without question, it is always subject to the restriction that he must not mismanage the property or allow the institution to suffer from any of the alienations made by him.

I have been at some pains to discover whether in any of the cases quoted before me any distinction could be drawn between the powers of a mahant over the income from the mutt property and the corpus. In some of the old cases, it was suggested that the mahant had complete power over the surplus income of the property after meeting the running expenses of the institution; but I find no warrant for such a distinction in any of the cases that have been quoted and which may be considered to be still good law. It would seem reasonable to suppose that income which arises out of mutt properties belong to mutt; and so it has been held in 43 Mad 253.[9] In that case, there was a dispute between the gurukal, who was the head of the mutt, and some Chetties who had been in possession of certain items of the mutt property for 90 years or more. They did not claim any beneficial right in the mutt property; but the gurukal, who was suing them for the return of the property, claimed it as

5. Nelliappa Achari v. Punniavanam Achari, A I R 1927 Mad 614=101 I C 420=50 Mad 567=52 M L J 415.
6. Srinivasachariar v. Evalappa Mudaliar A I R 1922 P C 325=68 I C 1=49 I A 237=45 Mad 565 (P C).
7. Niladri Sahu v. Chaturbhuj Das, A I R 1926 P C 112=98 I C 576=53 I A 253=6 Pat 139 (P C).
8. Ramcharan Das v. Naurangilal, A I R 1933 P C 75=142 I C 214=60 I A 124=12 Pat 251 (P C).
9. Arunachalam Chetty v. Venkatachalapathi Guruswamigal, A I R 1919 P C 62=53 I C 283=46 I A 204=43 Mad 253 (P C).

his own. A question arose as to a sum of Rs. 20,000 which was accumulated income. The Subordinate Judge declared that the gurukal was entitled to the entire beneficial enjoyment of the income of the suit villages during his life and continuance as the spiritual head of the institution, subject only to the maintenance of the institution. Their Lordships of the Privy Council say at p. 271 :

> It is plain to their Lordships that this (reasoning) would be not only a subversion of the usage and custom of the mutt, but would be a violation of the law applicable to such institutions. A fair test to be applied in such cases is to demand what is the true principle or nature of the administration of surplus income. It is, of course, the duty of a trustee to refrain from the personal enjoyment of such surplus and to add the same to the capital of the estate to be administered; and this law also applies to the property of a mutt or asthal, and that whether the title to the same is in the gurukal as spiritual head of the institution, which is an ordinary case, or is in trustees like the Chetties according to the usage and custom of the institution, as in the present case.

35 M L J 5[10] dealt with acquisitions made with the income of an asthal and it was held that they were subject to the same trust as the original property. Although that case might be distinguished; yet it cannot be doubted that their Lordships were considering who had the title to the income from mutt property; for the argument was raised before them that such income was the personal property of the mahant. That argument was repelled. It would therefore appear from the various cases quoted that no distinction can be drawn between liquid assets or the income of the property and the corpus itself. All money arising out of the mutt property becomes itself mutt property the moment it is received on behalf of the mutt; and no special act of appropriation is necessary to convert it into mutt property. On the contrary, such receipts remain mutt property, unless and until the mahant chooses to spend them in pursuance of the large powers given to him. Admittedly, upon a mahant's death the property vests in his successor and such liquid assets as are available and have not been otherwise disposed of by the late mahant pass immediately to his successor.

The title of a mahant to the money collected after he became mahant but which was due before the death of the late mahant would be much stronger; for the property had never passed into the hands of the late mahant and could not by any reasonable theory put forward before me, be considered as the property of one who was dead, before the property came into existence. The lower Courts were therefore wrong in holding that the rents not collected by the late mahant were his personal property, liable for the debts incurred by him. It is argued that no appeal lies with respect to this finding because no mention of the rents is made in the decree. I have, however, little doubt that if the plaintiff sought to execute the decree and the mutt raised the objection that the rents were not the property of the late mahant the executing Court would hold that the point had already been decided against them. The judgment can always be referred to in interpreting the decree, and I think that this appeal was very properly preferred. The appeal is therefore allowed with costs in all Courts. It seems not to have been contended in the lower appellate Court that the money received by the late mahant was used for purposes binding on the mutt, but it was argued that the money was utilised in financing some litigation upon which the Zamindar of Chinnakimedi had embarked and that the money had been subsequently repaid and credited to the general funds of the mutt, and so presumably utilised for mutt purposes.

It is suggested that the money upon receipt from the Zamindar of Chinnakimedi was used partly in discharge of the bills of food purveyors and partly in meeting the necessary expenses of the late mahant in defending himself against a charge of murder. There is certainly room for doubt whether the money recovered from the Zamindar of Chinnakimedi can be connected with the suit promissory note; but even if it can, both the lower Courts found that it had not been proved that the money received in execution was applied in discharge of debts borrowed for purposes binding on the mutt. Although money was paid to food purveyors, it does not appear to have been paid to them for food supplied; but rather to discharge the principal and interest due on debts incurred for purposes unknown to us. With regard to the criminal case, one cannot say, without reference to the judgment and other evidence furnishing us with information regarding the nature of the case against him, whether he was justified in using the mutt property to defend himself. One can

10. Basudeo Roy v. Jugal Kishwar Das, A I R 1918 P C 37=45 I C 818=35 M L J 5.

easily think of circumstances in which such a spending would not be warranted, although in many cases it would. The lower Courts are not even satisfied that any part of the money went to meet these expenses. I am not prepared therefore to disagree with the finding of the lower Courts on either of these points.

It is now argued for the first time, and that only in reply, that the mere fact that the money was received in the general accounts to the enrichment of the mutt gives the right to the plaintiff to have recourse against the mutt property. I do not think that any such general principle can be laid down that would be independent of all considerations how the late mahant had used the surplus money in his possession. Certainly it is not an unmixed question of law and I do not feel justified in going into this question now. The memorandum of cross-objections is dismissed with costs. Leave to appeal is granted with respect to the main appeal. With respect to the memorandum of cross-objections leave is refused.

C.R.K./S.C. *Appeal allowed.*

A. I. R. 1937 Madras 122

CORNISH, J.

(*Jaggupilla*) *Narayanamurti* and *another*—Appellants.

v.

(*Jaggupilla*) *Suryanarayana* and *others*—Respondents.

Appeal No. 226 and Civil Misc. Petn. No. 5310 of 1935, Decided on 1st October 1936, against decree of Sub-Judge, Vizagapatam, in A. S. No. 203 of 1930.

(a) Civil P. C. (1908), O. 7, Rr. 14 and 18—Scope — Document neither produced with plaint nor listed — Document can be allowed to be produced under R. 18 only for purpose of evidence and not for putting forward new rights under it.

Only ground contemplated by R. 18 for allowing a document which has not been produced in accordance with R. 14, to be produced at a later stage is that it may be used as evidence. A plaintiff will not be allowed to put forward as creating rights a document on which he has not in terms sued : *A I R 1916 P C 217, Rel. on.* [P 123 C 1,2]

(b) Pleadings—Setting up new case—Partition suit—Unlisted document — Document showing jointness and providing for division of after acquired properties between parties to it — Document produced in evidence — Appellate Court decreeing claim on basis of contract under document—Claim cannot be decreed on a cause of action different from the one set up in plaint.

Where in a partition suit the trial Court allowed the document under O. 7, R. 18, C. P. C. to be produced for the purpose of evidence and the document provided that certain properties to be acquired should be divided among parties and that the parties were joint but the trial Court dismissed the claim holding that separation had already taken place and the appellate Court gave decree to plaintiff on the ground that he was entitled to a share on the basis of contract under the document :

Held : the appellate Court could not decide a case upon a matter which had not been raised as part of the case in the pleadings nor been the subject of an issue in the trial Court : *12 Cal 239 (P C), Rel. on.* [P 123 C 2]

(c) Practice — Amendment of plaint — Amendment is not admissible if it prejudices rights of opposite party, e. g., plea of limitation.

Amendments except under peculiar circumstances are not admissible when they prejudice the rights of opposite party as existing at the date of such amendments, e. g., right to set up plea of limitation : *Weldon v. Neal, (1887) 19 Q B D 394* and *A I R 1936 Mad 785, Rel. on.* [P 123 C 2]

V. Govindarajachariar and *K. Krishnamurthi*—for Appellants.

P. Somasundaram and *Y. Suryanarayana*—for Respondents.

Judgment.—The appellants are defendants 4 and 8 in a partition suit brought by respondent 1. The plaintiff is the son of one Ramanna, who is the father of defendant 5 and the grand-father of defendants 2 and 3 who are the grandsons by a deceased son. Ramanna is the brother of one Sanyasi deceased, whose adopted son is one Gaddayya who was a natural born son of Ramanna. Defendant 4 is Gaddyya's son. Defendant 8 is Gaddayya's widow, Gaddayya having died in 1926 before suit. The plaint makes it perfectly clear that the right to partition claimed by the plaintiff was founded upon the position that the plaintiff and these defendants were members of a joint Hindu family. At the trial the principal issue was whether Ramanna and Sanyasi had become divided. Both the trial Court and the lower appellate Court have found that these two men became divided in 1912. The trial Court therefore holding that plaintiff and defendants were not members of a joint family dismissed the suit. It appears that at the trial a document Ex. L-1 was by permission of the Court allowed to be given in evidence. This document had not been produced with the

plaint or mentioned in the list of documents annexed by the plaintiff to his plaint as required by O. 7, R. 14. But the Court in the exercise of its discretion under R. 18 allowed the document to be received in evidence on the plaintiff's request. In fact, the only ground contemplated by R. 18 for allowing a document which has not been produced in accordance with R. 14 to be produced at a later stage is that it may be used as evidence. Ex. L-1 is an agreement which was entered into between the plaintiff's father and his deceased son Jagannadham (father of defendants 2 and 3) and Gaddayya in 1916. This document provides that certain properties to be acquired or which might be acquired by the parties to it should be divisible between them ; and the document also refers to them as being members of a joint Hindu family. Undoubtedly this document was produced for the purpose of supporting the plaintiff's case that he, his father and brothers and Gaddayya were members of a joint family. The suit having been dismissed by the trial Court there was an appeal to the Subordinate Judge's Court. The learned Subordinate Judge upheld the finding of the trial Court that Ramanna and Sanyasi had become divided and that consequently there was no joint family in existence at the time of the plaintiff's suit. He, however, decided that the plaintiff, though not entitled to a partition as a member of a joint Hindu family, was entitled to a share on the strength of the agreement evidenced by Ex. L-1. What he says in his judgment is as follows :

> Exhibit L-1 has been proved to be a genuine document. Effect has to be given to it. From the evidence I am satisfied that the plaintiff is not entitled to a share as a member of a joint Hindu family but is entitled to a share under the agreement Ex. L-1.

In other words, the learned Subordinate Judge has given a decree to the plaintiff not on the cause of action laid in the plaint but on a different cause of action, viz., contract. The learned Subordinate Judge has set up an entirely new case for the plaintiff to that which the plaintiff put forward in his plaint. I am unable to agree with the lower appellate Court that the reference contained in paras. 3 and 5 of the plaint to this agreement is any foundation for treating it as a cause of action upon which the plaintiff has sued. It is clear that the only purpose for which permission of the Court was obtained to produce Ex. L-1 was for the purpose of evidence of the parties being joint. It has been ruled by their Lordships of the Privy Council in 32 M L J 137[1] that a plaintiff cannot be allowed to put forward as creating rights a document on which he has not in terms sued. Again, in 12 I A 166[2] at p. 170 their Lordships have laid down as a general principle that an appellate Court cannot decide a case upon a matter which has not been raised as part of the case in the pleadings nor been the subject of an issue in the trial Court. The learned Subordinate Judge's judgment cannot therefore be upheld. An application has been put forward on behalf of the respondent for leave to amend the plaint. This has been objected to by the appellants because the amendment at this time of day would deprive them of the right which they have to set up, a plea of limitation. I think that the principle stated in (1887) 19 Q B D 394,[3] which is cited in the Full Bench decision in 71 M L J 250[4] is applicable to the circumstances of this case. There, Lord Esher said:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments .... Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

In my opinion there are no such peculiar circumstances here which would justify me in departing from the general rule. The plaintiff could have applied for amendment in 1929 when the suit came on for hearing. The result is that the appeal is allowed with costs throughout against respondent 1. The decree of the first Court will be restored and the order of remand set aside.

C. M. P. No. 5310 of 1933 is dismissed. Leave to appeal is refused.

C.R.K./P.R. *Appeal allowed.*

1. Sulaiman v. Biyaththumma, A I R 1916 P C 217=39 I C 243=32 M L J 137 (P C).
2. Official Trustee of Bengal v. Krishna Chunder Mozoomdar, (1884) 12 Cal 239=12 I A 166=4 Sar 657 (P C).
3. Weldon v. Neal, (1887) 19 Q B D 394 = 56 L J Q B 621=35 W R 820.
4. Official Assignee of Madras v. Kuppuswami Naidu, A I R 1936 Mad 785=165 I C 301=71 M L J 250 (F B).

A. I. R. 1937 Madras 124

BEASLEY, C. J. AND GENTLE, J.

(*Dodla*) *Rami Reddi* and *others* — Appellants.

v.

(*Devireddi*) *Pattabhirami Reddi* and *another*—Respondents.

Appeal No. 225 of 1931, Decided on 6th May 1936, against decree of Sub-Judge, Nellore, in O. S. No. 45 of 1930.

(a) Evidence Act (1872), S. 92, Proviso 3—Mortgagee executing document promising to execute deed of release in respect of certain properties mortgaged to him whenever desired by other party to agreement—He cannot set up oral argeement that release deed was only to be given when entire mortgage debt was paid, it being directly contradictory to terms of contract itself.

Where the oral agreement pleaded is directly contradictory to the terms of the contract reduced into writing and is not one constituting a condition precedent to the attaching of any obligation under the contract, it is not admissible in evidence. [P 125 C 1]

Where a person executes a document promising to execute a deed of release in respect of certain properties mortgaged to him whenever desired by the other party to the agreement, he is not entitled subsequently to set up an oral agreement that the release deed was only to be given when the entire mortgage debt was discharged inasmuch as such oral agreement is directly contradictory to the terms of the contract itself. It does not come under Proviso 3 to S. 92 and is inadmissible in evidence. [P 125 C 1]

(b) Specific Relief Act (1877), S. 22—Court has discretion under S. 22 to refuse specific performance—Mere delay by itself is no ground for refusing relief—But where delay raises presumption of abandonment of claim or has caused hardship to opposite party or something to his prejudice, Court can refuse relief.

Under S. 22 of the Specific Relief Act, the Court may exercise its discretion and not decree specific performance where the circumstances in which the contract is made are such as to give the plaintiff an unfair advantage over the defendant. Mere delay itself is no ground for refusing relief, but when it raises the presumption of abandonment of the plaintiff's claim or has caused hardship to the opposite party or something to his prejudice, the Court is entitled to exercise its discretion and refuse the relief prayed for. [P 125 C 1]

Ch. Raghava Rao—for Appellants.

K. Kuppuswamy—for Respondents.

Beasley, C. J.—This is an appeal by the plaintiff against the judgment of the principal Subordinate Judge of Nellore dismissing his suit. His claim in the suit was to compel the defendant to execute and register at his (the plaintiff's) cost a release deed in respect of the suit lands releasing the same from a mortgage in the defendant's favour dated 14th September 1920. This mortgage was executed by one Kali Chetty Narayana Reddy. The lands comprised in this mortgage and other properties were sold in Court auction on 3rd December 1924 and were purchased by the plaintiff subject to the defendant's mortgage. The plaintiff's case was that he entered into agreements of sale with third parties with respect to some of the lands to the knowledge and with the consent of the defendant who agreed that the plaintiff should pay him the prices stipulated under the agreements of sale and to release from his mortgage the lands agreed to be sold. Accordingly amounts paid by purchasers were duly paid to the defendant on 17th February 1926, 15th November 1926 and 14th February 1927 and at the same time under Exs. A-1, A-2 and A-3 he acknowledged the receipt of the money and agreed to execute a release deed in respect of the properties sold whenever the plaintiff required. By the date of Ex. A-3, i. e. 14th February 1927 sums, aggregating to Rs. 6,000 of which Rs. 1,500 was by a promissory note the remainder being cash, had been paid. The plaintiff, however, did not call upon the defendant to execute the release deed in respect of the properties sold for nearly three years. Then he filed the suit under appeal. The defendant set up the defence that there was an oral agreement that the release deed was only to be given when the entire mortgage debt had been discharged and that whenever thereafter the plaintiff called upon him to execute the release deed he was under an obligation to do so but not before. It is clear that Exs. A-1 and A-2 which are unregistered cannot be admitted in evidence at all and that only Ex. A-3 is admissible. That document, however, refers to the previous transactions of 17th February 1926 (Ex. A-1) and 15th November 1926 (Ex. A-2). In Ex. A-3 which acknowledges the receipt of Rs. 600 for the sale of certain property comprised in the mortgage, it is stated by the defendant :

> I shall execute at your cost a deed of relinquishment of right in your favour whenever desired by you and get the same registered,

and after referring to Exs. A-1 and A-2, he states :

> Therefore I shall whenever desired by you and at your cost, execute in the same manner a deed of relinquishment of right in your favour, even

in respect of those lands mentioned in that document and get it registered.

It is clear that the oral arrangement set up by the defendant cannot be admitted under S. 92, Evidence Act, unless it is a separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract. It is contended that it is such an oral agreement and therefore comes under proviso (3) to S. 92. In our view, that contention must fail. The contract is to execute a deed of release "whenever desired by you" and not "whenever desired by you after the mortgage has been discharged." The oral agreement pleaded is directly contradictory to the terms of the contract itself. Had the case rested there, then the plaintiff would have been entitled to succeed; but under S. 22, Specific Relief Act, the Court may exercise its discretion and not decree specific performance where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant. The learned Subordinate Judge was of the opinion that the discretionary relief should be refused to the plaintiff on that ground and also because of the delay by the plaintiff in enforcing his claim. Mere delay itself is no ground for refusing relief but when it raises the presumption of an abandonment of the plaintiff's claim or has caused a hardship to the opposite party or something to his prejudice, Courts are entitled to exercise their discretion and refuse the relief prayed for. In this case we are not concerned merely with the question of delay though on this point it is worthy of remark that the alleged purchasers of the property apparently took no steps to get from the plaintiff releases of the properties they had purchased from the mortgagee until according to the plaintiff himself just before he filed the suit which he says was filed owing to the pressure of his vendees. It is strange also that, if the plaintiff believed that he had the right to call upon the defendant to execute release deeds in respect of the properties sold piecemeal, he took no steps until just before the expiration of the period of limitation to enforce his right. There is something else; this is an unusual contract and the mortgagee agrees to the sale of the security, the mortgaged property, piecemeal instead of at one time; and the reason for this is, we think, quite apparent from an important exhibit in the case, namely Ex. 1, and the plaintiff's own evidence at the trial. Ex. 1 is dated 4th December 1924 and is written by the plaintiff to the defendant. It states the purchase by the plaintiff of the mortgaged properties in Court auction and fixes the amount of principal and interest due to the defendant on that date from the mortgagor Narayana Reddi at Rupees 12,100 and says that Rs. 1,100 had already been wholeheartedly waived by the defendant leaving Rs 11,000 due by Narayana Reddi to him. The plaintiff says that he purchased the properties in auction subject to this debt and says :

> If I should pay to you in full the said amount of principal and interest by 31st March 1925, either in instalments from this date or in one lump sum, you should forthwith cancel that document duly and hand it over to me. If I should pay you a sum of Rs. 6,000 by the said date 31st March 1925, you should grant me further time till 31st March 1926 for the payment of the balance, and if I should fail to pay it as aforesaid, you shall be entitled to recover on the liability of the mortgaged properties the whole of the amount of principal and interest without reference to the amount waived by you, and I shall raise no objection to it.

The plaintiff therefore undertook personally to discharge the mortgage and was given a remission of Rs. 1,100 provided he paid the money by 31st March 1925, or if he paid an instalment of Rs. 6,000 he was to have another year's time in which to pay. It is common ground that he did not pay; and therefore Ex. 1 was no longer operative in his favour. It is clear instead that an arrangement was come to between the plaintiff and the defendant whereby the plaintiff undertook to discharge the mortgage amount by instalments. The plaintiff himself set up an oral arrangement and since in our view this does not contradict the contract set out in Ex. A-3 and is quite consistent with the plaintiff's case in the plaint, it is admissible in evidence. Speaking of Ex. 1 he says in his evidence :

> So the document stood cancelled and the right to claim remission was lost. I sold some of the hypotheca subsequently and I paid Rs. 4,000, Rs. 2,500 and Rs 1,500 by pronote. The promise by defendant at that time was that he should release the properties sold from mortgage. Somewhere about September 1925, i. e. 6 months after breach of the agreement Ex. 1, I and defendant entered into an agreement that I should go on selling the hypotheca in parts and pay the defendant the price fetched and he should receive such amounts and execute release for the property sold. It was in pursuance of that agreement I sold in 1926 for Rs. 4,000.

It seems reasonably plain to us that the agreement was that the entire mortgaged property should be sold in parts as soon as possible and the defendant paid the price fetched with the object of discharging the mortgage debt. Time had already been given to the plaintiff for payment and it is obvious that within that time the whole of the mortgage amount was to be paid. Is it likely that in the circumstances the defendant would be willing that these piecemeal sales should be spread over a long interval? We think it is obvious that this cannot be so. The plaintiff sold only three of the mortgaged properties and did nothing thereafter and when he filed the suit nearly three years after Ex. A-3, no other properties at all had been sold. Whilst asking the Court to bind down the defendant to his part of the contract, i. e. release the properties from the mortgage as and when sold, the plaintiff thinks it fair that he should be released from what in our view clearly was an obligation undertaken by him, i. e. speedy discharge of the mortgage by this method. We do not agree and think that it would be wholly inequitable under the circumstances to grant the relief claimed in the suit. The appeal will accordingly be dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

A. I. R. 1937 Madras 126

VENKATARAMANA RAO, J.

(*Thazhe Nelloli Pazhe Peringati*) *Athiramankutti* and *another*—Appellants.

v.

(*Thazhe Nelloli Pazhe Peringati*) *Uppari* and *others*—Respondents.

Second Appeal No. 88 of 1932, Decided on 24th February 1936, against decree of Sub-Judge, Tellicherry, in O. S. No. 35 of 1931.

(a) Malabar Law—Perpetual Kanom—Deed of demise containing provisions relating to renewal and non-surrender—Provisions are not clog on equity of redemption because perpetual kanom is permissible under customary law of Malabar.

Provisions in a deed of demise relating to newal and non-surrender cannot be considered to be a clog on equity of redemption because a perpetual kanom is permissible under the customary law of Malabar: *30 Mad 61, Not foll.*; *A I R 1916 Mad 652* and *A I R 1918 Mad 509, Rel. on.* [P 127 C 1]

(b) Malabar Law—Perpetual Kanom—Unregistered deed creating perpetual Kanom—Adjudication that persons held property under saswatham tenure—Persons holding property for 12 years can acquire title by adverse possession.

A mere assertion by a tenant cannot convert the nature of his tenure, but where either the origin of the tenancy is not known or a document purporting to confer a permanent tenure is invalid for want of registration or otherwise and the persons have been holding for a period of 12 years in assertion of permanent right, they can certainly acquire a right by adverse possession and much more so in the case of an adjudication in their favour: *A I R 1916 Mad 652, Rel. on*; *A I R 1923 P C 118, Ref.* [P 127 C 2]

M. C. Sreedharan—for Appellants.

P. Govinda Menon—for Respondents.

Judgment.—The question raised in this second appeal is whether the defendants are holding the suit lands on a perpetual or saswatham tenure. It is found by both the lower Courts that Ex. 1, the original demise, was granted to the defendants' predecessor-in-title. The document provides for the payment of a kanom of Rs. 50 and there is a significant provision at the end of it, viz.,

> At the end of every twelve years a renewal should be taken charging the said sum of Rs. 50 as kanom and you may enjoy the same without surrendering or causing it to be surrendered.

On 27th April 1895, there was another deed of demise, Ex. A, in and by which the suit property was demised

> for a period of twelve years on Kuzhikanom right and for carrying on trade, fixing rent of Rs. 10 for each shop;

and there is the following stipulation therein viz.,

> you may hold in possession the said properties as hitherto . . . . . .

It appears that there was a melcharth granted by the predecessor-in-title of plaintiff 1 in 1903 to one Mammad who filed a suit in 1906 for recovery of the arrears of rent. In that suit it was held that the defendants were holding the property on saswatham tenure. The said finding may not have been necessary for that decision in that suit, but the question was raised and there was an adjudication. The present suit is brought both by the plaintiff 1, who is a jenmi of the suit properties and by plaintiff 2, who is a melcharth holder under a deed dated 7th December 1927 for redemption and possession. The same defence is again raised, viz., that the defendants are holding under a perpetual tenure. Both the Courts have concurrently found that the defendants have been holding under a saswatham tenure. The learned District Munsif found it on the ground that, at any rate, since

the adjudication in 1906 the defendants must be deemed to have been holding the property under a saswatham tenure and acquire a title by adverse possession. The learned Subordinate Judge confirmed his decision. Mr. Sridharan contends that Ex. 1 cannot be considered to be a perpetual tenure or grant and the provision relating to renewal and non-surrender must be considered to be a clog on the equity of redemption. He relies upon the ruling in 30 Mad 61,[1] which supports him. But I find in a later decision in 2 M L W 941,[2] that Sadasiva Iyer, J. holds that a perpetual kanom is permissible under the customary law of Malabar. He was considering the document which is dated December 1857, admittedly prior to the Transfer of Property Act.

In a later decision reported in 7 M L W 119,[3] Bakewell and Phillips JJ., held that a document dated 30th July 1897, was a perpetual kanom deed, and valid under the Transfer of Property Act. Incidentally they observe at p. 237 that a perpetual kanom was recognized by this Court so long ago as 1871 (*vide* 6 M H C R 258[4]) and was held to be valid in 2 M L W 941.[2] In dealing with 30 Mad 61[1] they observed that the document in that case was executed before the Transfer of Property Act, and they do not say that the decision was wrong. But one may gather that the view of the learned Judges in 7 M L W 119[3] was that a perpetual kanom is permissible in Malabar. The question now arises if the perpetual kanom is permissible and if the defendants were holding under Ex. 1, though unregistered, the defendants could be deemed to have been holding on a saswatham tenure, under the original grant or have acquired right thereto by adverse possession. Mr. Sridharan laid considerable stress on Ex. A, the deed of 1895, which says that the kanom demise is for a period of 12 years. He contends and not without force, that the reference to 12 years and the payment of money for the improvements is inconsistent with a perpetual grant. But there is the provision that the property must be held as 'hitherto' which can only mean as under Ex. 1.

It may be that a provision was made for payment for improvements in case the demisee chose to surrender at any time after the period of 12 years. If really the defendants have been holding on a saswatham tenure it cannot be said that they have lost their right merely by taking the deed, Ex. A. Mr. Sridharan relied on the ruling in 50 I A 202,[5] for the proposition that the mere assertion in a judicial proceeding that a tenant is holding under a perpetual tenure will not confer on him a title by adverse possession. I quite agree that if the terms of a tenancy are known, a mere assertion by a tenant cannot convert the nature of his tenure, but where either the origin of the tenancy is not known or a document purporting to confer a permanent tenure is invalid for want of registration or otherwise and the defendants have been holding for a period of 12 years in assertion of the permanent right they would certainly acquire a right by adverse possession. Further in this case it was not a mere assertion in a judicial proceeding but there was an adjudication. In the view I have taken of this case following 2 M L W 941[2] that by Ex. 1 it was intended that the defendants should have a perpetual tenure, the decision of the lower Courts upholding their claim is correct. In the result the second appeal fails and is dismissed with costs. Leave granted.

C.R.K./P.R. *Appeal dismissed.*

1. Neelakandhan v. Anantha Krishna Iyer, (1907) 30 Mad 61=16 M L J 462.
2. Raman Nayar v. Kunhi Kolandan Mudaliar, A I R 1916 Mad 652=31 I C 184=2 M L W 941.
3. Kuttikatta v. Kunhikavamma, A I R 1918 Mad 509=43 I C 989=7 M L W 119.
4. Kottal Uppi v. Edavalath Thathan Nambudri, (1872) 6 M H C R 258.
5. Mohammad Mumtaz Ali Khan v. Mohan Singh, A I R 1923 P C 118=74 I C 476=50 I A 202=45 All 419=26 O C 231 (P C).

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* A. I. R. 1937 Madras 127

VENKATARAMANA RAO, J.

Vaikuntam Pillai and *another*—Appellants.

v.

Avudiappa Pillai and *others*—Respondents.

Second Appeal No. 95 of 1931, Decided on 16th March 1936, against decree of Sub-Judge, Ramnad, in A. S. No. 134 of 1928.

(a) Hindu Law—Joint family—Manager—Partition—Liability to account—All properties available for partition must be taken into account—Position of manager is analogous to trustee but with lesser obligations than trus-

tee—All property traceable to manager must be accounted for.

In a suit for partition it is well settled that an account will have to be taken of the properties that are available for division as on the date of the suit or as on the date of any severance in status effected by a member of the family in accordance with law. The relationship between a manager and the members of the family is not that of mere agent and principal. His position is analogous to that of a trustee but his obligations are not the same as that of a trustee. He is not bound to keep accounts. He has absolute control over the income and therefore he is not called upon to defend the propriety of his past dealing. But he is bound to account for all the family properties, moveable or immoveable, which have been traced to his possession and the members are entitled to look into the accounts to discover what the properties consisted of or what they consist of. It is open to the other members to show that the manager had in his possession certain family properties and that he must account for their disappearance and that the items of expenditure said to have been incurred were not incurred or not to the extent mentioned in the account or they were incurred for purposes other than the legitimate purpose of the family: *A I R 1922 P C 71, Rel. on.* [P 129 C 1]

*** (b) Hindu Law—Joint family—Manager—Liability to account—Ordinarily past transactions need not be accounted — Where member of family is entirely excluded account may be ordered.**

The ordinary rule is that the members of an undivided Hindu family, when making a partition, are entitled not to an account of past transactions but to a division of the family property actually existing at the date of partition. But where one member of the family has been entirely excluded from the enjoyment of the property, there might be good ground for ordering an account; but in the ordinary case of joint enjoyment by the members of the whole property, or of enjoyment by different members of different portions of the property, the taking of an account would be most difficult and unsatisfactory: *5 Bom 589, Rel. on.* [P 129 C 2]

*** (c) Hindu Law—Joint family—Manager—Powers of—Remission to debtors—Manager not bound to account for bona fide remissions—Onus of proving bona fides lies on manager—Manager is liable for interest recovered and not for what he ought to have earned as interest.**

The managing member of a joint family is entitled to settle accounts with the debtors and in the course of the settlement he will have the right to make a reasonable reduction either towards interest or principal if the circumstances of the case should allow it; it is not necessary that he should obtain the consent of the other members of the family or to do so only with their knowledge. He will have the right and discretion to make the remissions and if they were done bona fide it ought not to be open to the other members to question them; but he will have to satisfy that the remissions were made by him in the interest of the family having regard to the particular circumstances of the case. Prima facie the burden will be upon him and if he has given a satisfactory explanation of the same it is open to the other members to show that the remissions were not in the interest of the family and without consideration and not in the bona fide exercise of the discretion: *17 Bom 271, Foll.* [P 129 C 2; P 130 C 1]

He can only be called upon to account for such interest as he received on the debts. He will also be accountable for interest if he had re-invested the amounts. But he cannot be made accountable for not investing the same and realising the interest. [P 130 C 1]

K. Rajah Iyer—for Appellants.

A. S. Viswanatha Iyer—for Respondents.

Judgment.—This is a suit for partition and separate possession of the plaintiff's 1/12th share in the suit properties. Defendant 1 is the father of the plaintiff, defendants 2 to 5 are the brothers of the plaintiff and also the sons of defendant 1. Defendant 6 is the brother of defendant 1, and defendant 7 is the son of defendant 6. The claim was resisted by defendants 6 and 7 mostly on the ground that there was a division in the family 18 years before the suit, and that the properties in Sch. 2 and some other plaint mentioned properties belonged to defendant 6 solely as his self acquisition. Both the lower Courts concurrently found against the case of defendant 6. They came to the conclusion that the parties constituted a joint family on the date of the institution of the suit. It was also found that the properties comprised in Sch. 2 were also joint family properties. They mainly consisted of outstandings which were advanced either out of the income from family lands or out of the family trade which was carried on by defendant 6. It was further found that defendant 6 was living separately from defendant 1's branch. But the trade was carried on by defendant 6 assisted also sometimes by the elder son of defendant 1. Both the lower Courts accordingly decreed the claim of the plaintiff and directed division of the family properties and delivery of 1/12th share to the plaintiff. In Second Appeal on behalf of defendant 6 the main question argued was in regard to the direction for accounts given by both the lower Courts in respect of the properties in Sch. 2 to the plaint. As aforesaid it mainly consisted of the outstandings of the business carried on by defendant 6 on behalf of the joint family. The contention of Mr. Rajah Iyer is that the lower Courts have misdirected themselves in the application of the principles of Hindu law in the matter of accounting by the manager or members of the family

who are in possession of the properties. In a suit for partition it is well settled that an account will have to be taken of the properties that are available for division as on the date of the suit or as on the date of any severance in status effected by a member of the family in accordance with law. The principle on which the liability of a member to account is based is thus enunciated by the Privy Council in 44 Mad 656[1] at p. 663:

> In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with.

The relationship between a manager and the members of the family is not that of mere agent and principal. His position is analogous to that of a trustee, but his obligations are not the same as those of a trustee. He is not bound to keep accounts. He has absolute control over the income and, therefore, he is not called upon to defend the propriety of his past dealings. But he is bound to account for all the family properties, moveable or immoveable which have been traced to his possession and the members are entitled to look into the accounts to discover what the properties consisted of or what they consist of. It is open to the other members to show that the manager had in his possession certain family properties and that he must account for their disappearance and that the items of expenditure said to have been incurred were not incurred or not incurred to the extent mentioned in the account or they were incurred for purposes other than the legitimate purpose of the family. These pleas are, therefore, available to the members when the manager is or ought to be directed to file an account of the properties existing on the date of the plaint or on the date of the severance. So far as the manager is concerned these principles are well settled. But the question is when owing to differences in the family or for convenience of management, members of the family lived apart without a severance in status but still as members of a joint family entitled to participate in all the income of the joint family properties, on what basis is the account to be directed. Of course every member brings into the hotchpot all the properties in possession. In such a case, in my opinion, the principles applicable to a manager in regard to the liability for accounting will equally apply. Melvill, J. in 5 Bom 589,[2] at p. 595, thus explained the footing on which an account should be taken:

> The ordinary rule, no doubt, is that the members of an undivided Hindu family, when making a partition are entitled, not to an account of past transactions, but to a division of the family property actually existing at the date of partition ..... Where one member of the family has been entirely excluded from the enjoyment of the property, there might be good grounds for ordering an account; but in the ordinary case of joint enjoyment by the members of the whole property, or of enjoyment by different members of different portions of the property, the taking of an account would be most difficult and unsatisfactory, and we are not aware of any case in which the Courts have ever ordered it. There seems to us to be nothing in the circumstances of the present case which would induce us to depart from the ordinary rule.

In this case the fact is established as aforesaid that defendant 1's branch and defendant 6's branch have been in management of different portions of the joint family properties at any rate 15 years before the suit. Defendant 6 was carrying on a family trade or was in sole management of the properties in his possession with the knowledge and consent of defendant 1's branch. In so far as the corpus of the properties is traced to his possession he is bound to account and explain for its disappearance. Therefore, in respect of the items of the properties in Sch. 2 he is bound to account.

Mr. Rajah Iyer complains that the direction given by the lower Courts is wrong for two reasons. Sch. 2 consists of 19 items and out of them items 2, 3, 8, 10, 12, 14 to 17 and 19 were collected by defendant 6 after making certain remissions. The lower Court disallowed the said remissions and also directed him to account for interest on the said sums from the date of the collections. The ground alleged by the learned District Munsif is that defendant 6 had no right to make the remissions without the knowledge or consent or acquiescence of the other members of the family and that he is liable for interest on the amounts he has received from the date of collection. So far as the question of remission is concerned, in my opinion, the principle enunciated by the lower Court is wrong. The managing member of a joint family is entitled to

1. Arumilli Perrazu v. Subbarayadu, A I R 1922 P C 71=61 I C 690=48 I A 280=44 Mad 656 (PC).

2. Konerrav v. Gurrav, (1880) 5 Bom 589.

settle accounts with the debtors and in the course of the settlement he will have the right to make a reasonable reduction either towards interest or principal if the circumstances of the case should allow it. It is not necessary that he should obtain the consent of the other members of the family or to do so only with their knowledge. Therefore, defendant 6 though a junior member of the family was left in sole management of the trade along with defendant 1's branch. He will have the right and discretion to make the remissions and if they were done bona fide it ought not to be open to the other members to question them ; but he will have to satisfy that the remissions were made by him in the interest of the family having regard to the particular circumstances of the case. Prima facie the burden will be upon him and if he has given a satisfactory explanation of the same it is open to the other members to show that the remissions were not in the interest of the family and without consideration and not in the bona fide exercise of the discretion. Sargant, C. J. in 17 Bom 271[3] at p. 283 in dealing with a similar question observed :

> As to the remissions of tenants and compromises of suits, although they show a loss to the family firm of a considerable sum between 1920 and 1942 (Sambat), the defendants have failed to give any proof that they were improper or uncalled for. The circumstance that Damodar was not made a party to the suits, may have afforded the defendants an opportunity of taking a technical objection, but cannot by itself and without any other evidence afford sufficient reason for concluding that they were compromised without adequate cause or contrary to the interests of the family. As to the remissions to debtors, the Court below has considered they were satisfactorily explained by the plaintiff . . . . .

In the matter of interest defendant 6 can only be called upon to account for such interest as he received on the debts. He will also be accountable for interest if he has re-invested the amounts, but he cannot be made accountable for not investing the same and realizing the interest. Therefore, the direction that he should be accountable with interest from the date of the collection is not correct. I, therefore, direct an account be taken of the said items 2, 3, 8, 10, 12, 14 to 17 and 19 in the light of the above observations and remit the case back to the District Munsif's Court. In other respects the decrees of the lower Courts are confirmed. As the appellants have substantially failed I direct them to pay the costs of the respondents.

C.R.K./B.D. *Order accordingly.*

3. Damodardas Manekalal v. Uttaram Manekalal, (1893) 17 Bom 271.

✻ A. I. R. 1937 Madras 130

PANDRANG ROW, J.

In re *Vedagiri Perumal Naidu* — Petitioner.

Criminal Revn. No. 139 and Petn. No. 129 of 1936, Decided on 10th September 1936, from judgment of Joint Magistrate, Chingleput, in C. A. No. 44 of 1935.

✻ Penal Code (1860), S. 290—Respectable man of 55 years passing urine in grazing ground under cover of tamarind tree in village to which Madras Town Nuisances Act does not apply—His act does not amount to public nuisance and is not punishable as such—Moreover, fine of Rs. 10 is out of all proportion to offence alleged.

A mere act of passing urine in any public place in the sense of a place open to the public, does not amount to an offence under S. 290 unless the act is such as would cause or must necessarily cause annoyance to the public. The public, which one must have in view, is the general public and not an individual of particularly refined susceptibilities. [P 131 C 1]

Where, therefore, a respectable man of 55 years passes urine in a grazing ground poramboke under cover of tamarind tree in a village to which the Towns Nuisances Act does not apply, his act does not amount to a public nuisance and is not punishable as such as no annoyance is likely to be caused to villagers by such an act. The habit of promiscuous urination may be opposed to the interests of public health, decency and morals but that would not by itself constitute it a crime in tracts to which Town Nuisances Act has not been applied. Moreover a fine of Rs. 10 in such a case is out of all proportion to the alleged offence. [P 130 C 2 ; P 131 C 1, 2]

B. Manavala Choudari—for Petitioner.

K. Venkataraghava Chari (for Public Prosecutor)—for the Crown.

Order.—The petitioner in this case was convicted of a public nuisance, and sentenced under S. 290, I. P. C., by the Stationary Sub-Magistrate of Chingleput, to pay a fine of Rs. 10 and in default of payment, to undergo simple imprisonment for one week. This conviction and sentence were confirmed by the joint Magistrate of Chingleput. The alleged public nuisance was that the petitioner, a respectable man of 55 years, passed urine in a grazing ground poramboke under cover of a tamarind tree in the village of Guduvancheri to which the Towns Nuisances

Act does not apply. If the view taken by the Courts below is to be accepted as correct, it would follow that the mere act of passing urine in any public place, in the sense of a place open to the public, would amount to an offence punishable under S. 290, I. P. C. The essential ingredient of the offence is that the act must cause any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. There is no question of obstruction or danger or injury in this case and the only question of danger is whether there was annoyance caused to the public on whether the act was one which must necessarily cause annoyance to the public.

The public which one must have in view is the general public, that is to say, in this case the villagers and not an individual of particularly refined susceptibilities. It is common knowledge that in most of the villages (including the village of Guduvancheri) there are no public latrines or urinals and it is the usual practice for men to pass urine in public places of course without any indecent exposure. And such an act does not cause any annoyance to villagers in general. It may be that the act is likely to cause annoyance to others not inured to such sights; much familiarity has dulled the susceptibilities of people living in villages and in this country generally, and no actual annoyance is likely to be caused to villagers by such an act. It is not likely that the petitioner in this case who is, as I have already observed, a respectable man of 55 years, would have made any indecent exposure of his person while performing the act, and I am unable to agree with the learned Magistrate's observation that he fails to see how a man is to perform the act of passing urine without committing some sort of exposure, if by exposure is meant indecent exposure. It may be as, the learned joint Magistrate says, the habit of promiscuous urination is opposed to the interests of public health, decency and morals, but that would not by itself be sufficient to constitute it a crime in tracts to which the Towns Nuisances Act has not been applied.

The learned Magistrate seems to have thought that as the act took place in the full view of the police Sub-Inspector in this case, it certainly amounted to an offence. But what is not otherwise an offence cannot become an offence when it is done in the full view of a Sub-Inspector of Police; no attempt has been made on behalf of the Crown to support the proposition that because the act was done in the presence or full view of the Sub-Inspector of Police, it amounts to an offence. In fact, so far as I understood the learned Public Prosecutor, he did not seriously contend that the act amounted to an offence under the circumstances. In my opinion, in the circumstances disclosed by the evidence, the act did not amount to a public nuisance and was not punishable as such. Moreover, the sentence imposed, viz. a fine of Rs. 10, was out of all proportion to the alleged offence; even in towns to which the Towns Nuisances Act applies similar acts are punished only with very small fines, namely of 4 or 8 annas. It is difficult to avoid the impression that this is a case of oppression, and not a case in which the criminal proceeding was instituted for the betterment of public health, decency or morals. The conviction of the petitioner and the sentence imposed on him are set aside, and he is acquitted. The fine, if paid, must be refunded.

C.R.K./R.M. *Conviction set aside.*

*** * A. I. R. 1937 Madras 131**

VENKATARAMANA RAO, J.

A. Pr. L. M. L. Lakshmanan Chettiar —Appellant.

v.

K. Srinivasa Iyengar and *others* — Respondents.

Appeal No. 180 of 1933, Decided on 28th August 1936, against appellate order of Dist. Judge, Chittoor, D/- 23rd February 1933.

*** (a) Insolvency — Co-parcener adjudged insolvent — Effect of — His share in joint family property vests in receiver, but he does not cease to be member of joint family.**

The share of a co-parcener in joint family property, on being adjudged insolvent, vests in the Official Receiver. The insolvent co-parcener, however, does not cease to be a member of joint family, but still continues as a member thereof : *A I R 1934 Mad 676, Rel. on.* [P 133 C 1]

*** (b) Insolvency — Order of adjudication, effect of — Co-parcener father adjudged**

insolvent — Father's right to dispose of undivided sons' share also vests in Receiver for debts binding on family.

In the case of an insolvent co-parcener who is a father having undivided sons, not only his share but also the right of the father to dispose of his sons' share in the joint family property for discharge of debts neither illegal nor immoral, vests in the Receiver. [P 133 C 1]

* (c) **Hindu Law—Alienation by co-parcener—Effect of—In spite of alienation of his share by co-parcener he continues to be member of the family with rights of survivorship with respect to property other than his transferred share.**

A co-parcener, though he may have alienated the whole or part of his undivided share, will continue to be a member of the family with the rights of survivorship between himself and remaining members in respect of all the family property other than what he has transferred : *25 Mad 690 (F B), Rel. on.* [P 133 C 2]

* * (d) **Insolvency — Co-parcener adjudicated insolvent for his personal debts—Effect of order of annulment — Insolvent's share once divested of its character as joint family property on his insolvency, cannot regain that character on annulment order—Insolvent's share reverts to him as individual property and goes on his death to his heir at law —His share is liable for satisfaction of his debts.**

The effect of the insolvency of a co-parcener for his personal debts is that his share vests in the Official Assignee and is thus lost to the joint family, so that his death will not restore to the joint family the share which has vested in the Official Assignee. [P 133 C 2]

The law in England, where the conception of a joint Hindu family is unknown, cannot be applied in India. Once the share of the insolvent is divested of its character as joint family property, it cannot regain that character when it comes back to the insolvent on annulment unless he has by an unequivocal act of his own, imposed it with the said character. Under S. 37, Provincial Insolvency Act, it reverts to the insolvent as his individual property, so that if he is not alive on the date of reversion, it will go to his heir at law. The insolvent's share on reversion not, therefore, being joint family property, can be made available for his debts : *A I R 1930 Mad 278 ; 7 Bom 438* and *A I R 1929 Mad 665 (F B), Rel. on.* [P 134 C 1, 2]

S. A. Seshadri Iyengar—for Appellant.

D. Ramaswami Iyengar — for Respondents.

Judgment.—This miscellaneous second appeal raises a question as to the effect of an annulment in regard to the share of an insolvent who was at the moment of adjudication a member of a joint undivided Hindu family. The insolvent, one Raghava Iyengar, and his brother, defendant 1 were undivided brothers of a joint family owning certain immoveable property. In 1922 the said Raghava Iyengar was adjudicated an insolvent by the High Court. Subsequent to his adjudication and before obtaining the order of discharge he appeared to have borrowed from the plaintiff a sum of money on a promissory note. He died thereafter. Subsequent to his death the plaintiff filed in or about 1930, O. S. No. 1098 of 1929 on the said promissory note against defendant 1, and his sons, defendants 2 and 3, and also defendant 4 who was the widow of the said Raghava Iyengar. A decree was passed in the said suit against the defendants for the amount claimed by the plaintiff payable out of the assets of the said Raghava Iyengar in the hands of the defendants.

On 28th September 1931 the adjudication order was annulled and I find from the report of the Official Assignee that it was at his instance that the order of adjudication was annulled. The ground for the annulment was that the creditors had been paid in full, but in spite thereof the insolvent had not applied for annulment, and that after the insolvent was dead the Official Assignee desired that the adjudication should be annulled and that he might be permitted to draw his commission on the amount paid to the creditors. The plaintiff filed an application for execution of his decree, out of which this second appeal arises, for attaching and selling a half share in the properties mentioned by him in the execution petition. The application was resisted on two grounds : that the properties were the separate properties of defendant 1 ; and even assuming that they were joint family properties defendant 1 had a half share on the date of adjudication and on annulment they reverted to defendants 1 to 3 as joint family property and they have taken the same by survivorship and the creditor had no right to attach the same. Both the Courts have concurrently found that the properties were not separate properties but joint family properties wherein Raghava Iyengar had a half share. The District Munsif allowed execution to proceed ; but the learned District Judge dismissed the execution petition on the ground that immediately on the annulment the property vested in defendants 1 to 3 as joint family property, and it cannot be regarded as assests in the hands of defendant 1 liable to be proceeded against for the debts of the said Raghava Iyengar. This view of the learned District Judge has

now been assailed before me as unsound by Mr. Seshadri Iyengar. I am inclined to accept his contention. The legal consequences of a valid order of adjudication made on the insolvency of a member of a coparcenary in regard to his share in the joint family property may be thus stated.

The share of the insolvent vests in the Official Receiver. In regard to an insolvent who is a father having undivided sons, the right of the father to dispose of his sons' share in the joint family property for the discharge of the debts which were neither illegal nor immoral also vests in the Official Receiver. The insolvent does not cease to be a member of a joint family but still continues as a member thereof. In a recent decision of this Court the following observations occur :

> Neither the filing of the insolvency petition nor the adjudication of the applicant can sever the joint family status : 58 Mad 126[1] at p. 136.

In that case it was held that the vendee from the Official Receiver of an undivided share of a member did not become a tenant in common with the other members of the family and therefore was not entitled to claim mesne profits from the date of sale. Bankruptcy is an involuntary alienation. On the question whether an alienation of a share of a member of a joint family effects a severance in status there has been a conflict of opinion. One view is that it does effect a severance in status (*vide* 39 Mad 159,[2] at p. 172 and 35 Mad 47,[3] at p. 59). The other view is that it does not. The ground for this view may be thus stated. The severance of a joint family can only be effected by a mode known and recognised by Hindu Law, that is, what is called Vibagha or partition. The effect of a partition according to Hindu Law is :

> Whether it is effected amicably or by a decree of Court that it breaks not only the joint ownership of the property, but also the family union, that is, the corporate character of the family: 25 Mad 690[4] at p. 717.

The effect of an alienation may be to break up the joint ownership of the property but the corporate character of the family can only be disturbed by a member. It is unnecessary for me to consider which view is correct. But there can be no doubt as to what the consequences of an alienation are. They are thus stated by Mr. Bhashyam Iyengar, J.:

> An undivided member of a family though he may have alienated the whole or any part of his undivided share will continue to be a member of the family with the rights of survivorship between himself and the remaining members in respect of all the family property other than what he has transferred. No doubt such a member acts unfairly towards the rest of the family and if they are dissatisfied with his so doing their only remedy is to become divided from him: 25 Mad 690[4] at p. 717.

The members of the family lose their right of survivorship in the share of the insolvent and it ceases to be joint family property so that on the death of the insolvent the share which vested in the Official Assignee is not divested from him (*vide* 7 Bom 438[5] and the observations of Wallace, J., in 53 Mad 1[6] at p. 14) :

> .... that by the insolvency of a coparcener of course for his personal debts, his share vests in the Official Assignee and is thus lost to the joint family .... the death of the one coparcener before partition would not restore to the joint family the share which has vested in the Official Assignee.

If this is the true legal position, the share of the insolvent is in the hands of the Official Assignee not as joint family property but as separate property available, for the benefit of the personal creditors of the insolvent. The question is what is the effect of an annulment on the said property in the circumstances of this case when there has been a valid adjudication. Mr. Ramaswami Iyengar argues that under S. 37 on annulment the property reverts to the debtor. The effect of a reverter according to him is that the property regains its original character as joint family property and is taken by the members of the family as if no partition had taken place with benefits of survivorship; and thereafter it will not be available to the personal creditors of the insolvent unless that share had been seized in execution and rendered available for the enforcement of the debts. Mr. Ramaswami Iyengar relied on two English cases, viz. (1871) 6 Ex. 279[7] at p. 283

1. Venkatarayudu v. Sivaramakrishna Iyer, A I R 1934 Mad 676=153 I C 368=58 Mad 126=67 M L J 486.
2. Sundararajan v. Arunachala Chetty, A I R 1916 Mad 1170=33 I C 858=39 Mad 159=29 M L J 793 (F B).
3. Chinnu Pillai v. Kalinatha Chetti, (1912) 35 Mad 47=9 I C 596=21 M L J 246.
4. Ayyagari Venkataramayya v. Ayyagari Ramayya, (1902) 25 Mad 690 (F B).
5. Fakirchand Motichand v. Motichand Hurrukchand, (1883) 7 Bom 438.
6. Narayana Sah v. Sankara Sah, A I R 1929 Mad 865=121 I C 1=53 Mad 1=57 M L J 685 (F B).
7. Bailey v. Johnson, (1871) 6 Ex 279.

and (1872) 7 Ex 263,[8] the same case on appeal, for the position that the effect of an annulment is to remit the debtor, to his original position at the moment of adjudication as if there had been no insolvency, and therefore as at the moment of adjudication the debtor was a member of a joint family, the property went back to him as joint family property. Construing an analogous Section, S. 81, English Bankruptcy Act, of 1869, Kelly, C. B. in (1871) 6 Ex 279[7] at p. 283 observes thus :

> .... the only sensible meaning which can be attached to the word 'revert' is, that what was apparently the property of the trustees at the time of the annulling of the bankruptcy, shall thereupon become the property of the person whose bankruptcy has been annulled, as if it had always been his.

This observation, in my opinion, does not support Mr. Ramaswami Iyengar. If the language of Kelly, C. B. is to be given full effect it is this. At the date of annulment it was the property of the trustee and on annulment it becomes the property of the debtor, that is, the property goes back to the debtor with the same character in which it was held by the Official Receiver while the bankruptcy continued. The annulment would not completely wipe out the effect of a valid order of adjudication. The bankruptcy is wiped out to this extent, viz., that the property goes to the debtor free from all claims in bankruptcy so that the debtor can deal with the property as if it is his own, that is, with all the original powers and rights which he would have had, had there been no bankruptcy. In the same case, (1872) 7 Ex 263[8] at p. 265, it will be seen that Blackburn, J. was not prepared to say that the effect of S. 81 in every case will be

to go back to the beginning and to place the bankrupt in the position of having always owned what is by the section to "revert to him . . . "

I agree with the remarks of Reilly, J., in 52 Mad 648[9] at p. 668 :

> Certainly it cannot be suggested that in this country annulment of adjudication puts the clock back as if the adjudication had never been.

It will be unsafe to rely upon observations in the cases decided in England where the conditions are not similar and where the conception of a joint Hindu family is unknown. Once the effect of insolvency is to divest the share of the insolvent of its character as joint family property, it cannot regain that character when it comes back to the insolvent on annulment unless he can by an unequivocal act of his own impress it with the said character. Under S. 37, Provincial Insolvency Act, it reverts to the debtor as his property, that is, as his individual property, so that if on the date of the reversion, he is not alive, it will go to his heir under the law, and in this case the widow, defendant 4; the property thus being not joint family property, defendants 1 to 3 have not taken it by survivorship. It is therefore available for the satisfaction of the debt of the plaintiff. I therefore reverse the decree of the learned District Judge and restore that of the District Munsif with costs. Leave refused.

C.R.K./A.L. *Decree reversed.*

8. Bailey v. Johnson, (1872) 7 Ex 263=41 L J Ex 211=20 W R 1013.
9. Jethaji Peraji Firm v. Krishnayya, A I R 1930 Mad 278=122 I C 351=52 Mad 648=57 M L J 116.

✻ A. I. R. 1937 Madras 134

BURN AND LAKSHMANA RAO, JJ.

T. V. A. K. T. Annamalai Chettiar and *another*—Appellants.

v.

T. T. K. K. Kumarappan Sriranga Chariar and *another*—Respondents.

Letters Patent Appeals Nos. 35 and 37 of 1935, Decided on 16th September 1936, against judgment of Pandrang Row, J., D/- 25th January 1935, reported in *A I R 1935 Mad 647.*

✻ Execution—Powers of executing Court—Executing Court has no power to go into disputed question o 'acts which if proved would take away its jurisdiction to order sale—Decree for sale of mortgaged property—Judgment-debtor alleging that property is not liable to sale being inalienable—Executing Court is not entitled to enquire into plea : *41 M L W 485=A I R 1935 Mad 647=156 I C 331, Reversed.*

The executing Court has no power to go into disputed question of facts which if proved would take away its jurisdiction to order sale. Where there is a final decree for sale of mortgaged property, it is not permissible for the Court to

enquire into a plea raised by the judgment-debtor that the property is not liable to be sold on the ground that it is a temple service inam and therefore inalienable. When the decree on the face of it discloses no want of jurisdiction and there is nothing in the proceedings from which the executing Court can take notice that the land is inalienable, the executing Court is not entitled to go behind the decree : *A I R 1933 Mad 362* ; *A I R 1936 Mad 618* and *A I R 1931 Rang 252*, *Rel. on* ; *28 Mad 84* ; *A I R 1927 Mad 911* and *A I R 1922 Mad 197 Disting.* ; *41 M L W 485*= *A I R 1935 Mad 647*=*156 I C 331*, **Reversed.**

[P 135 C 2; P 136 C 1]

K. Rajah Ayyar, *S. V. Venugopalachari* and *S. A. Seshadri Ayyangar* — for Appellants.

D. Ramaswami Ayyangar—for Respondents.

Burn, J.—There is only one point for decision in these appeals and that may be stated as follows : When there is a final decree for sale of mortgaged property, is it permissible for the executing Court to enquire into a plea raised by the judgment-debtor that the property is not liable to be sold on the ground that it is a temple service inam and therefore inalienable ? The allegation of the judgment-debtor that the property is inalienable temple service inam is denied by the decree-holder. The learned advocate for the respondent is not able to cite any authority for the proposition that the executing Court in such a case has jurisdiction to enquire into the question of fact whether the land is inalienable or not. Mr. Rajah Ayyar for the appellant in L. P. A. No. 35 of 1935 has brought to our notice a decision of Pakenham Walsh, J. in 37 M L W 358[1] which is exactly in his favour. The learned advocate for the respondent relies upon 28 Mad 84[2] and 50 Mad 897.[3] Pakenham Walsh, J. dealt with 28 Mad 84[2] but it does not appear that 50 Mad 897[3] was cited before him.

The distinction as it appears to us between those two cases and the present case and between those two cases and the case decided by Pakenham Walsh, J., is that in 28 Mad 84[2] it was admitted that the land was service inam being the emoluments attached to the office of village carpenter. If so, the land was inalienable by reason of S. 5, Madras Hereditary Village Officers Act (Act 3 of 1895). In the case of 50 Mad 897,[3] there was no dispute about the fact that the land sought to be sold was part of an impartible estate which was inalienable by reason of S. 6, Madras Impartible Estates Act (2 of 1904). In the present case there is no provision of statute law forbidding this alienation, but the learned advocate for the respondent brought to our notice the decision in 45 Mad 620.[4] That, however, is distinguishable from this case, because that was a case in which a village service inam was attached and sought to be sold in execution of a decree for money. Pakenham Walsh, J. has pointed out that in the case before him, which is precisely similar to the case before us, there is a decree explicitly for the sale of the mortgaged property. The decree on the face of it discloses no want of jurisdiction. There is nothing in the proceedings from which the executing Court can simply take notice that the land is inalienable, and in such a case, as Pakenham Walsh, J. observes, it is very undesirable to lay down that the executing Court should go behind the decree. The learned Judge observes at p. 360 :

> The question therefore in this case is very simple and it is whether, when there is no want of jurisdiction apparent on the face of the decree, the party in execution can raise a disputed point of fact, which, if his contention is true, would have deprived the Court of its jurisdiction to pass a decree in that matter. I am quite clear that there is no authority quoted to this effect and the doctrine would obviously have most disastrous consequences.

We are fully in agreement with this reasoning which appears to us to be decisive. The learned advocate for the respondent has brought to our notice that there are many cases in which the Court executing a decree has been held to have power to enquire into the validity of the decree, for example, cases in which it is alleged that a decree has been passed against a dead person. We are not disposed to extend the principle to any

1. Ranga Ayyar v. Sundararaja Ayyangar, A I R 1933 Mad 362=142 I C 643=37 M L W 358.
2. Raja of Vizianagaram v. Mantivuda Chelliah, (1905) 28 Mad 84=15 M L J 468.
3. Raja of Kalahasti v. Venkatadri Row, A I R 1927 Mad 911 = 105 I C 248=50 Mad 897 = 53 M L J 533.
4. Anjanayulu v. Sri Venugopala Rice Mill Ltd., A I R 1922 Mad 197 = 70 I C 466 = 45 Mad 620=42 M L J 477.

cases outside the limits within which the principle has hitherto been confined. As the learned Officiating Chief Justice has observed in 59 Mad 642[5] at p. 654 :

> Even the Judges who wished to concede to the executing Court power to go behind the decree have used language to indicate that that power should be circumscribed and kept within the narrowest possible limits.

" It is against public policy and good sense alike," as Page C. J. points out in 9 Rang 480,[6] "that the Court charged with the execution of a decree should be allowed to question its validity." The learned advocate for the respondent contends that he is not asking that the executing Court should be considered to be empowered to question the validity of the decree, but that he is only asking that it should be held to have power to enquire into facts which if proved would take away its jurisdiction to order sale. Our learned brother, Pandrang Row, J. has accepted this contention. Referring to 28 Mad 84,[2] and 50 Mad 897,[3] he says that:

> If the executing Court has the power to decide whether execution should be allowed as directed in the decree, it follows that the executing Court in order to decide this question whether execution should proceed or not has necessarily the power of taking such evidence as may be necessary to decide it.

With all respect, we think that there is here a slight begging of the question involved. The question which we have to decide is whether the executing Court has power to go into disputed questions of fact which if proved would take away its jurisdiction to order sale. The only authority of this Court which is exactly in point would answer this question in the negative. It is not necessary to criticise 28 Mad 84[2] and 50 Mad 897.[3] Those cases simply lay down that where there are indisputable, or undisputed, facts brought to the notice of the Court which take away its jurisdiction to order sale, the Court, as Curgenven, J. observed in 50 Mad 897,[3] at p. 909, has to stay its hand and refrain from execution. That is not at all, with due respect to our learned brother, the same as saying that when there is a dispute with regard to the facts, the Court has power or is bound to enquire into the dispute and to decide the question of fact. We think therefore that in this case the learned District Judge of Chittoor was right in holding that the judgment-debtor was not entitled to raise this question in execution. It follows that the orders of our learned brother in C. M. S. A. Nos. 52 of 1933 and 103 of 1933 must be set aside and the orders of the learned District Judge restored in both cases. The appellants will recover their costs from the respondent in all the Courts.

C.R.K./R.M. *Order accordingly.*

5. Krishnamurthi v. Imperial Bank of India, A I R 1936 Mad 618=164 I C 472 = 59 Mad 642=71 M L J 209.
6. S. A. Nathan v. S. R. Samson, A I R 1931 Rang 252=135 I C 65=9 Rang 480 (F B).

✻ A. I. R. 1937 Madras 136

VENKATARAMANA RAO, J.

Periakaruppa Pillai—Appellant.

v.

(*Minor*) *Satyanarayanamoorthi* — Respondent.

Second Appeal No. 170 of 1932, Decided on 27th March 1936, against decree of Sub-Judge, Devakotta, in A. S. No. 45 of 1930.

✻ (a) Mortgage — Integrity of mortgage broken by mortgagee—Still one of several mortgagors or purchaser of portion of equity of redemption is entitled to redeem whole subject to equities of other persons.

In spite of the integrity of the mortgage being broken by mortgagee one of several mortgagors or a purchaser of a portion of the equity of redemption in the mortgaged property is entitled to redeem the whole of the property subject to the equities which other persons may have, due provision being made for their rights: *A I R 1927 Mad 1039, Dissent.; A I R 1921 P C 125, Foll.; S. A. No. 269 of 1932, Rel. on.* [P 138 C 2; P 139 C 1]

✻ (b) Mortgage—Redemption—Suit for — Non-joinder of necessary party—Relief can be given by safeguarding interest of party not joined.

If a person interested in the equity of redemption is known, he ought to be made a party in order to safeguard his right. But if he is not known or if it was not possible to have made him party, due provision may be made in the decree for safeguarding his rights. Where he is deliberately omitted, still relief can be given to the parties before Court: *A I R 1919 Bom 135* and *A I R 1933 Cal 325, Foll.* [P 139 C 2]

K. Bhashyam Iyengar and *T. R. Srinivasan*—for Appellant.

S. Venkatesa Iyengar—for Respondent.

Judgment.—This is a suit for redemption of a mortgage. One Muthayya Thevar

mortgaged items 1 to 6 of the plaint schedule with one Krishna Iyengar who in his turn mortgaged items 1 to 7 in respect whereof he had the mortgage right and item 7 which belonged to him absolutely to the defendant under a deed of mortgage dated 7th June 1904. At a rent sale the plaintiff purchased a portion of item 3 and took symbolical delivery of the same subject to the mortgage in favour of the defendant. Then the plaintiff called upon the defendant to take a proportionate amount of the mortgage or allow him to redeem the entire mortgage (by payment of the entire mortgage amount). The defendant declined to accede to either of the courses suggested by the plaintiff. Then the plaintiff filed O. P. No. 28 of 1927 on the file of the District Munsif's Court of Ramnad and deposited a sum of Rs. 600, the amount which according to him was payable under the deed of mortgage in favour of the defendant and asked for delivery of possession of the properties but the defendant declined to receive the amount deposited in Court and the said amount still remains in the Court. One of the defences raised by the defendant was that on 10th June 1912, eight years subsequent to the mortgage in his favour, item 7 was purchased by him from Krishna Iyengar under a sale deed dated 10th June 1912 and the plaintiff cannot claim redemption of it. In pursuance of this objection the plaintiff expressed his willingness to give up his claim in respect of item 7. The defendant filed an application to implead Krishna Iyengar's widow Lakshmi Ammal as party defendant being the person interested in the other items of the mortgaged property. But the Court dismissed the application on the opposition of the plaintiff.

The main defences of the defendant are that the plaintiff is not entitled to redeem all the items even on payment of the entire mortgage amount and that Lakshmi Ammal and her son are necessary parties to the suit. The learned District Munsif negatived both the contentions and held that the plaintiff would be entitled to redeem items 1 to 6 upon payment of the proportionate share of the mortgage amount chargeable thereon, and that Lakshmi Ammal and her son were not necessary parties to the suit. This decision was confirmed on appeal by the learned Subordinate Judge. Mr. Bhashyam Iyengar on behalf of the defendant has raised two contentions before me: (1) the integrity of the mortgage having been broken by the defendant having purchased item 7, the plaintiff is not entitled to redeem the entire mortgage property on payment of the mortgage amount but is entitled to redeem the item purchased by him on payment of a proportionate part of the mortgage amount, and (2) the suit is bad for non-joinder of Lakshmi Ammal and her son, the representatives of the mortgagor Krishna Iyengar. In regard to the first contention Mr. Bhashyam Iyengar relied on S. 60, T. P. Act, and on the decision of this High Court in A I R 1927 Mad 1039.[1] The general rule is that a mortgage is indivisible and that where more than one person is interested in the mortgaged property or where more properties than one are comprised in the mortgage, the mortgagee is entitled to insist on redemption of the entire mortgage and neither the mortgagor nor any one of the mortgagors is entitled to redeem his share or a portion of the mortgaged property on payment of a proportionate amount. S. 60 engrafts an exception in cases,

> where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part the share of a mortgagor.

But that section does not say that if the mortgagor desires to redeem the entire mortgaged property he will be precluded from doing so. The recent decision of the Privy Council in 48 Cal 22[2] makes this position clear. In that case 16 fields were mortgaged in 1893. In 1896 the mortgagor sold one of the fields. Then in 1899 the mortgagee brought a suit to foreclose the mortgage without making the vendees of the one field sold by the mortgagor parties. A compromise decree was arrived at in that suit in and by which it was agreed that the mortgagor should pay certain amount within a particular period and in default nine fields of the mortgaged property including the field sold away by the mortgagor in 1896 should be foreclosed and the mortgagee should be put in possession; and the decree ran "that the defendant mortgagor should stand absolutely debarred and foreclosed and from all equity of redemption in and to the mortgaged premises." The vendees of

1. Ganapathi Bhatta v. Beeru Bhandary, A I R 1927 Mad 1039=106 I C 196.
2. Yadalli Beg v. Tukaram, A I R 1921 P C 125 =47 I C 207=48 Cal 22 (P C).

the field sold in 1896 brought a suit claiming to redeem the nine fields which had been foreclosed. The Subordinate Judge was of opinion that the vendees were not entitled to redeem the whole property but only the field purchased by them on payment of the proportionate amount of the mortgage amount but this decree was reversed by the Judicial Commissioner who held that the vendees were entitled on payment of the entire mortgage amount to redeem the nine fields and accordingly directed the necessary amounts to be taken. This decision was confirmed in appeal by their Lordships of the Privy Council. Dealing with the argument regarding partial redemption their Lordships observe as follows :

> The only question that arises is whether they are entitled to redeem the whole of the nine fields, or only the field conveyed to them subject to the mortgage over the whole. According to English Law the respondents would have been entitled to redeem the mortgage in its entirety subject only to the safeguarding of the equal title to redeem of any other person who had a right of redemption, a point which has not arisen so far in the present case. The respondents, being transferees of part of the security, by English Law, if it applied, would on the one hand be entitled to redeem the entire mortgage on the properties generally, and correlatively could not compel the mortgagee to allow them to redeem their part by itself. This would be so as the result of principle unless something had happened which extinguished the mortgage in whole or in part, such as an exercise of a power of sale originally conferred on the mortgagee by his security or such conduct on the part of the transferees as would estop them from asserting what normally would have been their right. Nothing of this kind is alleged in the case before their Lordships.

Therefore this case is authority for the following propositions, namely (1) the character of indivisibility exists not only with reference to the mortgagee but also with reference to the mortgagor, i. e., the mortgagee can insist upon the redemption of the entirety of the mortgage and the mortgagor or transferees of part of equity of redemption cannot insist upon a partial redemption of the mortgage. (2) But if the integrity of the mortgage is broken by the mortgagee, either by exercising the power of sale conferred under the deed of mortgage or by acquiring a portion of the property otherwise, the mortgagee will not be entitled to insist upon the redemption of the whole but must submit to a partial redemption in case the mortgagor or his assignee chooses to claim it, and (3) the mortgagor or anybody acquiring a partial interest from him will also lose a similar right of claiming redemption of the whole if by his conduct he has estopped himself from asserting what normally according to their Lordships' opinion would have been his right. Dealing with a case of the right of one of several mortgagors to redeem more than his share, their Lordships made the following observation :

> The Judge in the original Court thought that the decisions of the Courts in India had established that one of the several mortgagors cannot redeem more than his share unless the owners of the other shares consent or do not object. Subject to proper safeguarding of the rights to redeem which these owners may possess, their Lordships are of opinion that this is not so in India, any more than in England. The decisions referred to when scrutinised turn out to be based not on any general principle different from that adverted to, but on the special circumstances of the transactions to which they related, circumstances which have nothing analogous to them in the facts now under review.

Therefore it is clear that one of several mortgagors or a purchaser of a portion of the equity of redemption in the mortgaged property is entitled to redeem the whole of the property subject to the equities which other persons may have, due provision being made for their rights. The proposition which Mr. Bhasyham Iyengar contends that once the integrity of the mortgage is broken, the mortgagor or assignee of a portion of the equity of redemption of the mortgaged property cannot insist upon the redemption of the whole is untenable in view of the above decision of the Privy Council. It is clear authority for the position that even though the integrity of the mortgage is broken by the conduct of the mortgagee, the mortgagee will be entitled to insist on the redemption of the whole unless by his conduct he is precluded from doing so. Such a right seems to be clear from Ss. 91 and 92, T. P. Act. No doubt in A I R 1927 Mad 1039,[1] Devadass and Jackson, JJ., have taken a different view. With due respect to those learned Judges I am of opinion that they have misapprehended the obvservations of their Lordships of the Privy Council in 48 Cal 22.[2] Referring to the decision of the Privy Council the learned Judges observe :

> This decision does not govern the present case as the defendants have acquired the right of the mortgagors to the mortgaged property. The decision of the Privy Council case would have been different if the person who resisted the redemption had acquired in whole or in part the right to the equity of redemption from the mortgagor.

These observations seem to indicate that it is entirely dependent upon the will of the mortgagee whether he would preserve the integrity of the mortgage or not. I do not find any warrant for this view in the judgment of the Privy Council. On the other hand they seem to clearly express the view that it is the normal right of the assignee of a portion of the equity of redemption to claim a redemption of the whole unless there was some conduct on his part to estop him from doing so. The view which I am taking that in spite of the integrity of the mortgage having been broken by the mortgagee the assignee of a portion is entitled to redeem the whole receives support from a recent decision of the learned Chief Justice and King, J., in S. A. No. 269 of 1932. In that case there was a mortgage which comprised properties in Schs. A and B thereto. Subsequent to the mortgage the respondent in that case became the purchaser of Sch. B property. The appellant mortgagee filed a suit to enforce his mortgage without impleading the respondent, obtained a decree and in execution thereof purchased both Schs. A and B properties and subsequently sold away Sch. A property. The appellant then sued to recover possession of Sch. B property but he was obstructed by the respondent. Thereupon he filed a suit to get the balance of the mortgage amount after crediting the sale proceeds of Sch. A property. The respondent insisted on redeeming both Schs. A and B properties. The learned Judges held that he could. I am therefore of opinion that the plaintiff would prima facie be entitled to insist on a redemption of items 1 to 6 on payment of the entire mortgage amount.

But the question is, can he be given this relief in this suit? It is in this connexion that the second contention of Mr. Bhashyam Iyengar becomes relevant. No doubt under S. 91, T. P. Act, he is entitled to institute a suit for redemption of the entire mortgaged property; but under O. 34, R. 1, Civil P. C., he is bound to make all persons interested in the equity of redemption parties. The section is imperative though no doubt subject to the other provisions in the Code, one of such provisions being O. 1, R. 9. The object of O. 34, R. 1 is to prevent multiplicity of actions and to adjust the equities of all parties interested in the equity of redemption. So normally speaking, if the plaintiff desires to have redemption of the entire mortgage, he ought to have made the representative of Krishna Iyengar parties. The observations of L. J. Lindley in (1886) 32 Ch D 430[3] at p. 436 seem clearly to indicate that if a person interested in the equity of redemption is known he ought to be made a party in order to safeguard his rights. But if he is not known or it was not possible to have made him a party, due provisions may be made in the decree for safeguarding his rights. O. 34, R. 1, I think, in my opinion, makes it obligatory to make the persons interested in the equity of redemption if they are known as parties to the suit because it may be they may validly object to the plaintiff redeeming the whole or there may be equities shown which will prevent the plaintiff redeeming the whole. In this case the plaintiff not only deliberately omitted to make the representatives of Krishna Iyengar parties to the suit but opposed the application made by the defendant. The question again is, is the plaintiff precluded from getting any relief? O. 1, R. 9 says:

> No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Therefore even though the plaintiff has omitted to make representatives of Krishna Iyengar parties to the suit, his suit cannot be defeated if relief otherwise can be granted to him: *vide* 43 Bom 575[4] and 60 Cal 87.[5] The plaintiff is interested only in a portion of item 3 in the mortgaged property and he can be given relief by allowing him to redeem that part on payment of a proportionate amount. I therefore modify the decree of the lower appellate Court by directing redemption of the property purchased by him on payment of a proportionate amount of the mortgage. In fixing the value of this proportionate amount, credit will have to be given to the purchase of item 7. I therefore modify the decrees of the lower Courts accordingly and remit the case to the District Munsif's Court at Ramnad to ascertain the proportionate amount payable on the portion of item 3 purchased by the plaintiff and pass a revised decree for redemption. As

3. Hall v. Heward, (1886) 32 Ch D 430=55 L J Ch 604=54 L T 810=34 W R 571.
4. Shaha Saheb v. Sadhasiv Sapdu, A I R 1919 Bom 135=51 I C 223=43 Bom 575=21 Bom L R 369.
5. Umeschandra Mandal v. Hemangachandra Maiti, A I R 1933 Cal 325=143 I C 315=60 Cal 87=58 C L J 422=36 C W N 1138.

the suit had to be instituted owing to the obstructive conduct of the defendant and as the plaintiff has partially failed I direct each party to bear his or their own costs of this appeal and in the lower appellate Court. But the plaintiff will get his costs of the trial Court from the defendant as already awarded by the learned District Munsif. (Leave refused).

C.R.K./K.B. *Case remanded.*

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* A. I. R. 1937 Madras 140

VARADACHARIAR AND MOCKETT, JJ.

Shanmukam—Appellant.

v.

Nachu Ammal—Respondents.

Appeal No. 104 of 1934, Decided on 25th September 1936.

(a) Hindu Law — Joint family property — Mortgage by father for himself and as guardian of his son of alleged self-acquired property — Father and son impleaded in mortgage suit and decree against both—Son being represented in mortgage by his father and impleaded along with him in suit, is bound by decree, so far as his interest in the property is concerned.

Mere description of property dealt with by the father as his self-acquisition does not conclude the question, whether the son's interests if any in the property, even on the assumption that it is joint family property, would be bound by the transaction or not. [P 141 C 1]

Father of joint Hindu family mortgaged for himself and as guardian of his son a certain property, inter alia, as self-acquired property. In the mortgage suit mortgagee, to avoid the risk of the nature of property mortgaged, impleaded son also as a party. Son pleaded that the decree could not bind his interest but of his father only :

Held : that any ambiguity arising from the use of expression 'self-acquisition' was removed by the fact that the son was made a party to the document represented by his father as guardian, so that whatever interest the son might possess in the properties hypothecated, even they should be held to be joint family properties and might be bound by the transaction. Son was therefore bound by the decree so far as regards his interest in the property hypothecated was concerned and the liability could not extend to property which was his own : *34 All 296* (*P C*), *Disting.*; *15 Cal 70* (*P C*), *Rel. on.* [P 142 C 1]

(b) Party—Omission—Omission to add some more persons — Omission does not disentitle plaintiff to decree against persons impleaded — Question remains open against non-impleaded persons only.

Where plaintiff sues some persons omitting some others, his omission to add some other persons as parties does not disentitle him to a decree against the persons impleaded. The effect of the omission is that the question remains open against persons who are not impleaded. [P 141 C 1]

*** (c) Hindu Law—Joint family — Father—Debts—Son's liability—Son under pious obligation to pay father's debts—Father, though junior member of joint family, has power to dispose of son's share to satisfy his debts if moral, even though he is not manager of joint family.**

Ancestral property which descends to a father under Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It is a pious duty on the part of the son to pay his father's debts and it being the pious duty of son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable for father's debts if they are not tainted with immorality. [P 142 C 5]

It is on the liability of the son's share for the discharge of the father's debts that father's power of disposal of son's share is based and this power of disposal is subject to the limitation of debts not being immoral or illegal. A father therefore even if he is a junior member of family, has power of disposal over his son's share for debts not illegal or immoral, even though he is not the manager of the family : *Case law discussed.* [P 143 C 1, 2]

*** (d) Hindu Law—Debts—Son's liability—Pious obligation—True basis of pious obligation is relationship of father and son— Whether father is a manager also is immaterial.**

The doctrine of pious obligation of son to pay his father's debts cannot be restricted to cases where father also happens to be the manager. If this limitation were well founded it would also follow that the father's power of disposing of the son's share for the satisfaction of his own debts must be likewise limited. There cannot be any justification for such limitation when it is remembered that the son's obligation to pay his father's debts was under the original Smritis independent of possession of assets of joint family property. It depends purely upon the relationship of father and son. It is only by case law developed during the early part of nineteenth century and by statute law in the Bombay Presidency that the liability of the son for father's debts was limited to assets and to joint family property. The true basis of the obligation therefore is the relationship of father and son and not the accident of the father being the manager of the joint Hindu family : *A I R 1933 Mad 690* and *A I R 1934 All 590*, *Rel. on* ; *1936 M W N 866*, *Dissent.* [P 143 C 2 ; P 144 C 1]

K. S. Ramabhadra Iyer and *P. Sridhara Rao*—for Appellant.

S. T. Srinivasagopalachariar — for Respondents.

Varadachariar, J. — This is an appeal by defendant 2 against a decree for sale passed in the mortgagee's suit. Defendant 2 is the undivided minor son of defendant 1 who executed the suit mortgage bond (Ex. A) on 24th May 1924, securing repayment of a sum of Rs. 11,000 borrowed in the manner and for the purposes set forth in Ex. A. Besides the two defendants, it is stated that there are two other members in their joint family viz., the father and the uncle of defendant 1. Ex. A purports to mortgage six items of properties which it would appear were all purchased in the name of defendant 1

though he was only a junior member in the family. In respect of the first of these items, the document uses the following words "property which I purchased as self-acquisition under a sale deed dated 27th March 1919, etc." In respect of the other items, though a reference is made to the fact of purchase in defendant 1's name, the term self-acquisition is not used. The mortgage bond is executed by defendant 1 for himself and as guardian of defendant 2.

The suit was instituted against the two defendants only, and, in the first instance, an ex parte decree was passed against them. In proceedings to set aside the ex parte decree, the result of an order passed by this Court on appeal was that it was set aside only as against defendant 2 and the original decree stood as against defendant 1. At the second trial, the learned Subordinate Judge passed a mortgage decree in the ordinary form against defendant 2 also and provided for liberty to apply for a personal decree in due course. It is against the decree passed on the second hearing that this appeal has been filed. It may be convenient at the outset to dispose of an objection taken with reference to the frame of the suit and the allegations in the plaint. It was argued that if the plaintiff wanted relief on the footing that the mortgaged properties are joint family properties, he should have added the father and the uncle of defendant 1 as parties to the suit and in their absence the plaintiff must be limited to a remedy on the footing that the hypothecated properties are the self-acquisitions of defendant 1 and that therefore no decree should be passed even against defendant 2 on the assumption of the hypothecated properties being joint family properties. We are unable to accept this contention as well founded.

It may no doubt be open to the plaintiff to implead as parties to his suit persons who are not parties to the mortgage and seek to bind them by the mortgage. But that is very different from saying that if he does not implead such persons as parties to his suit, the omission disentitles him to a decree even as against persons impleaded. The only result of the omission will be to leave the question open as against the non-impleaded parties and this is the view which the lower Court has adopted in this case. It was next contended on behalf of the appellant that the plaint is framed only on the footing that the hypothecated properties are the self-acquired properties of defendant 1 and that therefore no mortgage decree ought to be passed as against defendant 2. Whatever criticism the plaint may be open to, it is clear, as the lower Court points out, that by the time issues came to be framed in the case, the parties realized that the question of defendant 2's liability to be bound by the mortgage even on the assumption that the properties hypothecated were joint family properties was one of the matters to be tried in the suit; and issue 5 was accordingly framed in these terms: "Is the mortgage sued on true, valid and binding on the minor defendant 2?" In this view defendant 2 cannot claim to have been in any manner prejudiced by the form of the plaint; and, now that the question raised by issue 5 has been fully tried, there is no reason for declining to grant to the plaintiff such relief as he may be entitled to on the assumption that the hypothecated properties are joint family properties.

A cognate argument to the above was advanced in the following form, viz., that as Ex. A purports to describe the hypothecated properties or at least one of them as the self-acquisition of defendant 1, the Court must, on the authority of the decision in 34 All 296,[1] hold that it was not intended by defendant 1 to deal with the properties in any other character, and accordingly only defendant 1's interests in the hypothecated properties can be held bound. The decision in 34 All 296[1] has been considered in several decisions of this Court, where it has been pointed out that the mere description of the property dealt with by the father as his self-acquisition does not conclude the question whether the son's interests if any in the property, even on the assumption that it is joint family property, would be bound by the transaction or not. In addition to these cases we may refer to an earlier decision of the Privy Council in 15 Cal 70,[2] where two members of a joint Hindu family purported to mortgage certain properties describing them as solely belonging to them. Their Lordships nevertheless held that the other members of the family would be bound by that mortgage and the

1. Balwant Singh v. Rao Maharaj Singh, (1912) 34 All 296=14 I C 629=39 I A 109 (P C).
2. Daulat Ram v. Mehr Chand, (1888) 15 Cal 70 =14 I A 187=5 Sar 84 (P C).

execution sale following thereon, when it was clear from the document taken as a whole that their interests also were intended to be conveyed and it was also found that the purpose of the debt was one binding upon them.

In the present case, any ambiguity arising from the use of the expression self-acquisition is removed by the fact that defendant 2 has been made a party to the document, represented by his father as guardian. The utmost that can be derived from the reference to the property as self-acquisition in the document is that the father might have claimed it to be his self-acquisition, but as the creditor was not prepared to take any risk on that matter he insisted on the son also being expressly joined in the document so that whatever interest the son might possess in the properties hypothecated even if they should be held to be joint family properties might be bound by the transaction. In this view there is no force in the objection raised on the strength of the decision of the Privy Council in 34 All 296.[1]

The main argument however on behalf of the appellant was directed to the question raised by issue 5; and appellant's learned counsel contended that as defendant 1 was not the manager of the family because of his father's existence, defendant 1 had no power to bind his son's share in the family property by a mortgage, even though it be to secure repayment of defendant 1's antecedent debt. In support of this contention, he relied on a decision of a Bench of this Court in Appeals Nos. 406 and 467 of 1930 [1936 M W N 866.[3]] That judgment, given on a similar document, executed by defendant 1 in this case, certainly supports the appellant's contention, but having given the matter our most respectful attention and consideration, we regret we are unable to take the same view. It may be convenient to clear the ground by referring at the outset to the connexion between the Hindu law doctrine as to the pious obligation of the son to pay the father's debts and the father's power to alienate joint family property including the son's share for the discharge of those debts. As early as in 1 I A 321,[4] at p. 331, their Lordships quoted the following passage from the judgment of Knight Bruce, L. J. in 6 M I A 393,[5] viz. :

> The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt.

and proceed to explain this dictum as follows :

> That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son, as the son of his father acquires an interest by birth, is liable to the father's debts.

The same idea was expressed by Lord Hobhouse in the following sentence in 13 Cal 21,[6] at p. 35 :

> The decisions have established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against a creditor's remedies for their debts, if not tainted with immorality.

The result of this view has been to treat even the son's share in the joint family property as at the disposal of the father to the extent necessary to discharge the father's debts unless they are illegal or immoral. It is on this footing that under S. 266 of the old Civil P. C., and S. 60 of the Code of 1908 the Courts have held that a decree against the father can be executed even against the son's share in joint family property; and S. 53, of the Code of 1908, put the matter even more directly by providing that at the father's death joint property, which under the Hindu law would have been available for the satisfaction of his debts, must be treated for the purpose of execution as assets descending to his undivided sons as legal representatives. Likewise, under the Insolvency Act, Courts in India have held that the Official Assignee in the father's insolvency can exercise the power which the father has under the Hindu Law to sell even his son's share in joint family property for the discharge of his debts. And this view has now been affirmed by the Judicial Committee in P. C. Appeals Nos. 23 and 24 of 1932,[7] from Lahore. It is thus on the principle of the liability of the son's share for the discharge of the

3. Rayalu Aiyer v. Vairavan Chettiar, (1936) M W N 866.
4. Girdharee Lal v. Kantoo Lal, (1873) 1 I A 321 (P C).
5. Hanooman Prasad's case, (1854) 6 M I A 393 =18 W R 81=2 Suther 29=1 Sar 552 (P C).
6. Nanomi Babuasin v. Modhun Mohun, (1886) 13 Cal 21=13 I A 1=4 Sar 652 (P C).
7. Sat Narain v. Sri Kishen Das, A I R 1936 P C 277=164 I C 6=17 Lah 644 (P C).

father's debts that the father's power of disposal of the son's share for the satisfaction of those debts has been based. It is true that a distinction has been made between an involuntary sale of the father's property for the satisfaction of his debts and a voluntary disposition by him, by introducing the limitation that in the latter case the debt must be antecedent to the transfer of property and not contemporaneous with the transfer. As pointed out in the Full Bench judgment of this Court in 29 Mad 200,[8] and the judgment of the Privy Council in 46 All 95,[9] this limitation was introduced on the principle of *stare decisis*; but in none of the cases has this power of the father been further limited by restricting it to cases in which he also happens to be the managing member of the joint family.

A person who is the managing member has in that capacity another kind of power of disposition over joint family property, viz. that for purposes of family necessity or clear family benefit he may dispose of family property even to the extent of binding the shares of persons who are not his descendants. The two powers respectively possessed by the father and the manager have been contrasted in the judgment in 46 All 95.[9] The one arises out of the relationship of father and son; the other arises out of a representative character, whether de jure or de facto, where the transferor is in management of the family property. There is no doubt reference in more than one place in the judgment in 46 All 95[9] to the father as manager, but that is only to contrast the position of the father manager with any manager who is not a father and could not have been intended to restrict the powers of the father as such to cases in which he also happens to be the manager. Their Lordships only purported to state the rule deducible from the earlier decisions of the Board and no such limitation is found in the earlier decisions. It has sometimes been attempted to restrict the doctrine as to the pious obligation of the son to pay his father's debts to cases in which the father also happens to be the manager. If this limitation were well-founded, it would no doubt also follow that the father's power of disposing of the son's share for the satisfaction of his own debts must be likewise limited; but the preponderance of authority is against the limiting of the doctrine of the pious obligation of the son to cases where the father also happens to be the manager (*see* 57 Mad 190[10] and 57 All 176[11]). Even in 1936 M W N 866[3] the learned Judges gave a decree against the minor defendant as on a 'money claim.' There can indeed be no justification for any such limitation when it is remembered that the son's obligation to pay his father's debts was under the original Smritis independent of the possession of assets or joint family property.

It depended purely upon the relationship of father and son. It is only by case law developed during the early part of the 19th century and by Statute Law in the Bombay Presidency that the liability of the son for the father's debts was limited to assets and to joint family property. The true basis of the obligation therefore is the relationship of father and son and not the accident of the father being the manager of the joint Hindu family. In view of these considerations, we find ourselves unable to accept the basis on which the decision in 1936 M W N 866,[3] has proceeded. The learned Judges say that so far as the transactions relating to joint family property are concerned, it is only the joint family manager and not the father that can be regarded as the guardian of minor members of the family and as competent to transfer their interests. This will undoubtedly be true so far as transactions sought to be supported on the basis of the family necessity or benefit are concerned; but, as we have endeavoured to show, the liability of the son's share in the family properties to be called upon to satisfy his father's debts exists independently of its liability to be sold or mortgaged for the purposes of the larger family. To the extent required for satisfying the father's debt, there can be no doubt that the father's creditor can attach and sell not merely the father's share of the joint family property but also the son's share,

8. Venkataramanayya Pantulu v. Venkataramanna Doss Pantulu, (1906) 29 Mad 200=16 M L J 69.
9. Brij Narain v. Mangal Prasad, A I R 1924 P C 50=77 I C 689=51 I A 129=46 All 95 (P C).
10. Veerayya v. Parthasarathi Appa Rao, A I R 1933 Mad 690=149 I C 188=65 M L J 417=57 Mad 190.
11. Chhotey Lal v. Ganpat Rai, A I R 1934 All 590=150 I C 411=1934 A L J 483=57 All 176 (F B).

and for this purpose it makes no difference that the father is only a junior member. If the creditor can so attach and sell, it seems to us to follow, for the reasons that we have already stated, that the father has the power to transfer the son's share also for the same purpose. Otherwise the creditor cannot reach the son's share as falling within the language of S. 60 or S. 53, Civil P. C., which undoubtedly postulates that the father has got the power so to transfer.

We hold that the suit mortgage is binding upon defendant 2's share in the hypothecated properties to the extent to which the debts referred to in Ex. A are shown to be antecedent debts. The learned Subordinate Judge has pointed out that no serious attempt has been made to prove that the debts as such are not binding upon the son on the ground of illegality or immorality. As stated already, the mortgage bond was executed to secure repayment of a sum of Rs. 11,000. Out of this amount, we agree with the lower Court that all the items mentioned in Ex. A except the last may be regarded as antecedent debts or otherwise binding on the son. As regards the last item of Rs. 2,430 the learned Judge rightly points out that a sum of Rs. 350 must be held to have passed for the discharge of antecedent debts, because it represents the amount disbursed to the creditors referred to in some of the previous items. In respect of the balance of Rs. 2,080 the document acknowledges it as cash then received. There is no doubt a further statement that it was required for discharging other debts incurred "for the purpose of my family;" but no details are available as to the debts so discharged. The evidence of P. W. 3 as to the kind of enquiry which the lender's agent is said to have made for the purpose of satisfying himself that there were antecedent debts to be thus discharged is far from satisfactory. The creditor will not discharge the burden of proof lying upon him merely by saying that he found it inconvenient to press the father to give details of the debts which he had or proposed to discharge when the father said that it was a delicate matter.

We must accordingly hold that the mortgage Ex. A is as such binding upon the share of the son, defendant 2, in the hypothecated properties, only to the extent of Rs. 11,000 minus Rs. 2,080 or Rs. 8,920. This sum will carry interest as per the terms of the lower Court's judgment. In respect of the balance of Rs. 2,080 the plaintiff will be entitled to relief against defendant 2 only as on a money claim and not on the mortgage as such. Adopting the course followed by Pandrang Row and K. S. Menon, JJ. in 1936 M W N 863,[12] we would add a direction in the decree to the effect that if after the sale of the share of defendant 1 in the hypothecated properties for the full amount of the decree already passed by the lower Court and of defendant 2's share in the hypothecated properties for the amount for which we are now giving the plaintiff a mortgage decree as against defendant 2, the amount of the decree is not fully discharged, the plaintiff will be entitled to proceed against defendant 2's interests in the hypothecated properties if any still remaining and against his interests in other joint family properties for the recovery of this sum of Rs. 2,080 with interest as per the terms of the lower Court's decree. As regards the direction in Cl. 5 of the lower Court's decree, relating to the liberty to apply for a personal decree, appellant's learned counsel drew our attention to an inaccuracy which may perhaps mislead the Court at later stages of this suit. As drafted, that clause provides for liberty to apply for a decree against defendant 1 personally and the other properties of defendants 1 and 2. There is no objection to the general reference to the other properties of defendant 1, but so far as the other properties of defendant 2 are concerned, it ought to be made clear that the liability can attach only to defendant 2's share in family properties and not to properties which can be regarded as his own. Cl. 5 of the lower Court's decree will be modified so as to make this clear.

We do not think it necessary to interfere with the direction of the lower Court as to costs. As regards the costs of this appeal, we think it proper to direct that the appellant will pay three-fourths of respondent 1's costs in the appeal and the appellant will himself pay the court-fee due to Government on the memorandum of appeal.

C.R.K./M.D. *Decree modified.*

12. Vennimal Pillai v. P. O. Banking Corporation Ltd., (1936) M W N 863.

* A. I. R. 1937 Madras 145

CORNISH, J.

Venkatasamy Naicken—Appellant.

v.

Secy. of State and *others*—Respondents.

Appeal No. 20 of 1934, Decided on 22nd September 1936, against appellate order of Dist. Court, Coimbatore, D/- 3rd August 1933.

(a) Civil P. C. (1908), S. 35—Costs—Discretion of Court — Discretion to be exercised must be subject to limitation prescribed in other parts of Code.

The discretion given to the Court over costs is made by S. 35 "subject to such conditions as limitations as may be prescribed" which clearly include any limitations prescribed in other parts of the Code. [P 145 C 2]

(b) Civil P. C. (1908), O. 33, Rr. 12 and 11 —Government cannot apply to recover court-fee from next friend.

It is not competent to Government if it thought there was a better prospect of recovering the court-fee from the next friend, who might be a person of property, than from the pauper plaintiff, to apply under R. 12 for an order making the next friend pay the court-fee. [P 145 C 2]

*** (c) Civil P. C. (1908), O. 33, Rr. 11, 12 —Court cannot be deprived of its rights under R. 12.**

The Court cannot deprive the Government of the right which is expressly given by Rr. 11 and 12 of O. 33, to have an order that the plaintiff shall pay the court-fee when a pauper suit fails : *A I R 1931 Mad 249, Disting.* [P 146 C 1]

V. C. Veeraraghavachari—for Appellant.

K. S. Champakesa Iyengar—for Respondents.

Judgment.—The appellant, a minor, with his mother as next friend, brought a suit in forma pauperis against his father for a partition. The suit ended in a compromise whereby the suit was withdrawn. The compromise, however, provided that the next friend should pay the court-fee. The compromise was approved by the Court, but beyond that no order was made by the Court touching the payment of the court-fee. The next friend apparently has no means to pay the court-fee, and there seems some force in the suggestion that the compromise arrangement on this matter was a device to save the plaintiff from the liability. O. 33, R. 11 provides that where the plaintiff fails in the suit, as he did in the present instance, the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper. The Court which sanctioned the compromise having made no order under R. 11, the Government applied under R. 12 for an order. This rule says that the Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under R. 11. The Government did so apply and the Sub-Judge purporting to act upon the analogy of O. 32, R. 14, ordered that the court-fee should be paid by the next friend. On appeal this order was reversed by the District Judge who held that O. 33, R. 11, was mandatory.

The learned advocate for the appellant has relied upon 35 Mad 716.[1] In this case it was held that S. 35 of the Code and O. 33, R. 11, are to be read together and that the Court under the general power conferred upon it by the section over costs can order a next friend to bear the costs of a pauper suit including the court-fee. It was not decided in that case, and indeed the question did not arise for decision, that the Court in its discretion could make such an order when Government made an application to the Court under R. 12 to make an order under R. 11. It must be borne in mind that the discretion given to the Court over costs is made by S. 35 'subject to such conditions and limitations as may be prescribed,' which clearly include any limitations prescribed in other parts of the Code. I think it would not be competent to Government if it thought there was a better prospect of recovering the court-fee from the next friend, who might be a person of property, than from the pauper plaintiff, to apply under R. 12 for an order making the next friend pay the court-fee. The obvious answer to the application would be that it was not an order which the Court could make under the terms of R. 11. It seems to me that upon such an application the power of the Court to make an order that some person other than the plaintiff or a co-plaintiff shall pay the court-fee is equally negatived by the language of R. 11. It has been argued that this restriction of the Court's power is contrary to the decision in 53 Mad 716,[1] which of course

1. Elumalai Naicker v. Kuppammal, A I R 1931 Mad 249=128 I C 156 = 53 Mad 716 = 58 M L J 623.

is binding upon me, and to which I happened to be a party. I do not think so.

The decision did not profess to dispose of the question which is now before me. The Court may direct the next friend to pay costs in a pauper suit, as in an ordinary suit, and if the Government is content with such an order as regards its rights to recover the court-fee no question can arise. But I am of opinion that the Court cannot by such an order deprive the Government of the right which is expressly given by Rr. 11 and 12, O. 33 to have an order that the plaintiff shall pay the court-fee when a pauper suit fails. For these reasons I think that the appeal fails. It is dismissed with costs. Leave refused.

C.R.K./B.D. *Appeal dismissed.*

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* A. I. R. 1937 Madras 146

BURN AND MENON, JJ.

Mullangi Ramayya and *others*—Appellants.

v.

Thondapu Bapanamma and *another*—Respondents.

Letters Patent Appeal No. 33 of 1935, Decided on 29th July 1936, against judgment of Varadachariar, J., D/- 26th February 1935, reported in *A I R 1936 Mad 16.*

*** (a) Hindu Law—Widow—Surrender by widow in favour of next reversioner—Alienation by widow of part of her husband's estate for payment of debts binding on estate—Surrender of the part remaining is valid.**

Where part of the property inherited by a widow from her deceased husband is alienated by her for discharge of her husband's debts and subsequently surrenders the whole of the remaining estate in favour of the next reversioner, the surrender is valid as the part alienated by the widow has ceased to belong to the estate inherited from her husband, by reason of alienation binding upon it, the conception of the entirety of the estate to be surrendered being applicable only to the existing estate : *A I R 1929 Mad 37* and *A I R 1928 Bom 26, Disting.*; *A I R 1918 P C 196, Expl.* [P 147 C 2]

(b) Hindu Law—Widow — Surrender—One survey number left out in deed but possession of it delivered to reversioner—Surrender is valid.

Where a survey number (which had been obtained by the husband in exchange for his own number) has been left out to be mentioned in the deed of surrender executed by widow in favour of the next reversioner, but the old number has been included therein and the possession of the new survey number is however delivered to the next reversioner along with the other property in the deed, the surrender is of the whole of the estate and is therefore valid. [P 147 C 1]

Ch. Raghava Rao and *M. Sriramamurthi*—for Appellants.

G. Lakshmanna and *Chandrasekhara Sastri*—for Respondents.

Burn, J.—This is an appeal from the judgment of Mr. Justice Varadachariar in Second Appeal No. 338 of 1931.* The facts have been clearly set out in the judgments of the lower Courts and in the judgment of our learned brother and need not be repeated. Mr. Ch. Raghava Rao for the appellants who were the plaintiffs in the suit has contended again before us that the surrender, by Sitamma in favour of her daughter's son now deceased who was the husband of defendant 1, was invalid. This is put upon two grounds. In the first place, it is said that the surrender was only partial because the deed of surrender executed by Sitamma, Ex. 1, did not contain Survey No. 345, an item of land got in exchange by Gangaraju himself before he died. Ex. 1 contains Survey No. 260/3-A which was the survey number given up by Gangaraju when he obtained Survey No. 345 in exchange. Since one item of the estate of the husband was not surrendered by the widow, it is contended that the surrender as a whole was invalid. The other ground is that admittedly the widow Sitamma had made alienations by way of sale of other portions of the estate of her husband which came to her after his death and that she thereby became incompetent to make any surrender in favour of the nearest reversioner. Our learned brother, Varadachariar J., found against the appellants' contention and hence this Letters Patent appeal preferred with the leave of the learned Judge.

With regard to Survey No. 345, our learned brother made a slight slip when he stated that both the lower Courts had accepted the reason given on behalf of the defendants for including in the surrender deed Survey No. 260/3A instead of Survey No. 345. The learned District Judge said that the explanation given on behalf of the defendants might be true or might not. He did not expressly accept the explanation. We agree however with Mr. Lakshmanna for the respondents that this slight mistake in the judgment of our learned brother is not a matter of any importance. Ex. 1 shows that the widow

* Reported in A I R 1936 Mad 16.

Sitamma meant to surrender in favour of her daughter's son the whole of her husband's estate remaining in her control. There is evidence that Survey No. 345 also was handed over to her daughter's son and that he remained in enjoyment of it thereafter. We see no reason to suppose that this transfer of possession to Sitamma's daughter's son was not made in pursuance of the widow's intention to surrender her husband's estate. This is a point of fact, and since we think that it is clear beyond the possibility of any doubt, we cannot accept the suggestion made on behalf of the appellants that this question should be remanded to the lower appellate Court for a finding. With regard to the other contention that the widow became incompetent to make a surrender because she had already alien ted certain portions of the estate of her husband in her hands, we cannot accept it. Our learned brother has dealt very fully with the matter and we agree with his reasoning and with his conclusion. The only case which tends to support the position taken by Mr. Raghava Row in this appeal is that in 55 M L J 859.[1] In that decision Phillips and Odgers, JJ. referred to the decision of the Privy Council in 46 I A 72,[2] and proceeded to apply the principle. They said:

> To apply this principle it is clear that when the widow purported to surrender her estate she did not and could not surrender the whole of her husband's estate so as to efface herself entirely. The previous alienations were her own acts and she could not get rid of them. To that extent she was unable to surrender the whole of the estate and therefore the surrender which she purported to make is invalid.

This they said was the view taken in 51 Bom 1019.[3] It is necessary however to point out, as our learned brother Varadachariar, J. did, that in 55 M L J 859,[1] it was admitted that at any rate one of the alienations made by the widow before she purported to surrender her husband's estate to the nearest reversioner had been found to be invalid, and in the Bombay case, the widow after first purporting to make a gift of practically the whole of her husband's estate proceeded thereafter to purport to surrender the whole of it to the nearest reversioner including the property already gifted away by her. It is obvious that those facts are very dissimilar from the facts in this case. Here it has never been contended that the alienations made by Sitamma were invalid and not binding upon the reversion. Mr. Raghava Rao suggests indeed that this point also ought to be referred to the lower Courts for a finding, but we are clear that there is no necessity to do that. There is evidence on behalf of the defendants that the alienations made by Sitamma were made in order to discharge her husband's debts. This was not contradicted and the witnesses who gave it were not cross-examined on the point. We therefore hold that it is a question of fact which is concluded. Those alienations being valid, we think our learned brother Varadachariar, J. was undoubtedly right in holding that those items of property ceased to be part of the estate of Sitamma's husband in her hands. That being so, we fail to see why those alienations should render her incompetent to make a surrender of the whole of her interest in what remained of her husband's estate. As our learned brother put it:

> Wherever any portion of what was once the estate of the husband has ceased legally to belong to it by reason of an alienation binding upon the estate, the conception of the entirety of the estate to be surrendered must reasonably be applied only to the existing estate.

We do not think that there is anything in the observations of their Lordships of the Privy Council to support the view that where an alienation by a widow has been made for purposes binding upon the estate of the reversioners the widow becomes incompetent to surrender the whole of her interest in what remains. Their Lordships, as our learned brother pointed out, have laid emphasis upon the necessity for the surrender of the whole interest of the widow. Particularly, they lay stress upon the necessity for seeing that the widow is not carrying out a mere device to divide the estate between herself and the reversioner and is not reserving for herself any interest in the estate. These requisites are completely carried out in the case before us. Sitamma undoubtedly surrendered everything, retaining nothing for herself. For these reasons this appeal must be dismissed with costs.

C.R.K./A.L *Appeal dismissed.*

1. Vijiaraghavachariar v. Ramanujachariar, A I R 1929 Mad 37=114 I C 283=55 M L J 859.
2. Rangaswami Goundan v. Nachiappa Goundan, A I R 1918 P C 196=50 I C 498=46 I A 72=42 Mad 523 (P C).
3. Sakharam Bala v. Thama Bala, A I R 1928 Bom 26=107 I C 265=51 Bom 1019=29 Bom L R 1571.

* A. I. R. 1937 Madras 148

KING, J.

Subbaraya Pillai—Appellant.

v.

Pichaipillai Udayan and *another*—Respondents.

Second Appeal No. 605 of 1932, Decided on 27th April 1936, against decree of Sub-Judge, Trichinopoly, in A. S. No. 75 of 1931.

*** (a) Deed — Construction— Mortgage or charge—Distinction between — Intention expressed in language of deeds must be looked into—Essentials of valid mortgage — Mortgage invalid for want of registration does not amount to charge.**

The distinction between a charge and simple mortgage is a very subtle one and to judge of the intention of parties, the language in which the intentions are expresssd alone must be looked into. [P 149 C 1]

The essentials of a mortgage are four in number: (1) It must be created by act of parties, (2) it must be for a debt, (3) it must be of a specific property and (4) it must involve a covenant to pay. [P 149 C 1]

Where a person gave a statement in a proceeding instituted by him under S. 145, Criminal P. C., in which he undertook to pay Rs. 750 to the respondent in that proceeding by a certain date and to give him the right of proceeding against the property in respect of which the proceedings were instituted and two other properties if he fails to pay and on the respondent agreeing to those terms the proceedings were dropped :

Held : that the above statement satisfied all the requirements of a mortgage, that as it was not attested or registered, it was invalid as a mortgage and that it could not also be held to be a charge : *23 M L J 131* and *21 M L J 562*, *Rel. on.* [P 148 C 2 ; P 149 C 1]

*** (b) Contract—Novatio — Original cause of action — Mortgage which is invalid but goes to discharge valid mortgages — Law applicable to pro notes insufficiently stamped cannot be extended to such invalid mortgage.**

A promisee of an insufficiently stamped pronote can sue on the original cause of action but the analogy cannot be extended to a case of an invalid mortgage created to satisfy a valid mortgage, so as to allow the mortgagee under invalid mortgage to sue on the valid mortgages. The law regarding pronotes depends upon the special characteristics of Negotiable Instruments : *A I R 1916 P C 68*, *Disting.* [P 149 C 2]

M. Patanjali Sastri—for Appellant.

T. S. Raghavachari—for Respondents.

Judgment. — This appeal is concerned with 3 acres 53 cents of land in Varahur with Survey No. 231/3, which in 1906 was mortgaged by one Ayyasami Padayachi to one Muthusami Udayan for Rs. 100. In 1910 Ayyasami Padayachi and his wife Kamakshi further mortgaged a house for Rs. 250 to the same Muthusami Udayan. In 1921, Ayyasami Padayachi being then dead, his widow sold the equity of redemption in this land by two contradictory sale deeds to Muthusami Udayan's son Pichaipillai Udayan, the plaintiffs, and to defendant 1. The dispute which inevitably arose between the rival vendees was referred to arbitration and an oral award was pronounced in November 1921 by which defendant 1 was to keep the property and pay Rs. 750 to the plaintiff in discharge of his two mortgages. If default was made in payment plaintiff was to have the right to bring this property to sale. No payment was made, disputes broke out again, and in 1923 the Sub-divisional Magistrate, Ariyalur, took action under S. 145, Criminal P. C.

On 30th January 1923, defendant 1 gave a statement before the Sub-Magistrate, Perambalur (Ex. D) in which he undertook to pay Rs. 750 to plaintiff by 1st September and to give him the right of proceeding against this property and two other items of property if he failed to do so and promised, if plaintiff would agree to this proposal and refrain from entering upon the suit land, to drop the proceedings before the Sub-divisional Magistrate. Plaintiff expressed his agreement in a statement made on the same day to the same Sub-Magistrate, and the proceedings under S. 145 were duly dropped. Defendant 1 has still made no payment, and in 1928 he sold the suit property to defendant 2. In 1929 plaintiff filed the suit out of which this second appeal arises, claiming a sum of Rs. 1,400 (Rs. 750 with interest) to be realized by the sale of the suit property and by the personal liability of defendant 1. In his suit plaintiff based his claim to a charge on the property upon the oral award. The learned District Munsif held that the oral award created a valid charge and defendant 2 purchased the property with knowledge of plaintiff's rights. He accordingly decreed plaintiff's suit as prayed for. Against this decree defendant 2 alone appealed. In the appeal the learned Subordinate Judge of Trichinopoly confirmed the finding that defendant 2 had notice of plaintiff's rights, but held that the oral award did not create a valid charge. The appeal however did not succeed, as the Subordinate Judge held that a charge was created by the two statements of 1923

before the Sub-Magistrate. Defendant 2 has now filed this second appeal.

In second appeal plaintiff placed no reliance upon the oral award, and the main argument was whether the recitals of Ex. D constituted that document a mortgage or a charge. 'Mortgage' is defined in S. 58 and 'charge' in S. 100, T. P. Act, and the crucial consideration which emerges from these definitions is this: that if any document can be construed as a mortgage it cannot be a charge. The learned Subordinate Judge holds that Ex. D was 'intended' to be a charge, and was not 'intended' to be a mortgage. The distinction between a charge and a simple mortgage is a very subtle one and to judge of the 'intention' of parties we must look to the language alone in which their intentions are expressed. What then are the essentials of a mortgage? They are set out in a judgment of a Bench of this Court reported in 23 M L J 131[1] as four in number; (i) it must be created by act of parties; (ii) it must be for a debt; (iii) it must be of specific property; (iv) it must involve a covenant to pay; and in 21 M L J 562,[2] two other features of a document are held not to be essential for constituting it a mortgage. These are (a) formal transfer of interest and (b) an express power of sale. Now it is clear upon a perusal of Ex. D that the four essentials mentioned above are all present though the two non-essentials may be absent. Ex. D therefore must be a mortgage if this is the law to be applied to its construction and the learned advocate for the respondent has not been able to refer me to any authority which overrules or casts any doubt upon the law as so propounded. I must therefore rule that Ex. D is a mortgage. As it has not been attested or registered it is invalid as a mortgage, but being invalid as a mortgage, not from any defect in its recitals but for non-compliance with subsequent statutory requirement it is conceded that it cannot be held to be a charge. In the result then respondent's case as based upon Ex. D must fail. Respondent however now puts forward yet a third alternative case, that he is entitled to a decree upon the original mortgage of 1906 which had been kept alive by various payments and acknowledgments up till the date of his plaint. Although, as pointed out for the appellant, there is no such alternative prayer at the end of his plaint to this effect, passages in paras. 8 and 14 show that respondent had this alternative prayer in mind, and I think this point may fairly be considered. It is based mainly upon a decision of the Privy Council reported in 39 All 178.[3] It seems to me that that case is clearly distinguishable from the present case. There a mortgagee took second mortgages in substitution of a first, and those second mortgages were held not to be binding on the mortgagor. Their Lordships say :

> It does not appear to be consistent with equity or good conscience that the defendants having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Mt. Nandan, and consequently did not bind them, should now claim the benefit of that transaction as a release of the mortgage of 1876.

In the present case there is no fraud played upon the mortgagee. He simply took a mortgage without realising that it was a mortgage and that he ought to have it attested and registered. Defendant 2 is putting forward a technical plea which he is entitled to put forward and which, though it affects the validity of Ex. D as a mortgage, does not release defendant 1 from his personal obligation under it. I cannot see that 39 All 178[3] can be applied to the facts of this case. Respondent finally falls back upon the analogy of insufficiently stamped promissory notes, and argues that if the promisee of such a note can sue upon the original cause of action, the mortgagee of an invalid mortgage ought to be permitted to sue on the valid mortgage which the invalid mortgage was intended to discharge. But it seems to me that this part of the law regarding promissory notes depends upon the special characteristics of negotiable instruments, and in the absence of authority I am unable to extend it from promissory notes to mortgages. In the result this appeal must be allowed and respondent's suit dismissed with costs throughout as against defendant 2. The decree against defendant 1 is confirmed.

C.R.K./B.D. *Appeal allowed.*

1. Rama Brahman v. Venkatanarasu Pantulu, (1912) 23 M L J 131=16 I C 209.
2. Balasubramania Nadar v. Sivaguru Asari, (1911) 21 M L J 562=11 I C 629.
3. Har Chandi Lal v. Sheoraj Singh, A I R 1916 P C 68=39 I C 343=44 I A 60=39 All 178.

A. I. R. 1937 Madras 150

CORNISH, J.

Kandaswami Mudali—Appellant.

v.

Annamalai Reddi and *others*—Respondents.

Appeal No. 10 of 1934, Decided on 10th September 1936, against appellate order of Dist. Court, Trichinopoly, D/- 7th September 1933.

Restitution—Ex parte decree set aside—New decree passed smaller in amount than ex parte decree — Defendant applying for refund of excess amount received by plaintiff in execution of ex parte decree that was subsequently set aside—Application made within three years of the passing of new decree but after three years from setting aside of ex parte decree—Art. 182, Lim. Act applied and not Art. 181, and application for restitution was within time - Application for restitution was to enforce legal obligation against plaintiff—Even if S. 144, Civil P. C., was not strictly applicable yet restitution should be granted under S. 151, Civil P. C.

A preliminary decree in a suit was passed ex parte, but before the passing of the final decree the defendant had applied to have the ex parte preliminary decree set aside. He did not succeed in this application until the matter had been carried to the appellate Court when the ex parte decree was set aside and the suit was remanded for fresh trial. The result of the new trial was that a new decree for a sum less than the amount of the ex parte decree was passed. An application for restitution was made by the defendant of the excess amount received by the plaintiff from the sale under the ex parte decree. This application was more than three years after the setting aside of the ex parte decree but within three years of the passing of the new decree and the plaintiffs contended that the application was barred by time :

Held : that an application for restitution was in reality an application for execution of a decree on the ground that it was to enforce a legal obligation arising from the decree itself, that is to say, an obligation upon the decree holder to refund more than he was entitled to receive under the decree. Under such circumstances, Art. 182, Lim. Act, is the appropriate provision and not Art. 181. When an ex parte decree is set aside and a fresh trial ordered, this process could not be rightly described as a variation or reversal of the decree which had been set aside. The parties were remitted to the position in which they had stood before the ex parte decree was made. There was a re-trial and the decree made upon this re-trial was a new decree. Being a new decree it was not a decree varying or reversing the decree which had been set aside. The effect of the new decree was to fix the liability of the defendant, and if the result was that the plaintiff was entitled to less than he had actually received upon the execution of the decree which had been set aside, he was in equity at all events, bound to restore the excess. S. 144, Civil P. C., may not be strictly applicable to the case, but upon the equitable principle which underlies S. 144, and also in pursuance of the inherent power of the Court to prevent an abuse of its process, an order for restitution of the balance could be made in favour of the defendant : *A I R 1917 Mad 194, Foll.*; *A I R 1931 Lah 504, Not foll.*

[P 150 C 2; P 151 C 1]

K. R. Rangaswami Iyengar — for Appellant.

A. Srirangachariar—for Respondents.

Judgment.—In execution of a mortgage decree against the appellant his property was brought to sale on 10th August 1927. The preliminary decree in the suit had been made ex parte but before the passing of the final decree the appellant had applied to have the ex parte preliminary decree set aside. He did not succeed in this application until the matter had been carried to the appellate Court when the ex parte decree was set aside and the suit was remanded for fresh trial. This was on 16th January 1928. The result of this new trial was that the mortgage amount decreed was Rs. 278-9-3 less than the amount of the ex parte decree. This new decree was made on 31st October 1928. An application for restitution was made by the appellant of the excess amount received by the respondent from the sale under the ex parte decree. This application was made on 30th October 1931. The question is, is this application in time? The District Judge has held that restitution could have been and ought to have been claimed when the ex parte decree was set aside on 16th January 1928, and consequently that the application is time-barred. This decision would be right if Art. 181, Lim. Act, governed the application. It has been held by the Lahore High Court in A I R 1931 Lah 504[1] that Art. 181 is the relevant provision to application for restitution. But a Bench of this High Court, in 33 M L J 413,[2] has held that an application for restitution is in reality an application for execution of a decree on the ground, as I understand it, that it is to enforce a legal obligation arising from the decree itself, that is to say, an obligation upon the decree-holder to refund more than he is entitled to receive under the decree.

The Madras ruling is that Art. 182, Lim. Act, is the appropriate provision.

1. Gujar Mal v. Narayana Singh, A I R 1931 Lah 504=134 I C 206=32 P L R 395.
2. Unnamalai Ammal v. Mathan, A I R 1917 Mad 194=42 I C 530=33 M L J 413.

Cl. 7 of this Article gives a period of three years, where the application is to enforce the payment which the decree directs to be made on a certain date from that date. Therefore it has been argued for the appellant that the decree having been made on 31st October 1928 and the decree having given three months' time for payment, the application for restitution made on 30th October 1931 is in time. In my opinion this contention is correct. When an ex parte decree is set aside and a fresh trial ordered, I do not think that this process can be rightly described as a variation or reversal of the decree which has been set aside. The parties are remitted to the position in which they stood before the ex parte decree was made. There is a re-trial and the decree made upon this re-trial is a new decree. Being a new decree it is not a decree varying or reversing the decree which has been set aside. The effect of the new decree was to fix the liability of the defendant and if the result is that the plaintiff is entitled to less than he has actually received upon the execution of the decree which has been set aside, he is in equity at all events bound to restore the excess. S. 144, Civil P. C., may not be strictly applicable to the case, but upon the equitable principle which underlies S. 144, and also in pursuance of the inherent power of the Court to prevent an abuse of its process, I think that an order for restitution of the balance can be made in favour of the appellant. As I have already said, this application was made within the time limit fixed by Art. 182 and it was in time. The result is that the appeal is allowed with costs and the order of the District Munsif will be restored. Leave to appeal is refused.

C.R.K./B.D. *Appeal allowed.*

A. I. R. 1937 Madras 151

STODART, J.

In re *Malavaraya Padayachi*—Petitioner.

Civil Revn. No. 479 of 1936, Decided on 21st August 1936, from order of Dist. Court, South Arcot, D/- 8th November 1935.

Insolvency—Proof of debts — Power of Receiver in ordering enquiry—Court holding debt to be true under S. 53, Provincial Insolvency Act—Creditor filing this proof before Receiver—Receiver can order enquiry though he should lease it to other creditors to contest—Act or decision indicated in S. 68, Provincial Insolvency Act, does not apply to steps taken in such enquiry.

A Receiver under S. 53, Provincial Insolvency Act contested a mortgage by insolvent in favour of a creditor, but the Court held in creditor's favour by holding that the mortgage debt was true. On this the creditor filed this proof of his debt before the Official Receiver, but the Receiver declined to enter him in the schedule of creditors and ordered further inquiry. The creditor appealed on the ground that the refusal of the Receiver was ultra vires:

Held : it was possible that the Receiver had acquired further information as to the validity of the debt or that when the fact was known that this petitioner was proving his debt, other creditors who knew nothing about the annulment proceedings might come forward to attack the debt. The Official Receiver could not be said to be acting ultra vires in posting petitioner's application for proof of debt for further inquiry though there would have been nothing wrong and perhaps it would have been better if he had admitted the debt and put the onus of getting it expunged from the schedule on the other creditors. The Official Receiver should not in any way be fettered in the course of making inquiries into the validity of debt of which proofs are tendered. Act or decision indicated in S. 68 did not apply to some step taken in the course of such an inquiry. [P 152 C 1]

K. Subramaniam—for Petitioner.

Order.—This petition arises in insolvency. The chief question for consideration is the scope of S. 68, Provincial Insolvency Act. Petitioner had a mortgage from the insolvent. It was annulled by the Court under S. 54 (1), Provincial Insolvency Act. In the same proceedings the Court, at the instance of the Receiver, considered the question whether the mortgage should be annulled under S. 53 as being not supported by consideration. The Court decided this in favour of the petitioner holding that the mortgage debt was true. The petitioner then filed proof of the debt before the Official Receiver relying on this finding in his favour. The Official Receiver it appears declared that he would not admit the debt to the Schedule without further inquiry. Against this declaration of the Official Receiver the petitioner applied to the Insolvency Court contending that the Official Receiver was bound to accept proof of the debt and to admit it to the Schedule. The Insolvency Court disallowed the petition. The petitioning creditor then appealed and the District Judge held first that the Official Receiver was entitled to hold further inquiry and secondly that the petition was premature. On the first point, namely, whether the Official Receiver was bound

to accept as final the decision in the annulment petition, it is possible that new information may have come to the Official Receiver since that petition was tried.

I do not say that any such new information has been obtained in this case. All I do say is it is possible that the Official Receiver has acquired further information as to the validity of the debt or that when the fact is known that this petitioner is proving his debt other creditors who knew nothing about the annulment proceedings may come forward to attack the debt. I am not prepared therefore to say that the Official Receiver was acting ultra vires in posting petitioner's application for further inquiry though of course there would have been nothing wrong and perhaps it would have been better if he had admitted the debt and put the onus of getting it expunged from the Schedule on the other creditors. Whatever the force of this reasoning, I think however that the petition must fail on the ground that it is premature. It appears to me that the Official Receiver should not in any way be fettered in the course of making inquiries into the validity of debts of which proofs are tendered. I do not think that the act or decision indicated in S. 68 applies to some step taken in the course of such an inquiry. Let the Official Receiver decide that the debt is or is not to be admitted to the Schedule. Then the party aggrieved has his remedy. For all we know in this case the decision of the Official Receiver may be that the finding in the annulment proceedings is binding on him or that until it is shown that fresh evidence of a very cogent nature has been discovered he is not prepared to re-open the matter. But I do think the Official Receiver must be given an opportunity of considering the case and coming to a decision; and that till he does so petitioner has no grievance and is not entitled to make an application under S. 68. It is argued by learned counsel that petitioner is aggrieved because he has to produce witnesses and so on. But there does not appear to be any need for him to adduce any further evidence till he knows on what new grounds his mortgage debt is being attacked. I dismiss this petition.

C.R.K./B.D. *Petition dismissed.*

*** A. I. R. 1937 Madras 152**

BEASLEY, C. J.

Mathuranayagam Pillai — Petitioner.

v.

Municipal Council, Madura—Respondent.

Civil Revn. No. 1675 of 1934, Decided on 14th October 1936, from decree of Dist. Munsif, Madura, in S. C. S. No. 2726 of 1933.

*** Tort—Negligence — Contributory — Old coconut tree standing near newly erected electrical post — Tree falling and causing damage to Municipality — Municipality though had knowledge of its being old did not serve notice on owner of tree for cutting it down— Municipality cannot claim damages being itself guilty of contributory negligence.**

The Municipality in the exercise of their statutory powers erected posts upon which to carry some electrical wires and one of such posts was erected very near a coconut tree which admittedly to the knowledge of their authorities, was very old and damaged, and was likely to cause damage to their property, and ought to have been felled and removed The tree, after the erection of the post, did fall and caused damage to the post near it. It was within the powers of the Municipality either before or after erecting the post to require the owner of the tree to fell and remove it, and on his failure to do so, the Municipality could themselves have done it under the powers vested in them :

Held : that inasmuch as the Municipality stood by having known of the existence and the presence of the danger, and allowed the danger to happen and cause damage to their property without taking steps to remove it, were guilty of contributory negligence which was the real cause of the damage and therefore they were not entitled to recover damages from the owner of the tree. [P 152 C 1]

K. V. Srinivasa Ayyar—for Petitioner.

R. Sundaralingam—for Respondent.

Order.—The respondents here are the Municipality of Madura, and in the exercise of their statutory powers they erected some posts upon which to carry some electrical wires. At the time when these posts were erected it was plain to the first witness for the Municipality, the Municipal Electrical Supervisor, that there was a coconut tree belonging to the petitioner, the defendant in the suit, and standing on his property which was a very old one and ought to have been felled and removed. The tree, after the erection of the posts, fell and caused damage to a post. Repairs were effected to it by the Municipality and the petitioner was sued for the amount expended by them on those repairs. The learned

District Munsif gave the Municipality a decree on the ground that the damage caused to the post was due to the negligence of the petitioner in not cutting down the old tree. According to the evidence and the finding, the tree fell not on account of being blown over by any high winds but on account of its old condition.

It must be mentioned under S. 219, Madras District Municipalities Act, the Municipality is empowered to call upon the owner of any tree to secure, lop or cut it down, should it be likely to endanger any person or structure, and in the event of the notice being disregarded themselves either to cut or lop or remove the tree. Therefore the Municipality could have called upon the petitioner to remove it as being a source of danger to the post erected by them. That they knew of the dangerous condition of the tree is apparent from the evidence of P. W. 1, the Municipal Electrical Supervisor. He says that the tree was about 15 feet from where the post was and that even when the post was fixed there, he had seen the tree there and noted it as a very old one and feared that it might fall. He, however, did not send any report to the Chairman requesting him to send a notice to the petitioner. He says that he did not do so because it was not the practice to do so. He also adds that by a look at the tree he could say whether it was an old tree or not.

The position therefore is that, fully aware of the nearness of the tree to the post, and that it was an old one and might fall and of course in falling cause damage to Municipal property, the Municipality nevertheless erected the post and, having erected the post, they did not exercise the powers which are given to them under S. 219 of the Act. It is all very well to argue that the powers are merely permissive. That is quite true. But what is to be said of the position of a body which is invested with those powers, and knows of the danger and its imminence and what is likely to result and stands by and suffers the danger to remain? In my view, this is clearest possible evidence of contributory negligence on the part of the Municipality. It is quite true that the tree belonged to the petitioner and was on his land. It is not quite clear whether the post was erected on Municipal land or defendant's land.

It was stated by the learned counsel for the petitioner that it was on his land. But this is contested by the respondents and I deal with the case on the assumption that the post was not standing on the petitioner's land at all. As contended by the petitioner, if a person keeps upon his land something which he knows to be dangerous such as a tree in a dangerous condition and it falls over and damages somebody else's property, he must be held to be guilty of negligence. That, as a general proposition, is perfectly correct and nobody will contradict it. But there comes into this the position of the respondents. As before stated, they knew perfectly well of the presence of this, according to them, very dangerous tree. They could, before erecting the post, have required the petitioner to fell the tree and remove it, and if he had refused to do so they could themselves have felled it and removed it; or they could have put up the post first and, having put it up, called upon the petitioner to remove it and on his failure to do so could have done so themselves. They did nothing. They stood by knowing of the existence and presence of this dangerous tree and would themselves have avoided the danger and, when that happened which they themselves feared would happen, seek to make the petitioner responsible for it. There is no evidence at all that the petitioner knew that the tree was dangerous; but assuming that he did, his attention was not called to it by the Municipality. Under these circumstances the District Munsif not having addressed himself to the question of contributory negligence, as he ought to have done, and in my view there being clear evidence of contributory negligence which was really the cause of the damage, the C. R. P. must succeed and be allowed with costs and the decree in the Court below reversed and the suit dismissed with costs.

C.R.K./B.D. *Revision allowed.*

A. I. R. 1937 Madras 153

BURN AND LAKSHMANA RAO, JJ.

Radhakrishna Chettiar—Appellant.

v.

Narayanaswami Iyer—Respondent.

Letters Patent Appeal No. 6 of 1936, Decided on 23rd September 1936, from judgment of Wadsworth, J., D/- 16th October 1935.

Res judicata—Widow of testator as trustee of his properties incurring debt for purpose named in will—Creditor obtaining personal decree against her and attaching property of testator—Suit by widow as trustee to set aside attachment on ground that it was trust property—Suit dismissed on ground that it was not trust property but nature of remainderman's interest was not decided—Sale in execution of decree against widow held passed only right and title of widow in testator's property and decision in suit filed by widow did not operate as res judicata in remainderman's subsequent suit for possession of property.

A testator in his will directed his widow as trustee of his property to conduct a pending appeal. The widow borrowed some amount for that purpose by a promissory note. On default of payment the creditor obtained a personal decree against her and in execution attached the testator's property in her hand. The widow thereupon brought a suit as trustee to set aside the attachment. The suit was dismissed on the ground that the property was not trust property. The nature of the interest of the remainderman was not decided in that suit. Subsequently after her death the remainderman brought a suit for possession of the property :

Held : that by the sale in execution of the decree obtained in previous suit only the right, title and interest of the widow in the property passed and the sale was not operative beyond her lifetime. The remainderman could therefore bring a suit for possession after her death and the decision in previous suit brought by the widow to set aside the attachment did not operate as res judicata against him : *A I R 1927 P C 41, Ref.*

[P 155 C 1]

T. M. Krishnaswami Iyer and *N. Sivaramakrishna Iyer* — for Appellant.

R. Desikan — for Respondent.

Lakshmana Rao, J.—The plaintiff is the appellant and the suit is for recovery of the plaint property from the respondent, the purchaser in execution of the decree in S. C. S. No. 192 of 1920, obtained by one Subramania Iyer against Kaliammal, the mother of the appellant. The appellant claims the property under the will of his father and the undisputed facts are that the father died in 1916 possessed of the plaint property and other properties situate in the villages of Mangalavaram and Sourirajanpatnam. He left him surviving his widow Kaliammal and the son, the appellant, and after setting out the amount of his debts and charities to be conducted in perpetuity for the welfare of his soul, the will directs Kaliammal to sell the properties in Sourirajanpatnam, discharge the debts, pay Rs. 200 to a temple and invest the balance of the sale proceeds in the purchase of properties. The will then provides that Kaliammal should as trustee enjoy the properties so purchased and the Mangalavaram property and out of the income thereof pay the kist, spend Rs. 10 and Rs. 5 annually on two religious charities, give annually an allowance of paddy to the appellant and his wife and another female relative and maintain herself. The will directs her next to conduct an appeal which was pending and it finally provides that on her death the appellant and his heirs should from generation to generation enjoy the properties as trustees, pay the allowance to the female relative and maintain themselves. Kaliammal entered into possession on the death of her husband and she borrowed Rs. 100 on a promissory note in 1917 from Subramania Ayyar for conducting the appeal which was pending. The amount was not repaid and S. C. S. No. 192 of 1920 was instituted by Subramania Ayyar against Kaliammal for recovery of the amount due under the promissory note. A personal decree was passed against her, and the plaint property was attached in execution of that decree. An unsuccessful claim petition was filed by Kaliammal as trustee objecting to the attachment of the plaint property on the ground that it was trust property not liable to be attached or sold in execution of a personal decree against her and O. S. No. 12 of 1927 was instituted by her as trustee to set aside the order on the claim petition on the same ground. The suit was dismissed on the ground that the property was private property burdened with a trust and saleable in execution of a decree against the holder thereof, and the property was sold. It was purchased by the respondent and when he went for delivery the appellant obstructed him. The obstruction was removed on 13th October 1927 and the property was delivered.

Kaliammal died subsequently and the suit out of which this appeal arises was instituted by the appellant within a year of dismissal of his application. It was resisted on the ground that under the will the property became the absolute property of Kaliammal and that even otherwise the decree in S. C. S. No. 192 of 1920 was binding on the estate, and accepting these contentions the District Munsif dismissed the suit. He held further that the decision in O. S. No. 12 of 1927 operates as res judicata and on appeal the decree was confirmed by the Subordinate Judge of Negapatam on the ground that under the will there was an absolute gift of the property to the widow. A second appeal was

taken, and while differing from the lower Courts regarding the construction of the will and holding that the will creates only a life interest to the extent of the surplus income in Kaliammal, the executrix named therein, our learned brother Wadsworth, J. upheld the decree of the lower Court on the ground that the decision in O. S. No. 12 of 1927 operates as res judicata.

Hence this Letters Patent appeal and the initial question for determination is whether the decision in O. S. No. 12 of 1927 operates as res judicata. That suit was instituted by Kaliammal as trustee of the charities and not as executrix, and the attachment was questioned on the ground that the property is trust property. It was decided that the property was not trust property and the extent or nature of the interest of the beneficiaries did not arise for consideration. Further this would not be a ground of attack in respect of the claim made in the suit, viz., that the property was trust property, nor could Kaliammal have resisted the sale of her beneficial interest in execution of the decree in question. She was not litigating in respect of the beneficial interest of the remainderman nor was anything decided about it. The decision in O. S. No. 12 of 1927 cannot therefore operate as res judicata and bar the claim of the remainderman and the sale in execution of the decree in S. C. S. No. 192 of 1920 could not pass anything more than the right, title and interest of Kaliammal. The suit promissory note was not executed by her as executrix though the amount was borrowed for carrying out the provisions of the will and it is well settled that in a suit on such a promissory note the creditor cannot have any direct claim against the estate of the testator. Further she was not sued as executrix nor was a decree claimed against the estate in her hands. The sale in execution could therefore be only of her right, title and interest in the plaint property, *vide* 52 M L J 426,[1] and on the unquestionable finding of our learned brother Wadsworth, J. that the will creates only a life interest in Kaliammal to the extent of the surplus income the sale would not be operative beyond her lifetime. The appellant, the remainderman, is therefore entitled to a decree for possession and the decision of Wadsworth, J. cannot be upheld. It is therefore set aside and there will be a decree for possession in favour of the appellant with mesne profits from the date of plaint to be ascertained by the trial Court. The trial Court will make the necessary enquiry under O. 20, R. 12, Civil P. C., and pass a final decree as to mesne profits. In the circumstances of the case there will be no order as to costs throughout.

O.R.K./M.D. *Appeal allowed.*

1. Lalit Mohan Pal v. Dayamoyi Roy, A I R 1927 P C 41=105 I C 469=52 M L J 426 (P C).

A. I. R. 1937 Madras 155

GENTLE, J.

P. Ramanujiah—Applicant.

v.

Commissioner, Corporation of Madras—Opposite Party.

Appln. No. 1826 of 1936, Decided on 29th September 1936.

Madras City Municipal Act (4 of 1919), S 98 (f)—Article sought to be taxed must be established to be one coming under heading of 'timber'—Intention of legislature is to impose tax upon raw mate ial, i. e., wood in respect of which no process of manufacturing is applied—Commodity known as plywood being manufactured article is not 'timber' and is not taxable under S. 98 (f).

The provisions contained in S. 98, Madras City Municipal Act, and S. 77 of the Act 10 of 1936, are from their nature tantamount to revenue and penal legislation and must be construed strictly, and before the corporation is entitled to recover tax under these provisions it must be fully established that the article they propose to tax is one coming under the heading of timber within the meaning of S. 98 (f), Madras City Municipal Act. [P 156 C 1, 2]

The commodity known as plywood is not timber within the meaning of either of these statutes and is not therefore timber taxable by virtue of the provisions of Cl. (f) of S. 98, Madras City Municipal Act. The intention of the legislature was the imposition of taxation upon raw material, that is to say, wood in respect of which no process of a manufacturing nature has been applied. Plywood being a manufactured article, is outside the contemplation of S. 98 of the Act of 1919 and for that reason the corporation have no power to tax plywood brought into the city. [P 156 C 2; P 157 C 2]

C. Veeraraghava Ayyar and *T. P. Ramachandra Ayyar*—for Applicant.

T. M. Krishnaswamy Ayyar and *V. Rajagopala Mudaliar* — for Opposite Party.

Order.—The matter which is for consideration here and which I have to decide is whether a commodity known as plywood is timber within the meaning of S. 98, Madras City Municipal Act of 1919.

The relevant passages in that section are as follows : "The corporation may levy (f) a tax on timber brought into the city." S. 129 of that Act has been repealed and there is substituted for it the provisions of S. 77, Madras Act No. 10 of 1936. The relevant passages of the latter section are as follows :

(1) If the council by a resolution determines that a tax shall be levied on timber brought into the city, such tax shall be levied at such rates not exceeding Rs. 5 per ton and in such manner as may be determined by the council. (2) No timber shall be brought into the city unless the tax due thereon has been paid. (3) The tax shall be levied on timber kept within the city for sale if the Commissioner has reason to believe that the tax if any due thereon has not been paid, provided that the tax shall not be levied if the person keeping the timber for sale produces satisfactory proof of the previous payment of the tax thereon. (4) The Commissioner may call for the accounts of any person keeping timber for sale for the purpose of levying the tax under sub-s. (3). (5) If the Commissioner is satisfied that any person has wilfully evaded the payment of any tax leviable under this section, the Commissioner may direct that such person shall in addition to such tax pay by way of penalty a sum not exceeding the amount of such tax. Such penalty shall be recoverable in the same manner as the tax.

The provisions of these two statutes give to the Corporation somewhat autocratic powers. They may levy a tax not exceeding Rs. 5 a ton upon timber brought into the city. The Corporation can prevent timber upon which a tax has not been paid from being brought into the city. Then one comes to the powers of the Commissioner ; if he has reason to believe that timber is kept for sale within the city and that that timber has not been the subject of the payment of tax, he may levy the tax and the onus is cast upon the tax payer or the person keeping the timber for sale to show that in fact the tax which is demanded has been paid. The Commissioner in respect of the matter I have just mentioned is entitled to call for accounts of the person keeping the timber for the purpose of levying the tax upon it. And then finally if the Commissioner is satisfied that any person has wilfully evaded the payment of tax upon timber brought into the city, he may direct that in addition to the tax which is to be paid a penalty of a sum equivalent to the amount of tax shall also be paid by the person having this timber in his possession. From their nature the provisions of these two sections are tantamount to revenue legislation ; and the last provision, namely, requiring payment of double the amount of tax in the case of a wilful avoidance, is penal legislation. Before the Corporation is entitled to recover tax under these provisions it must be fully established that the article they propose to tax is one coming under the heading of timber within S. 98 and these statutes, so far as they are relevant here, must be construed strictly. It is a revenue and a penal legislation.

I was informed by the learned counsel on behalf of the parties that there is no decided case and no authority in any law report which in any way deals with this matter ; and unfortunately neither of the statutes which I have mentioned provides a definition for the word 'timber' within the meaning of these Acts. One must therefore in effect dogmatise upon this matter. In my judgment, the commodity known as plywood is not timber within the meaning of either of these statutes, that is to say, it is not timber which is taxable by virtue of the provisions of sub-cl. (f) of S. 98 of the Act of 1919. The intention in my opinion of the legislature was to authorize the imposition of taxation upon raw material, that is to say, wood in respect of which no process of a manufacturing nature has been applied. Some process such as cutting or shaping for transport convenience and the purpose of preparing the rough timber into convenient sizes suitable for commercial or workshop uses must be contemplated because it is certainly most unusual to transport trees or the trunks or branches of trees in the condition in which they are hewn in the forest. If the legislature had intended to authorize the Corporation of Madras to inflict taxation upon timber or an article of timber in respect of which a manufacturing or workshop process in the ordinary acceptation of the term had been applied, it would and must have said so. In the absence of any precise enactment that a manufactured article or commodity is to be taxed it is not taxable. It is conceded by Mr. Krishnaswami Iyer on behalf of the Corporation that an article which is a finished article such as a chair, table or carving, although made entirely of wood or timber, is not an article which is the subject of taxation by the Corporation under S. 98. The expression "plywood" is not used in the same way as one uses the expression "oakwood" "teakwood" and "elmwood." These expressions indicate the nature of the origin

of the wood. There is no tree known as ply but there are teak, oak and elm trees. Plywood in my view is nothing more nor less than a manufactured article made from wood or timber in the same way that the chair and table which I mentioned are also manufactured from the same commodity. The method by which plywood is manufactured, I am informed—and there is no dispute about it—is this. First of all the tree trunks are obtained and the whole trunk cut into convenient lengths. The bark having been stripped off, the wood is boiled. After boiling it is placed latitudinally in a machine in the workshop and caused to rotate upon the axis running through the centre of the log. When rotating the trunk, the wood is cut into strips of very thin sheeting much in the same way as one unrolls a roll of white tape. These long strips or sheets are then subjected to a further process. The finished plywood varies in thickness from a minimum of three layers to a maximum of seven or eight layers or strips. The long strip or sheet obtained from the log is known as veneer. Firstly there is a sheet of veneer laid with the grain in one direction. The next sheet of veneer is then laid with the grain parallel to the first veneer and these two sheets or veneers are joined together by glue and with the glue there appears to be another sheet or strip of thin wood the grain of which is placed at right angles to the grain of the two pieces of veneer. Therefore one has first of all the strip of veneer with the grain running for example, from east to west, then next to that another strip of some wooden material, the grain of which runs at right angles, that is to say, north and south, and then comes the next sheet of veneer, the grain of which is running parellel to the grain of the sheet of veneer on the other side of this cross sheet of wood.

Thus by alternating a sheet of veneer with a sheet of cross grain material and glue to attach the veneer sheets together one has plywood manufactured. I have had shown to me samples of plywood. The largest thickness so far as I can see is one of eight strips altogether including cross or adhesive strips. The plywood having been made in this way it is then cut into planks of a size of either 6 feet by 5 feet or 5 feet by 4 feet and in those sizes it is sold. Incidentally it is not without interest to consider that except perhaps for vast trees in some South American forests one would never find planks of the width of the ones in which plywood is made. This process is more than cutting, fashioning or the shaping of the raw trees for the purpose of transport or making it into convenient sizes for the workshop or for the use of the artisan. It is a complicated method of manufacture requiring a degree of skill and no doubt an amount of time. The finished article is not in my view anything other than a manufactured commodity. When one again turns to subs. (1), S. 77 of the Act of 1936 one there finds that the duty imposed is to be not more than Rs. 5 a ton.

Therefore the material upon which the tax is to be imposed has to be weighed and it is by the weight of the timber that the Corporation are entitled to collect this tax. There must be a considerable amount of skill used in the manufacture of plywood; the weight of this is made up partly by wood and partly by glue. If plywood were timber within the meaning of S. 98 then the Corporation would be taxing glue at the rate of not more than Rs. 5 a ton. S. 98 empowers the Corporation only to tax timber, not to tax glue; glue is manufactured from the hoof of an animal or may be from some vegetable. This fact supports the contention that plywood is not timber within the meaning of the above section. In common parlance when one speaks of plywood one does not convey to the hearer, timber in the raw state, whether it be in the trunk or the joist or the plank. It conveys the result of workmanship and skill in the factory. One has seen in several dictionaries a definition of timber. One definition says "building materials of all kinds." It has never been suggested that tiles, slates, iron stauntions and glass are timber and that definition does not help. In the 1934 Concise Oxford Dictionary a definition of plywood is given. Plywood is there defined as a straight thick board made by glueing layers with the grains crosswise. For the reasons I have given, in my judgment the word "timber" in S. 98 of the Act of 1919 does not include such an article or commodity as plywood. Plywood, a manufactured article, is outside the contemplation of that section and for that reason in my view the Corporation have not powers under the statutes I have mentioned to tax plywood which is being brought into this city. The result of my finding is that

there will be an order that the Commissioner of the Corporation of Madras will forbear from levying and collecting a tax upon the consignment of 11 bundles of plywood belonging to the petitioner Mr. P. Ramanujiah and which arrived in Madras on 6th August 1936 by the steamship "Simla" and further there will be an order that the Commissioner will forbear from either preventing the import into the city by the petitioner of plywood or attempting to levy any tax upon plywood which he either brings or has brought within the City of Madras. This Rule is therefore made absolute with taxed costs for two counsel.

C.R.K./R.M. *Rule made absolute.*

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VARADACHARIAR AND HORWILL, JJ.

Ramankulangare Illath Narayan Nambi and *others*—Appellants.

v.

Pilavil Illath Sankaran Nambi and *others*—Respondents.

Letters Patent Appeal No. 88 of 1935, Decided on 13th October 1936, against judgment of Wadsworth, J., D/- 19th August 1936, reported in *A I R 1935 Mad. 1062.*

Estoppel — Plea of—Both parties under mistaken impression as to their respective rights and each acting under his impression —One party alleging that particular act or omission on part of the other party led him to adopt pa ticular course of action—Court should scrutinise connexion between representation and alleged course of conduct—Omission to speak forms basis of estoppel only when there was duty to speak.

In the case of a plea of estoppel, where the probabilities are that both parties were under a mistaken impression as to their respective rights, and each acted under his or her impression, if one of the parties asks the Court to believe, that any conduct or omission on the part of the other misled the former party into adopting a particular course of action, it is necessary for the Court to scrutinise the connexion between the representation and the course of conduct alleged to have been pursued as a result thereof. The law relating to estoppel draws a distinction between representations and omissions, and omission to speak out will furnish a basis of estoppel only when the circumstances are such as to throw upon a party the duty to speak out the truth. [P 159 C 1]

K. Kuttikrishna Menon—for Appellants.

B. Sitarama Rao and *C. S. Krishnamurthy Ayyer*—for Respondents.

Varadachariar, J.—This is an appeal against a judgment of Wadsworth, J. allowing a second appeal. Some of the points raised in the case were decided in the judgment of this Court in C. M. A. No. 283 of 1926. When the case went back to the first Court after that judgment, those Courts did not deal with the whole case but only with issues 4 and 5, a plea of res judicata and a plea of estoppel respectively.

The plea of res judicata has been found even by the lower Courts against the defendants. It was however represented before us by Mr. Kuttikrishna Menon on behalf of the appellants, that when this litigation was pending in appeal before the lower appellate Court, one of his clients had obtained a decree against plaintiff 2 in ejectment in respect of item 2. No petition has been filed before us to admit in evidence the papers relating to that litigation. We are not therefore in a position to express any opinion as to whether anything that happened in that litigation will or will not advance the plea of res judicata. The appellants may, if so advised, take proper steps before the lower Court to get the decision referred to admitted in evidence and then with the permission of that Court raise a plea of res judicata if it arises on that decision. The plea of estoppel was however decided by both the lower Courts in defendants' favour. But on second appeal by the plaintiffs Wadsworth, J. held that there was no basis for the plea of estoppel. The learned Judge based his decision on two grounds: one was that the representations relied on in support of the plea of estoppel were not representations on matters of fact but only of particular views on questions of law or in respect of the construction of a document; the other ground was that there was no definite allegation and much less any proof that defendant 1 was misled by any such misrepresentations into acting to her prejudice. So far as the first point is concerned, there is some force in the appellant's argument that some of the statements are not strictly statements on matters of law in the sense in which that expression is used in connexion with the question of estoppel. The statements themselves read like statements of fact, though they might have been founded on an erroneous view of law. But it does not seem to us necessary to pursue this point because

we agree with the learned Judge as to the other reason given by him.

The probabilities are that both parties were under a mistaken impression as to their respective rights and each acted under his or her impression. In a case of this kind, if one of the parties asks the Court to believe that any conduct or omission on the part of the other misled the former party into adopting a particular course of action, it is necessary for the Court to scrutinise the connexion between the representation and the course of conduct alleged to have been pursued as a result thereof. There is an utter absence of evidence in this case to satisfy these requirements of the plea of estoppel. Defendant 1, herself has not gone into the box; and having regard to the occasions when and the purpose for which the alleged statements are said to have been made, it seems to us very doubtful if they could even be regarded as representations made to defendant 1 or intended to be acted upon by her. The Courts below were certainly not justified in drawing an inference of estoppel from the mere omission of defendant 2 to defend particular litigations. The law relating to estoppel draws a distinction between representations and omissions; and omission to speak out will furnish a basis for estoppel only when circumstances are such as to throw upon a party the duty to speak out the truth. If plaintiff 2 had allowed a certain decree to be passed ex parte against him by omission to defend a suit it is too much to suggest therefrom that a further estoppel also would arise against him because somebody chooses to put a particular interpretation on that omission. The Letters Patent Appeal therefore fails and is dismissed with costs.

C.R.K./R.M. *Appeal dismissed.*

A. I. R. 1937 Madras 159

MENON, J.

Kajuluri Viranna and *others* — Petitioners.

v.

Tillapudi Venkayya and *others*—Opposite Parties.

Civil Misc. No. 155 of 1936, Decided on 2nd October 1936.

Madras Hereditary Village Offices Act (3 of 1895), Ss. 13 (1), 21 — Suit by persons actually holding office in village for recovery of emoluments attached thereto, on ground that they are entitled to hold the office or to enjoy such emoluments, come within S. 13 — Such suits are excluded from jurisdiction of civil Courts by S. 21 and revenue Court has jurisdiction to deal with them.

Suits by persons who are actually holding an office in a village, for the recovery of emoluments attached thereto on the ground that they are entitled to hold the office or to enjoy such emoluments come within S. 13, Madras Hereditary Village Offices Act, and are excluded from the jurisdiction of the civil Courts by reason of the provisions of S. 21. There is nothing in S. 13 (1) itself which compels one to hold that suits by persons actually holding the office referred to therein for recovering the emoluments of that office do not come within the wording of that section, and therefore a revenue Court has jurisdiction to deal with such suits : *30 Mad 126 (F B)*; *A I R 1917 Mad 38* and *A I R 1927 Mad 433, Rel. on*; *A I R 1933 Mad 279, Disting.* [P 161 C 1]

V. Suryanarayana—for Petitioners.

P. Somasundaram — for Opposite Parties.

Order.—This is an application for the issue of a writ of *certiorari* to call for the records in S. S. No. 5 of 1934 on the file of the Deputy Collector of Cocanada and in the appeal therefrom, Summary Appeal No. 22 of 1935 on the file of the District Collector of East Godavari, and to quash the decisions therein. The suit was to recover possession of the lands from defendants 7 to 18 on the ground that they were emoluments attached to the potter service in the village of Velangi and that the plaintiff was entitled to perform that service and has been performing it from 1932. Defendants 7 to 18 denied the truth of the genealogy set up in the plaint and contended that the plaintiff was not entitled either to perform the service or to the possession of the lands in question, and that they have been in possession for a long time. The trial Court found that the relationship set up by the plaintiff was true, that the suit was not barred by limitation or adverse possession, but dismissed the suit chiefly on the ground that the relinquishment by defendants 1 to 4 in favour of the plaintiff was not proved and that the plaintiff had not been appointed in their place. In appeal, that decree was reversed and a decree was given for the plaintiff as sued for. The contention of the learned advocate for the petitioners before this Court is that the revenue Courts had no jurisdiction to entertain this suit. The only question therefore for decision is whether the Courts

below had jurisdiction to entertain the suit.

The allegations in the plaint make it clear that the lands, possession of which is sued for, are the emoluments of the potter service in the village concerned and that the plaintiff was suing in his capacity as the person who was entitled to that office on the death of his father and after relinquishment by his brothers, defendants 1 to 4, and who has been regularly performing the potter service in that village from 2nd December 1932. S. 13 (1), Madras Hereditary Village Offices Act (3 of 1895) is as follows :

> Any person may sue before the Collector for any of the village offices specified in S. 3 or for recovery of the emoluments of any such office, on the ground that he is entitled under sub-s. (2) or sub-s. (3), S. 10, Madras Proprietary Estates' Village Service Act, 1894, or under sub-s. (2) or (3), S. 10, or sub-s. (2) or (3), S. 11 or S. 12 of this Act as the case may be, to hold such office and enjoy such emoluments;

and S. 21 enacts :

> No civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in S. 3 or any question as to the rate or amount of the emoluments of any such office or except as provided in proviso (ii) to sub s. (1), S. 13, any claim to recover the emoluments of any such office.

It is not contended that this case comes within proviso (ii) to sub-s. (1), S. 13. What is argued is that it is only a person who is entitled to hold such office or to enjoy such emoluments and not a person who is actually holding the office, who is entitled to sue before the Collector. In other words, the contention is that if the person who is actually holding the office sues for the emoluments of that office, he must sue in a civil Court, and the only authority cited in support of that proposition is the case in 56 Mad 366.[1] In that case, no doubt Waller, J. observed (p. 371) :

> I am unable to see how the language of S. 13 can apply to a suit by an actual holder of an office to recover the emoluments thereof. Such a person comes into Court as the holder of the office and not as a person claiming to be entitled to hold it;

and the learned Judge proceeded to support it by the language of proviso (ii) to sub-s. (1), S. 13. But it has to be observed that that suit was not one to recover the emoluments of an office. The learned Judge himself begins that portion of the judgment by saying :

> The suit is not one to recover the emoluments of an office, but to eject persons who are alleged to have trespassed on some inam land which forms part of the emoluments of the office.

The observations are therefore more or less obiter. Again, the statement :

> Apart from that, I find great difficulty in following the decisions which have laid down that S. 21 of the Act takes suits by holders of offices for recovery of their emoluments out of the jurisdiction of the ordinary Courts.

That shows that the decision therein runs counter to the trend of the earlier decisions of this Court. Pandalai, J., who was the other member of the Bench, simply observed :

> I agree with my learned brother that the suit is not barred by S. 13 or S. 21 thereof.

The earlier decisions of this Court are clearly in favour of the view that suits by persons who are actually holding an office for the recovery of emoluments attached thereto on the ground that they are entitled to hold the office or to enjoy such emoluments, come within S. 13 and are excluded from the jurisdiction of civil Courts by reason of the provisions of S. 21. In 30 Mad 126[2] that view was upheld by three learned Judges of this Court. In that case the suit was by a person, who was actually a karnam at the time, for the recovery of land which was inam attached to the office, and Miller, J. observed :

> He can therefore only succeed by showing (i) that he is the karnam of the village entitled as such to enjoy the emoluments and (ii) that the land for which he sues is the emolument of his office. These must be the grounds of his suit and these are the grounds of suit which give him his right of action before the Collector under S. 13 (1).

In 5 M L W 151[3] the allegation was that the plaintiff and his ancestors had been enjoying, as of right, the carpenter and blacksmith inam and had been rendering service in connection therewith and that when the plaintiff demanded defendants 1 to 4 and 7 to 9 to deliver over possession of the land, they ignored his right and intimated to him that defendants 7 to 13 had an independent right to the property. It was held by a Division Bench of this Court (Spencer and Phillips, JJ.) that the case was one excluded from the jurisdiction of the civil Court by S. 21. Their Lordships observed :

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1. Ramamurti v. Narayana Gajapatiraju, A I R 1933 Mad 279=141 I C 307=56 Mad 366=64 M L J 361.
2. Kesiram Narasimhulu v. Narasimhulu Patnaidu, (1907) 30 Mad 126=16 M L J 514 (F B).
3. Devineni Pattayya v. Kandu Kuri Kotiah, A I R 1917 Mad 38=37 I C 918=5 M L W 151.

We are of opinion that in all cases where it is necessary for the plaintiff to allege, for the maintenance of his suit, that the land in suit is an emolument of a service inam, the jurisdiction will remain with the Collector under S. 13 of the Act. This is a principle laid down in the Full Bench decision in 30 Mad 126.[2]

Again, in 25 M L W 299,[4] another Division Bench of this Court held:

Therefore all suits for the emoluments of an office on the ground that the plaintiff is holding the office must primarily be brought in the Revenue Court. The Civil Court has jurisdiction only in one case, viz., where one of the issues is whether the emoluments are land or an assignment of revenue, and even that issue has to be decided first by the revenue Court, and only when the relief which the revenue Court can grant is exhausted . . . . can he sue in the civil Court for the recovery of the land.

In the last case it was distinctly stated that, even though the plaintiff was holding an office, the suit for the recovery of the emoluments has to be brought in the revenue Court. It may also be observed that there is nothing in S. 13 (1) itself which compels one to hold that suits by persons actually holding the office referred to therein for recovering the emoluments of that office do not come within the wording of that section. Having regard to the uniform course of decisions in this Court, it must be held that the lower Courts had jurisdiction to deal with this suit. No case is therefore made out for the issue of a writ of *certiorari*. The petition is therefore dismissed with costs. Advocate's fee Rs. 75.

C.R.K./R.M. *Petition dismissed.*

4. Kandappa Achari v. Singarachari, A I R 1927 Mad 433=99 I C 972=25 M L W 299.

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* A. I. R. 1937 Madras 161

VENKATASUBBA RAO AND VENKATARAMANA RAO, JJ.

Koti Viswanatham—Appellant.

v.

Pandiri Satyanandam and *others*—Respondents.

Letters Patent Appeal No. 20 of 1936, Decided on 23rd October 1936, from order of Burn, J., D/- 3rd February 1936, reported in *A I R 1936 Mad 665*.

*** (a) Contract Act (1872), S. 23—Mere fact that agreement is champertous does not render it void—It must also be shown to be contrary to public policy.**

The English law in regard to champerty and maintenance does not apply to India. The mere fact that an agreement is champertous is not of itself sufficient to render it void but it must be shown in addition to be contrary to public policy. [P 162 C 1]

(b) Civil P. C. (1908), O. 33, R. 5; O. 44, R. 1—Application for permission to sue in forma pauperis—Dispaupering of plaintiff—All that is necessary to be shown is that he has entered into agreement of character described in O. 33, R. 5—It is not necessary that agreement should be made with reference to or in view of intended suit or appeal—O. 33, R. 5, is enacted to prevent evasion of payment of court-fee—It matters little with what purpose agreement is entered into.

Order 33, R. 5 has been enacted to prevent payment of court-fee being evaded and it matters little with what purpose the agreement has been entered into; whether it is an honest or bona fide one or of an improper character is an irrelevant factor quite outside the scope of the enquiry. The principle underlying the provision is that a person ought not to be allowed to sue in forma pauperis after transferring his interest to a third party, no matter for what reason the transfer has been made. The question is whether at the date of institution of the suit there was a subsisting agreement falling within the provision. For a plaintiff to be dispaupered all that need be shown is, that he has entered into an agreement of the character described in respect of the subject matter of the suit and there is no warrant for assuming that the agreement should be one made with reference to or in view of the intended suit or appeal: *30 Mad 547, Rel. on; 18 Bom 464; A I R 1917 All 186* and *A I R 1934 Cal 740, Dissent.* [P 162 C 1, 2]

(c) Civil P. C. (1908), O. 44, R. 1; S. 149—Leave to appeal in forma pauperis refused—Court can grant time for payment of court-fee.

Where leave to appeal in forma pauperis has been refused, the appellate Court has power under S. 149 to grant time to pay the requisite court-fee. [P 162 C 2; P 163 C 1]

M. S. Ramchandra Rao—for Appellant.

G. Lakshmana and *G. Chandrasekhara Sastry*—for Respondents.

Venkatasubba Rao, J. — This is a Letters Patent appeal from the order of Burn, J. refusing leave to the appellant to file his appeal in forma pauperis. The facts, so far as they are relevant, may be shortly stated. The suit related to certain logs of timber, which the plaintiff claimed by virtue of an agreement with the first set of defendants. Defendant 5 was the rival claimant, who alleged that the logs belonged to him and had been transferred to defendant 6. The lower Court negatived the claim of defendants 5 and 6 and decreed the plaintiff's suit. The applicant before Burn, J. was defendant 5, who applied for leave to file the appeal in forma pauperis. Pending the action, the logs were sold and the sale

proceeds were brought into Court and defendant 5, reciting that some moneys were due from him to defendant 6, transferred to him such interest as he possessed in the proceeds. The point to note is, that the transfer was not made with reference to any intended appeal, having been effected, as stated above, even before the judgment was delivered by the Court below. The provision of law which governs the question is O. 33, R. 5, Civil P. C. (the provisions of O. 33 being applicable by virtue of O. 44, R. 1 to appeals also) which runs thus :

> The Court shall reject an application for permission to sue as a pauper : (e) where he has entered into any agreement with reference to the subject matter of the proposed suit under which any other person has obtained an interest in such subject matter.

It is contended for the appellant that the agreement referred to here must be of a champertous character, the idea being that the provision is aimed against bargains tending to promote litigation, such bargains being immoral in a legal sense. First it must be pointed out that the English law in regard to champerty and maintenance does not apply in India, for it has been laid down that an agreement being champertous is not of itself sufficient to render it void but must be shown, in addition, to be contrary to public policy. Further, it is to prevent payment of court-fee being evaded, that this provision has been enacted, and it matters little therefore with what purpose the agreement has been entered into; whether it is an honest or bona fide one or of an improper character, seems an irrelevant factor, quite outside the scope of the enquiry. There is no need to read into the section the suggested limitation, which does not find a place there. The principle underlying the provision is that a person ought not to be allowed to sue in forma pauperis, after transferring to a third party his interest in the property involved in the suit, no matter for what reason the transfer has been made.

In other words, as was observed in 30 Mad 547[1] (where, however, this point was not raised or considered), the question would be, whether at the date of the institution of the suit, there was a subsisting agreement falling within the provision. In one case in Bombay, one in Allahabad and one in Calcutta, a different view has been taken without much discussion (18 Bom 464,[2] 37 I C 172[3] and A I R 1934 Cal 740[4]), but with great respect we are unable to agree with these decisions. It is next contended that the agreement here does not offend against the provision, as it was not made in view of the intended appeal. The argument is, that from the use of the word "proposed," it should be inferred, that what the section refers to, is an agreement the party enters into having the suit in contemplation. That does not appear to be the natural meaning of the words. Is there an agreement or not referring to the subject matter of the proposed suit ?—that is the only question, and there is no warrant for assuming that the agreement should be one made with reference to or in view of the intended suit. R. 9, which relates to the dispaupering of the plaintiff, throws some light on the question. Under that rule, for a plaintiff being dispaupered, all that need be shown is, that he has entered into an agreement of the character described, with reference to the subject matter of the suit, and it is noticeable that the word "proposed" does not occur there. It is difficult to believe that R. 5 embodies a different principle from R. 9, the object of both the rules being to produce the same result.

In the Allahabad case mentioned above, 37 I C 172,[3] the learned Judges adopted the construction of the word "proposed" now contended for ; they seem to have arrived at the result by holding that if the agreement was to be champertous, it would necessarily be with reference to the suit in contemplation. As already stated, we are unable to agree with this view. Leave to appeal in forma pauperis has therefore been rightly refused. The question then remains, whether the learned Judge's order refusing to give the appellant time to pay the requisite court-fee, can be upheld. That the Court has power under S. 149, Civil P. C., to grant such time cannot be disputed. We have carefully gone through the facts and it has not been shown that there was want of bona fides on the part of the appellant ; nor can it be suggested that the party who ought to have filed the appeal was de-

1. Hanifa Bai v. Haji Siddick Bui Meanji Sait, (1907) 30 Mad 547=17 M L J 447=3 M L T 11.

2. Bai Chandaba v. Kuver Sahib Bapu Sahib, (1894) 18 Bom 464.

3. Mansa Puri v. Harbhagat Puri, A I R 1917 All 186=37 I C 172.

4. Abdul Jabbar v. Sanu Bibi, A I R 1934 Cal 740=152 I C 514=38 C W N 1069.

fendant 6, the transferee, and not defendant 5. The parties might reasonably have thought that the findings against defendant 6 could not be successfully attacked in appeal, but that so far as defendant 5 was concerned the point he could urge was altogether different. We are therefore of opinion that the appellant ought to have been given time for payment of the court-fee ; four days' time is accordingly granted from this date.

Mr. Lakshmanna for the respondent suggests that our order may work hardship upon him unless one of two courses is adopted : either defendant 6 should be brought on the record as appellant, or, the respondent should be allowed to apply for security for costs. Mr. M. S. Ramachandra Rao for the appellant believes that defendant 6 may be willing to come on the record as an appellant. If such an application is made, it will be allowed ; if not, Mr. Lakshmanna will be at liberty to apply for security for costs. When applications are made in this behalf, they shall be posted before this Bench. We direct the appellant to pay Rs. 103 (the costs awarded by the order under appeal) to Mr. Lakshmanna in one month from this date. If default is made it will be treated as equivalent to failure to comply with an order for security for costs and the respondent will be at liberty to take appropriate steps. We make no order as to costs in this appeal.

C.R.K /R.M. *Order accordingly.*

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* A. I. R. 1937 Madras 163

CORNISH, J.

Al. St. An. Chidambaram Chettiar — Appellant.

v.

Al. Vr. P. Pethaperumal Chettiar and *others* — Respondents.

Appeal No. 315 of 1936, Decided on 15th September 1936, against order of Sub-Judge, Devakotta, D/- 22nd July 1936.

(a) Receiver—Appointment—Mere declaratory suit—Court can appoint receiver of property in dispute for protecting it for benefit of person entitled to it.

If there is property in dispute between parties, and the Court thinks it expedient that the property should be protected for the benefit of the party ultimately entitled to it pending the suit, the Court can properly appoint a receiver of it under O. 40, R. 1 even in a suit which prays for no other relief than the declaration of some particular right or title : *20 M L J 638* ; *A I R 1932 Mad 193* and *A I R 1922 Lah 444*, *Rel. on.* [P 164 C 2]

*** (b) Receiver — Appointment — Court's power to appoint Receiver is limited to proceedings pending before it—On appeal seisin of case passes to appellate Court — High Court staying passing of final decree in original Court — Original Court has no power to appoint general receiver.**

Court's power to appoint a receiver is limited to the case where the proceedings are still pending before it. Either the suit must be pending, and it will be pending after a preliminary decree but before final decree, or the proceedings in execution of a final decree must be pending. In either event the Court in which the suit or proceeding is pending will have seisin of the suit or of the property subject to execution and this will be the basis of Court's power to appoint receiver of it. This principle applies equally well where a decree is partly preliminary and partly final. [P 164 C 2; P 165 C 1]

An appeal was pending before High Court against a decree and the High Court, while upholding the appointment of the special receiver appointed in that suit, had stayed the passing of a final decree as regards that in which a preliminary decree only had been made by the first Court. A party applied to the original Court for appointment of general receiver :

Held : that the original Court had no power to appoint general receiver as appellate Court had become seised of the whole case, there being no control of original Court over it : *32 Mad 416*, and *18 Mad 214*, *Rel. on*; *A I R 1921 Mad 568*, *Ref.* [P 165 C 1, 2]

M. Patanjali Sastri & T. K. Sundararaman—for Appellant.

V. V. Srinivasa Iyengar, *K. S. Krishnaswami Iyengar* and *P. S. Sarangapani Iyengar*—for Respondents.

Judgment. — The appeal is against the order of the Subordinate Judge appointing a Receiver. The appellant was plaintiff 21 in a suit brought by a group of persons of the A. L. family against a group of defendants representing the V. R. family for a declaration that both these families were entitled to the management and trusteeship of certain temple properties under a scheme framed by agreement between the families in 1907. The plaint prayed further reliefs against defendant 1 in particular by way of an injunction and for an account. The suit was decreed. The right of all the members of the A. L. and V. R. families to the trusteeship, as also the validity of the 1907 agreement and scheme, were declared; defendant 1 was restrained from interfering with the rights of the A. L. family, and he was directed to account for his management.

For this purpose a commissioner was appointed and this commissioner was also appointed receiver for the special purpose of at once realising all the debts due to the Devasthanam from the members of the A. L. and V. R. families and from strangers except tenants.

An appeal has been filed against the decree. It need only be observed with regard to the history of this dispute, subsequent to the decree, that the family discord and consequent difficulty in the management of the Devasthanam property have continued unabated. An application was subsequently made to the Sub-Judge by defendant 11 praying that plaintiff 1 be directed not to act by himself in the management and that if he did not agree, the receiver appointed specially should be appointed to generally manage the affairs of the Devasthanam. This application was resisted by plaintiff 1. The Court dismissed the application upon the ground that the Court had no further jurisdiction; that the decree being under appeal to the High Court, the High Court was the Tribunal to which the power of appointing a receiver belonged. 12 months or so later, a fresh application was made to the subordinate Court for the appointment of a general receiver, this time by the plaintiffs other than plaintiff 21, who objected to the application. The Sub-Judge, on this occasion differing from his predecessor, held that he had jurisdiction to appoint a general receiver. Hence the present appeal.

The learned counsel for the appellant has urged two objections to the validity of the order of the Sub-Judge. Firstly, he has contended that it was not competent to the Court to appoint a receiver in a declaratory suit; and secondly, that the decree having in part become final and an appeal being pending, the lower Court had no jurisdiction to appoint a general receiver. With regard to the first contention I think it cannot be maintained. There is, of course, no scope for the appointment of a receiver unless there is some property for him to receive. But whenever there is property which is the subject of dispute between litigants, or which is affected by the litigation, a receiver of it can be appointed by the Court if the Court thinks it just and convenient to make the appointment. In 20 M L J 638,[1] where the suit was for a declaration that a scheme was binding on the parties and alternatively for the settlement of a scheme and for the appointment of a receiver, it was held that the Court had power to appoint a receiver. "The whole aim and object of the suit," it was said, is to regulate the collection and distribution of the property of the temple and even though there is no application for the removal of the Dharmakartha (in which case no doubt the Court would have power to appoint a receiver) the subject is the same in both cases, namely the property of the temple.

That was a suit governed by S. 503 of the former Procedure Code which limited the power of the Court to appoint a receiver of property 'the subject of the suit.' The power of the Court under the new Code is certainly not less than it was under S. 503 of the old. The language of O. 40, R. 1 of the present Code has purposely been more widely expressed. I feel no doubt that if there is property in dispute between the parties, and the Court thinks it expedient that the property should be protected for the benefit of the party ultimately entitled to it pending the suit, the Court can properly appoint a receiver of it, even in a suit which prays for no other relief than a declaration of some particular right or title. This is in accordance with 61 M L J 904[2] and A I R 1922 Lah 444.[3] The second point taken for the appellant appears to me to have more substance in it. O. 40, R. 1 empowers the Court, where it appears just and convenient, by order to appoint a receiver of any property, whether before or after the decree. 'The Court' is not necessarily the trial Court. The Court which makes the order for a receiver after decree may be the Court which passed the decree or it may be the appellate Court which has become seised of the matter by reason of an appeal. The Court which passed the decree has, for example, the power conferred on it by S. 51 of the Code to appoint a receiver for the execution of the decree. But that is because the Court which passed the decree still has seisin of the property in suit. But if execution has been stayed it certainly would not have this power.

I think that a Court's power to appoint a receiver is limited to the case where the

1. Veeraraghava Thathachariar v. Krishnaswami Thathachariar, (1910) 20 M L J 638 = 7 I C 900.

2. Vythilinga Pandarasannadhi v. Theogarajaswami Devasthanam, Tiruvarur, A I R 1932 Mad 193=136 I C 771=61 M L J 904.

3. Amar Nath v. Mt. Tehal Kuar, A I R 1922 Lah 444=67 I C 383.

proceedings are still pending before it. Either the suit must be pending and it will be pending after a preliminary decree, but before final decree, or the proceedings in execution of a final decree must be pending. In either event the Court in which the suit or proceedings are pending will have seisin of the suit or of the property subject to execution ; and this will be the basis of the Court's power to appoint a receiver of it. A decree may be partly preliminary and partly final. It was so in the present suit. But this is no reason why the principle which I have just stated should not apply. In the present instance an appeal is pending to the High Court against the decree in the plaintiff's suit, and the High Court, while upholding the appointment of the special receiver appointed in that suit, has stayed the passing of a final decree as regards that in which a preliminary decree only had been made by the first Court. In these circumstances, has the first Court any further jurisdiction to appoint a general receiver of the property in suit ? It seems to me that the question has been put beyond dispute by the Full Bench ruling in 32 Mad 416.[4] It was there said by Sir John Wallis :

> Now after an appeal has been filed, the appellate Court is seised of the case and should no doubt be applied to rather than the Court of first instance unless the law expressly enjoins the contrary, as was held in 18 Mad 214[5]; but it is a very different thing to press this principle so far as to say that the act of a party in filing an appeal deprives the Court of first instance of power to dispose of an application which has been properly made to it in the exercise of its jurisdiction.

In the Full Bench case an application for review had been presented before an appeal had been preferred, and it was held that the subsequent filing of the appeal did not deprive the Court which gave judgment, from entertaining the application to review its judgment. And in 44 Mad 731,[6] it was held that upon the express language of O. 9, R. 13, that the Court which passed an ex parte decree being the only Court to which application to set it aside could be made, the Court's power to dispose of such an application was not ousted by the filing of an appeal against it. I think that when a decree has become final, and an appeal is pending, there is no room for any such exceptions to the general rule stated by the Full Bench in respect of the power to appoint a receiver of the property in the suit. The appellate Court has become seised of the whole case. The Subordinate Court had then no further control over it. The High Court was the Court which then had the power to appoint a receiver under O. 40, R. 1. The Sub-Judge's order appointing a receiver was therefore beyond his powers, and it must be set aside. The appeal is allowed with costs.

C.R.K./K.B. *Appeal allowed.*

4. Chenna Reddi v. Peddaobi Reddi, (1909) 32 Mad 416=2 I C 802=19 M L J 388 (F B).
5. Pichuvayyangar v. Seshayyangar, (1895) 18 Mad 214=5 M L J 39.
6. Palaniyappa Chetty v. Subramania Chetty, A I R 1921 Mad 568=62 I C 755 = 44 Mad 731=41 M L J 90.

A. I. R. 1937 Madras 165

KING, J.

Sripada Venkatasubba Rao—Petitioner.

v.

Namagiri Venkateswaralu — Opposite Party.

Civil Revn. Nos. 999 and 1000 of 1934, Decided on 20th February 1936, from order of Dist. Munsif, Cocanada, D/- 5th February 1934.

(a) Insolvency—Suit by insolvent—Receiver not asked, nor refusing permission—Suit is not maintainable particularly without Court's permission.

Where before filing the plaints the insolvent had not applied to the Official Receiver nor requested him to file the plaints on his behalf, such suits are not maintainable, particularly when no permission of the Court has been obtained for the filing thereof : *A I R 1918 Mad 294, Foll.* ; *A I R 1924 Mad 345* and *A I R 1921 Mad 402, Disting.* [P 166 C 2]

(b) Insolvency—Suit without Court's permission — Whether subsequent permission can cure defect (*Quaere*).

Quaere—Whether a permission granted by the Court subsequent to the filing of the suit will cure the defect in the original institution ? [P 166 C 2]

(c) Insolvency—Proceedings by insolvent—Suit by undischarged insolvent without Court's permission—Just before expiry of limitation, permission asked and granted beyond date of limitation for those suits—Permission should not be granted so as to validate suits already barred by limitation on date of permission.

Where an undischarged insolvent filed his suits without permission from Court, but finding that the suits were defective for want of permission, applied for and obtained it beyond the date of limitation :

Held : that inasmuch as suits were barred by limitation on date of permission, it should not be granted. [P 167 C 1]

V. Govindarajachari—for Petitioner.

P. Satyanarayana Rao and *V. Partha-sarathy*—for Opposite Party.

Order.—The petitioner in these two revision petitions was adjudicated insolvent in November 1929. In April 1932 he applied for his discharge which was granted in November. Between the date of his application and the order upon it, that is to say, in June 1932, he filed the plaints in the present suits. They were filed as small cause suits for small sums of money due on dealings. In September 1932 he obtained the permission of the insolvency Court to continue prosecuting these two suits. The decision in the suits, however, was that by reason of the fact that he filed these suits while he was still an undischarged insolvent they could not be maintained and even though the insolvent obtained the permission of the insolvency Court subsequently, that did not cure the original defect. The two suits were accordingly dismissed and the petitioner has applied in revision to this Court.

It is not denied that the authority to which the lower Court refers, namely (1918) M W N 289,[1] is directly in point. It is there held, without any reservation whatever, that a person who is an undischarged insolvent on the date of the suit has no right to sue. My attention has, however, been drawn to two subsequent rulings, which, it is argued, modify or overrule this statement of the law. The first is 47 Mad 673.[2] That is a decision which does not affect the powers of an insolvent and it lays down that if the Official Receiver refused to take action under S. 53 or S. 54, Insolvency Act, a creditor can, so to speak, take his place and apply to the Court under those sections. That ruling is certainly an authority for the position that applications can be maintained by persons other than the Official Receiver, but clearly the vital feature that distinguishes that case is that the Official Receiver had been asked to take proceedings himself and he refused to do so. In the present case it cannot be asserted that before the plaints were filed the insolvent had applied to the Official Receiver and requested him to file the plaints on his behalf. The second case is reported in 62 I C 854.[3] In that case litigation was undertaken by a person who was not yet adjudicated insolvent and it was held that his subsequent adjudication did not prevent him from prosecuting an appeal. There again stress is laid upon the fact that when the litigation was begun the plaintiff was under no disability. This cannot be any authority for the position that when litigation is undertaken by a plaintiff who is obviously under disability, that litigation can be valid. It seems to me, therefore, that neither of these two rulings deals with a similar situation to the present and (1918) M W N 289[1] still governs the facts in this particular case and I am bound by it. It is quite clear, therefore, that when these suits were filed they were not maintainable.

The next argument which is sought to be put forward is that the subsequent permission granted by the Court in September cures the defect. I have not permitted this argument to be developed because in my opinion another consideration would render it wrong for me if the argument were successful to use my discretion in favour of the petitioner. What has happened in this case is that the petitioner, without any attempt at requesting the Official Receiver to take action, has towards the end of the period of limitation thought fit to file these two suits himself. He subsequently discovered that the suits were defective and that it was necessary to apply to the insolvency Court for permission. The result clearly is, when we consider the point of view of the defendants, that if these suits had been disposed of between the date of the plaints and the date when the permission was granted, nothing whatever could have prevented a decree being given in favour of the defendants dismissing them. So that, even assuming that from September onwards these suits were no longer invalid, the result clearly is that it is not until September the proper plaints were filed against the defendants. Now I have examined the dates and discovered that if these suits had been filed in the first instance in September both of them would have been

1. Subbaraya Chettiar v. Lakshmi Ammal, A I R 1918 Mad 294=45 I C 239=1918 M W N 289.
2. Ananthanarayana Ayyar v. Rama Subba Ayyar, A I R 1924 Mad 345=79 I C 395=47 Mad 673.
3. Tatireddy v. Ramachandra Rao, A I R 1921 Mad 402=62 I C 854.

barred by limitation. It seems to me this is clearly a case analogous to those cases in which the plaintiff seeks permission to amend a plaint and it is a well known principle of law that such an amendment should not be allowed if its effect would be to deprive the defendant from pleading the bar of limitation. Seeing, therefore, that the plaintiff has through lack of diligence in this case not filed valid plaints until more than three years after the cause of action had arisen, I see no reason to interfere with the decree of the Court below dismissing the suits. These petitions are accordingly dismissed with costs.

C.R.K./B.D. *Petitions dismissed.*

A. I. R. 1937 Madras 167

PANDRANG ROW, J.

Mooka Pandaram—Petitioner.

v.

Sinnu Muthiriyan—Opposite Party.

Criminal Revn. Nos. 607 and 608 and Petns. Nos. 567 and 568 of 1936, Decided on 1st September 1936, from order of Dist. Magistrate, Trichinopoly, D/- 13th July 1936.

(a) Criminal P. C. (1898), S. 144 (4)—Application to District Magistrate to rescind order of Sub-Magistrate — Application for same relief already dealt with by Sub-divisional Magistrate — District Magistrate still has power to entertain application.

The power of the District Magistrate to entertain an application under S. 144 (4) is not lost by reason of the fact that the Sub-divisional Magistrate who is subordinate to him had already dealt with an application made under that sub-section to him. The wide powers of rescission or alteration given by sub-s. (4) to S. 144 are necessary for the protection of the subject. They are invoked not when a Subordinate Magistrate declines to pass an order under sub-section (1), but only when an order is passed thereunder interfering with the rights of subjects, and where an order of this kind, that is to say, an order which interferes with or limits the rights of subjects is passed, the law allows the Magistrate himself, who passed the order to change his mind and rescind or alter the order and allows every Magistrate superior to the Magistrate to do the same thing if he thinks fit.

[P 168 C 1, 2]

(b) Criminal P. C. (1898), S. 144—Powers of Magistrate — Superior Magistrate has no general or inherent power to suspend orders of Subordinate Magistrates — Hearing of application for rescission of Subordinate Magistrate's order should be made without delay and without staying or suspending that order.

A general power to suspend orders of Subordinate Magistrate is not given to superior Magistrates expressly by the Criminal Procedure Code and criminal Courts have no inherent power to pass such orders. S. 144 permits any authority which has the power to rescind or alter an order to do so after hearing only the party who applies for it and this hearing can be completed without delay, and there is no particular reason why there should be a stay or suspension before such hearing. It is not a case in which the other side has to be given notice and has to be heard. In all these cases under S. 144 it is really the liberty of the subject that is affected by the original order and though this interference might be made by the Magistrate at the instance of or when moved by some private individual, the superior authority can always rescind or alter the order without hearing the person at whose instance the original order was passed, the only limitation on his power being that he should hear the party who applies for rescission or alteration before declining to do so.

[P 168 C 2; P 169 C 1]

(c) Criminal P. C. (1898), S. 144 (4) — Authority to rescind or alter given by S. 144 (4) cannot be delegated—Even assuming that such power exists, delegation of such authority to same Sub-divisional Magistrate who had already dealt with application for rescinding is not proper exercise of such power.

The power of rescinding the order lies only with the Magistrate to whom the application is made and an order of the District Magistrate to whom the application was made, transferring the application to a Sub-divisional Magistrate is bad. The application made to the District Magistrate under S. 144 (4), Criminal P. C., cannot be brought either under S. 192 or under S. 528, Criminal P. C., which deal with the subject of transfer of cases. Moreover, the transfer to the very Sub divisional Magistrate who had already dealt with an application relating to this very matter under the very same sub-section would not have been a proper exercise of the power of transfer even if any such power really existed.

[P 169 C 1, 2]

K. S. Jayarama Iyer and *G. Gopalaswami*—for Petitioner.

A. Narasimha Iyer — for Opposite Party.

Public Prosecutor—for the Crown.

Order.—These are applications which arise out of an order of the District Magistrate of Trichinopoly staying the order of the Sub-Magistrate of Turaiyur in M. C. No. 12 of 1936 pending the orders of the Sub-divisional Magistrate, Musiri, to whom the District Magistrate forwarded an application by one of the parties in M. C. No. 12 of 1936 under S. 144 (4), Criminal P. C. The Sub-Magistrate passed an order on the application of the present petitioner prohibiting the counter-petitioners from interference with the performance of a certain festival by the petitioner. Some of the counter-petitioners applied to the Sub-divisional Magistrate of Musiri under

S. 144 (4), Criminal P. C., for rescinding the order and thereupon the Sub-divisional Magistrate after calling for the records passed an order confirming it except as regards counter-petitioners 1 to 6 in respect of whom the order was set aside apparently because they gave an undertaking before the Sub-divisional Magistrate that they would not interfere with the conduct of the festival. It may be mentioned in this connexion that these counter-petitioners 1 to 6 were not the petitioners before the Sub-divisional Magistrate. In other words they did not seek any rescission of the original order of the Sub-Magistrate. Thereupon one of the counter-petitioners, viz., the respondent in these petitions by name Sinnu Muthiriyan, approached the District Magistrate with a petition under S. 144, Criminal P. C., pointing out certain alleged irregularities in the enquiry by the Sub-Magistrate, and also his objections to the procedure followed by the Sub-divisional Magistrate and prayed that the order of the Sub-Magistrate should be rescinded altogether and that the order should be suspended pending disposal of the petition. The District Magistrate passed the following order on the application on the same date on which it was presented:

> Endorsement forwarded to the Sub-divisional Magistrate, Musiri, for enquiry and disposal.
>
> 2. The order of the Sub-Magistrate, Turaiyur, in M. C. No. 12 of 1936 is stayed pending orders of the Sub-divisional Magistrate after enquiry.

This order which appears to deal with the petition presented under S. 144 (4), Criminal P. C., almost as if it were one relating to a purely administrative matter is objected to on three grounds, namely, (1) that the District Magistrate had no power to entertain an application to rescind the order of the Sub-Magistrate after a similar application for rescission had been made to the Sub-Divisional Magistrate, and the latter had passed orders thereon, (2) that the District Magistrate had no power to suspend the order of the Sub-Magistrate temporarily pending the result of the enquiry ordered by him to be made by the Sub-Divisional Magistrate, and (3) that the District Magistrate had no power to transfer the case to the Sub-Divisional Magistrate for disposal. I am of opinion that as regards the power of the District Magistrate to entertain an application under S. 144 (4) the power is not lost by reason of the fact that the Sub-Divisional Magistrate who is subordinate to him had already dealt with an application made under that sub-section to him. The wide powers of rescission or alteration given by sub-s. 4 to S. 144 are necessary for the protection of the subject. They are invoked not when a Subordinate Magistrate declines to pass an order under sub-s. (1) but only when an order is passed thereunder interfering with the rights of subjects, and where an order of this kind, that is to say, an order which interferes with or limits the rights of subjects is passed, the law allows the Magistrate himself who passed the order to change his mind and rescind or alter the order and allows every Magistrate superior to that Magistrate to do the same thing if he thinks fit. These are provisions intended for the protection of the liberty of the subject and should be construed liberally; otherwise the final authority in the District who is to determine whether there should be any interference with the liberty of the subject, and if so, to what extent for the purpose of maintaining public tranquillity or preventing breaches of the peace, will be the Sub-Divisional Magistrate, and the District Magistrate would be powerless to interfere with what he considered a needless exercise by a Sub-Magistrate of the special powers given by S. 144 (1), Criminal P. C., if the Sub-Divisional Magistrate has chosen to exercise his powers under sub-s. 4. In the circumstances of this case I am of opinion that the District Magistrate must be deemed to have had the power if he thought fit to rescind or alter the order of the Sub-Magistrate, the order of the Sub-Divisional Magistrate being one which is in effect a confirmation of the Sub-Magistrate's order. The only alteration made in it was one which was of no consequence because the persons affected by the alteration were themselves prepared to abide by the order.

As regards the other two questions raised in these petitions, viz., the power of the District Magistrate to suspend the order and the power to transfer, I am of opinion, that the contentions of the petitioner are well founded. A general power to suspend orders of subordinate Magistrates is not given to superior Magistrates expressly by the Code of Criminal Procedure and that power is sought to be based by the Public Prosecutor on what is called the inherent power of the criminal Courts to pass such orders as are necessary in the interests of justice. The authorities on

this point, viz., the existence of inherent powers in criminal Courts in the mofussil are not uniform and it would appear as if the weight of authority in this Province is against the proposition that there is such an inherent power. S. 144 permits any authority which has the power to rescind or alter an order to do so after hearing only the party who applies for it and this hearing can be completed without delay, and there is no particular reason why there should be a stay or suspension before such hearing. It is not a case in which the other side has to be given notice and has to be heard. In all these cases under S. 144 it is really the liberty of the subject that is affected by the original order and though this interference might be made by the Magistrate at the instance of or when moved by some private individual the superior authority can always rescind or alter the order without hearing the person at whose instance the original order was passed, the only limitation on his power being that he should hear the party who applies for rescission or alteration before declining to do so.

As regards the power of transfer it has not been seriously argued by the Public Prosecutor that there is a power of transfer in a case of this kind. The authority that was invoked by the application to the District Magistrate was the authority to rescind or alter conferred by S. 144 (4) and this authority cannot be delegated. It has been decided in Crl. R. C. No. 318 of 1914,[1] that the power of rescinding the order lies only with the Magistrate to whom the application is made and that the order of the District Magistrate to whom the application was made transferring the application to a Sub-Divisional Magistrate is bad. The application made to the District Magistrate under S. 144 (4), Criminal P. C., cannot be brought either under S. 192 or under 528, Criminal P. C., which deal with the subject of transfer of cases. In this particular case it would almost appear as if the learned District Magistrate dealt with the application in an administrative way, and delegated his duty to the Sub-Divisional Magistrate after suspending the order complained of. Moreover, the transfer to the very Sub-Divisional Magistrate who had already dealt with an application relating to this very matter under the very same sub-section would not have been a proper exercise of the power of transfer even if any such power really existed.

The District Magistrate's orders suspending the order of the Sub-Magistrate and transferring the case to the Sub-Divisional Magistrate must be therefore set aside, and the District Magistrate will have to deal with the application made to him himself according to law, and the proceedings now pending before the Sub-Divisional Magistrate as a consequence of the order of the District Magistrate transferring the case to him must be quashed. I wish to make it clear at the same time that it will be open to the District Magistrate to rescind or alter the order or to decline to do so as he thinks proper; and nothing that has been said by me should be deemed to influence in any way his discretion which, in a case of this kind, has to be exercised for the protection of the rights of subjects consistently with the need for the preservation of the public tranquillity.

I direct further, in the circumstances of the case, that the cancellation of the order of suspension shall take effect only from the date immediately succeeding the date on which this order of the High Court is received by the District Magistrate.

C.R.K./A.L. *Order accordingly.*

1. Sundarsanam Aiyangar v. Srinivasachari, A I R 1916 Mad 533=26 I C 666=16 Cr L J 74.

A. I. R. 1937 Madras 169

VARADACHARIAR AND HORWILL, JJ.

Deivasigamani Ponnambala Desikar.

v.

Raja Srimathu Muthu Vijayaregunatha Dorai Singam and *another.*

Appeal No. 415 of 1932, Decided on 7th October 1936.

(a) Madras Survey and Boundaries Act (8 of 1923), S. 14— Suit between two adjoining estate holders regarding boundary line — Tenants or cultivators holding under them are not persons prima facie interested — Their non-joinder is not fatal to suit.

In a dispute between one estate holder and a neighbouring estate holder in respect of the boundary between the two estates, the estate holders are the persons prima facie interested in the dispute within the meaning of S. 14 and not the tenants or cultivators under the holders of either estate. Hence the non-joinder of such tenants or cultivators is not fatal to the maintainability of a suit regarding the dispute about the boundary line. [P 171 C 2]

(b) Practice—Joinder of parties — Application to implead after limitation — This by itself will not justify dismissal of application or suit.

Where an application is made to add certain persons as parties after the period of limitation for

the suit, this circumstance will not of itself justify either the dismissal of the application to implead them or the dismissal of the suit : *28 Bom 11, Rel. on.* [P 171 C 2]

K. Rajah Ayyar, V. Ramaswamy Ayyar and *R. Rangachari*—for Appellant.

B. Sitarama Rao and *N. G. Krishna Ayyangar*—for Respondents.

Varadachariar, J.—This appeal arises out of a suit filed by the Pandarasannadhi of the Kunnakudi Mutt for the purpose of getting a decision by an appellate Survey Officer (dated 22nd September 1924) set aside in some respects. There are two villages which may be referred to as M and A. M belongs to the Kunnakudi Mutt of which the plaintiff is the Pandarasannadhi and is a Dharmasanam village in the Sivaganga estate. A belongs to a Devasthanam in the Sivaganga estate and the Zamindar is the trustee thereof. Defendant 2 is an alienee from the Zamindar. Survey operations were started in this locality in 1922 or 1923. It is not clear from the records whether the proceedings were started when Act 4 of 1897 was in force or after Act 8 of 1923 came into force. It may be a question of some difficulty whether in dealing with the effects of the survey, the Court should apply the provisions of Act 4 of 1897 or those of Act 8 of 1923. There is reason to think that there is some marked difference between the two Acts in respect of the effect of the survey, if a suit is not brought within three years allowed by the Act. We do not pursue that question further because in the present instance the suit was undoubtedly filed within three years of the decision of the appellate Survey Officer. In the plaint as originally framed only the Zamindar was the defendant ; defendant 2 was later on impleaded as an alienee from the Zamindar subsequent to the institution of the suit. There is a statement in para. 9 of the plaint that :

> The lands in dispute are warapat punja lands in the holding of the various pattadars of the village and there have been for a long number of years exchange of pattas and muchilikas in respect of the suit lands and the mutt as well as the lessees from the mutt have been in enjoyment of the same by collecting waram, etc., due to them.

In the written statements filed in January 1928 by defendant 1, and in February by defendant 2, objections on the score of non-joinder were taken. The objection in para. 13 of defendant 1's written statement is general and does not specify who the ryots are that were asked to be joined. In defendant 2's written statement, para. 6 puts it more specifically that the plaintiff should have impleaded the tenants who, according to him, were in possession under him. The issues raised the question of non-joinder in various forms, but the question was not dealt with in the first instance nor for more than a couple of years after the written statements had been filed. A large mass of documentary evidence was filed in the case and a number of witnesses have been examined on both sides. On 11th July 1932 it appears from the B Diary that arguments were heard on issues 3, 5, 6 and 7 which were apparently regarded as preliminary issues.

We are constrained to observe that it is a pity that these preliminary arguments had not been thought of at a much earlier stage before time was spent on recording so much evidence. After hearing these preliminary arguments, an order was passed on the non-joinder issue on 1st August 1932. The learned Judge held that both on general considerations and by virtue of S. 14, Survey and Boundaries Act, the ryots of the two villages who were said to be in possession and enjoyment of several items of the property in dispute were necessary parties to the suit. Time was accordingly given to enable the plaintiffs to apply to implead them. I. A. No. 1096 of 1932 was accordingly filed. That application came on for hearing in September 1932 and the learned Judge then held that as the non-joinder of the persons proposed to be added was fatal to the maintainability of the suit and they were proposed to be added as defendants only after the three years' period of limitation had expired, it was not proper to allow them to be joined as parties to the suit at that stage. The result was that the learned Judge dismissed the suit. Hence this appeal by the plaintiff.

The order of the learned Judge has been supported by Mr. Sitarama Rao on the ground that under Ss. 13 and 14, Act 8 of 1923, a decision of the Survey Officer demarcating a boundary is conclusive not merely between the parties to a dispute before the survey authorities (as was held under the Act of 1897) but as against all persons interested in that boundary line and it could not therefore have been the intention of the legislature that a suit

under S. 14 could be instituted without impleading *eo nominee* all persons who may be interested in that boundary line. It may also be mentioned that in Act 4 of 1897 there was an explanation to S. 13 to the effect that :

> Where parties litigate bona fide in respect of boundaries of property claimed in common for themselves and others, all persons interested in such boundary dispute shall, for the purpose of this section, be deemed to claim under parties so litigating.

This provision has been replaced in S. 14 of the present Act by the following clause :

> The plaintiff in such suit shall join as parties to it all persons whom he has reason to believe to be interested in the boundary which is the subject of the suit.

Mr. Sitarama Rao contends that the result of this substitution is that if any persons whom the plaintiff must have believed to be interested in the boundary in question are not impleaded, the whole suit must fail because it will not be possible to correct the Survey Officer's determination only as against some of the persons interested while leaving it in force as against other persons. Mr. Sitarama Rao may be right to this extent, that it is desirable to have before the Court all persons interested in the boundary in question ; but we think it will be reading too much into that provision to say that the omission to implead any person so interested is necessarily fatal to the suit. The very language in which that clause is couched, by reference to the reasonable belief of the plaintiff as to the persons interested, is against the extreme contention put forward by Mr. Sitarama Rao. It must also be remembered that the Survey and Boundaries Act deals with the survey of lands in estates as well as lands in ryotwari areas. In applying S. 14 to survey of lands in estates there are, it seems to us, other considerations also to be borne in mind. Within an estate, there may be various grades of cultivators possessing various rights as against the holder of the estate.

There may be cultivators of private lands ; there may be persons in possession of non-occupancy lands and of occupancy lands of service tenures and so on. There may also be waste lands in the estate. It is one thing to postulate that between the holder of the estate on the one hand and against the various persons in occupation of a particular piece of land in the estate on the other, there are varying interests and tenures ; but it does not seem to us to be the correct principle that in a dispute between the holder of the estate and the holder of any neighbouring estate in respect of the boundary between the two estates, the tenants or cultivators under the holder of either estate are prima facie persons interested within the meaning of this part of S. 14, at any rate not to the extent that their non-joinder should be regarded as fatal to the maintainability of the suit. It has been decided with reference to the language of the Permanent Settlement Regulation that for various purposes the registered proprietor is the owner of the area comprised in the settlement and in recent cases from Calcutta, the Privy Council have laid down that he is the owner even to the extent of being regarded as the person entitled to the rights to minerals in the land (*cf.* S. 7, Madras Estates Land Act). We are therefore inclined to think that in a dispute between one estate holder and a neighbouring estate holder in respect of the boundary between the two estates, the estate holders are the persons prima facie interested in the dispute within the meaning of S. 14. It is significant in this connexion to note that when the survey now in question was conducted the only persons who appeared in response to the notice under S. 6 were plaintiff and the zamindar. In this view, the learned Judge seems to us to have gone too far in holding that the omission to add the ryots as parties to the suit in the first instance was such a defect as necessitated the dismissal of the suit.

It is true that the application to add the ryots as parties was made after the lapse of three years from the date of the Survey Officer's decision. But in view of the principle laid down in 28 Bom 11,[1] that circumstance will not of itself justify either the dismissal of the application to implead them or the dismissal of the suit. We would therefore direct that I. A. No. 1096 of 1932 be ordered as prayed for. We would also set aside the decree of the lower Court dismissing the suit and remand the case for disposal on the merits. We cannot however help thinking that this situation has been brought about by the plaintiff himself and might well have been avoided if he had

1. Guruvayya v. Dattatraya, (1904) 28 Bom 11 = 6 Bom L R 618.

taken steps earlier to file the suit or had impleaded the ryots in the ordinary course. We accordingly direct that up to this stage all costs incurred shall be respectively borne by the parties themselves. There will be a refund of court-fee on the memorandum of appeal.

C.R.K./S.C. *Appeal allowed.*

A. I. R. 1937 Madras 172

VENKATASUBBA RAO, OFFG. C. J. AND VENKATARAMANA RAO, J.

B. Ramayya—Appellant.

v.

Mrs. Josephine Elizabeth and *others*—Respondents.

O. S. Appeals Nos. 56 of 1933, 2 and 3 of 1935, Decided on 15th September 1936, from order of Ananthakrishna Ayyar, J. D/- 11th May 1933.

(a) Hindu Law—Applicability—Converts—Mere declaration by convert as to re-conversion to Hinduism is inadequate to make him Hindu in absence of other evidence showing re-conversion.

The mere fact that a person who has renounced Hinduism makes a declaration that he has become a re-convert to Hinduism is totally inadequate to make him a Hindu in absence of other evidence showing that there was re-conversion to Hinduism. [P 173 C 1]

(b) Hindu Law—Applicability — Convert—Formal conversion whether necessary for person becoming Hindu (*Quaere*).

Quaere.—Whether a formal conversion is a pre-requisite to a person becoming a Hindu: *A I R 1928 Mad 1279, Expl.; A I R 1934 Mad 630, Ref.* [P 172 C 2]

N. Ramanatha Ayyar and *T. V. Muthukrishna Ayyar*—for Appellant.

V. Radhakrishniah, N. Muthuswami Ayyar, M. A. T. Coelho and *T. Krishnarajan*—for Respondents.

Venkatasubba Rao, Offg. C. J.—The same question arises in the three appeals, namely, is Dr. Iswarayya to be treated as having died a Christian or a Hindu? He was originally a Hindu and a Brahmin by birth and became a convert to Christianity. What is now alleged by his Brahmin brother Ramayya is, that Dr. Iswarayya changed his religion again in 1926 and became a Hindu by re-conversion. A definite case was put forward in the trial Court, namely, that the deceased underwent a formal ceremony of expiation and re-conversion. This case the trial Judge has found to be utterly false, and we must without hesitation affirm the finding. Ananthakrishna Ayyar, J. seems to have thought that without undergoing a formal ceremony, a convert to Christianity cannot again become a Hindu. For this purpose he relies upon the following observations in 52 Mad 160[1]:

> A European does not become a Hindu merely because he professes a theoretical allegiance to the Hindu faith, or is an ardent admirer and advocate of Hinduism and its practices; but if he resides long in India, abdicates his religion by a clear act of renunciation and adopt Hinduism by undergoing formal conversion, gives up along with Christianity his Christian name and deliberately assumes a Hindu name, marries in accordance with Hindu religious rites a person who is a Hindu by race and religion, and cuts himself off from his old environments and takes to the Hindu mode of life, in such a case the Court may justly come to the conclusion that he has become a Hindu within the meaning of the Succession Act. These tests are satisfied in the present case and I therefore hold that Mena Renda otherwise called Sulochana was a Hindu at her death.

This passage is clearly no authority for the position that a formal conversion is a pre-requisite to a person becoming a Hindu. As Varadachariar, J. points in 67 M L J 389,[2] this passage does not lay down that every one of the tests mentioned there should be fulfilled where conversion to Hinduism is alleged; all that was laid down was that each of the tests enumerated in the passage having been fulfilled, there was conclusive evidence in favour of the alleged conversion. It is unnecessary to pursue the matter further. Assuming, without deciding, that in a case of this sort a formal conversion is unnecessary, we must hold that the evidence adduced here falls far short of what is required to show that there was a re-conversion to Hinduism. The appellants rely upon two facts, first, that in the Service Register the entry "Indian Christian" was changed into "Hindu Brahmin," against the deceased's name at his request and secondly, that in two affidavits filed by the deceased he described himself as a Hindu. The positive case put forward by the appellants that there was a formal ceremony, hopelessly failed. Again, the attempts made to show that Dr. Iswarayya took to the Hindu mode of life proved equally futile. We quite recognize that it is unnecessary to show that Dr. Iswarayya

1. Ratansi D. Morarji v. Administrator General, Madras, A I R 1928 Mad 1279=111 I C 364 =52 Mad 160=55 M L J 468.
2. Guruswami Nadar v. Irulappa Konar, A I R 1934 Mad 630=155 I C 708=67 M L J 389.

who was a convert to Christianity, became by re-conversion not only a Hindu but a Brahmin. Indeed, it seems to have been assumed throughout, that the conversion, if in fact it did take place, had the effect of restoring him to his original caste. But this is a matter which we need not further pursue, as we are satisfied that the evidence adduced to prove that the deceased adopted the ways of a Hindu and observed the Hindu mode of life, is hopelessly discrepant. We are quite clear that the mere fact that a person makes a declaration that he has become a re-convert to Hinduism, is totally inadequate to make him a Hindu. We must therefore hold that at the time of his death, Dr. Iswarayya was a Christian and affirm Ananthakrishna Ayyar, J.'s finding on this point, though upon grounds slightly different from those adopted by the learned Judge.

That being so the question does not arise whether the legacy in favour of Mrs. Josephine Elizabeth is valid or not; in other words, whether she possesses the character of a legatee under S. 234, Succession Act. Mrs. Josephine Elizabeth does not claim to be a residuary legatee, all that she alleges being that there are specific bequests in her favour. Under S. 234 as between a legatee and the intestate heirs, the latter are preferentially entitled to administration. The deceased having died a Christian, it follows that his widow is entitled to the grant. The finding of the trial Judge therefore that the legacy in favour of Mrs. Josephine Elizabeth is invalid, is an unnecessary finding and our direction is that it shall be vacated. It remains to observe that granting Dr. Iswarayya became by re-conversion a Hindu, the question would still arise, namely as between the Hindu brother on the one hand and the Christian wife and children on the other, who would be entitled to succeed? It seems to have been tacitly assumed by the appellants that if the re-conversion was proved, the Hindu brother would be the deceased's heir. This matter Ananthakrishna Ayyar, J. did not deal with, nor is it necessary for us to go into it in view of our findings.

Lastly, we must deal with the question of costs. In the circumstances we think the proper order to make is that in O. S. A. No. 2 of 1935 Ramayya shall pay the costs of the respondent, Mrs. Swarnam Iswarayya, whom we authorize to take her costs out of the estate in the first instance. When the costs are recovered from Ramayya, they will become a part of the estate. As to Mrs. Josephine Elizabeth, she will get her costs in O. S. A. No. 3 of 1935, which we fix at Rs. 250 out of the estate to be paid to her by the administratrix. In O. S. A. 56 of 1933 we make no order as to costs.

C.R.K./R.M. *Order accordingly.*

A. I. R. 1937 Madras 173

VENKATARAMANA RAO, J.

Palaniyandi Pillai and *another* — Appellants.

v.

Rasappa Pillai—Respondent.

Appeal No. 170 of 1932, Decided on 17th August 1936, against appellate order of Dist. Court, Salem, D/- 12th March 1932.

(a) Civil P. C. (1908), S. 144—Decree in favour of *A* for sale of property—Purchase by himself—Sale set aside on application of *B* (purchaser pending suit) under O. 21, R. 89—On appeal decree in favour of *A* reversed by District Judge — Application by *B* for restitution of deposit amount—Application granted—Appeal by *A* to High Court against decree of District Judge—Decision reversed—Letters Patent appeal—Decision restored—Second application for restitution—Application held sustainable.

In a suit by *A* for recovery of annuity, a decree was passed in his favour and the property was put to sale, *A* himself being the purchaser. *B* who had purchased the property pending the suit made an application under O. 21, R. 89 and the sale was set aside. The decree in favour of *A* was reversed on appeal by District Judge. Consequently *B* made an application for restitution of the amount deposited by him and the application was granted. *A* preferred an appeal against the decision of the District Judge and the decision was reversed, but on Letters Patent appeal decree of the District Judge was restored. *B* therefore made a second application for restitution of the amount deposited. The trial Court dismissed the application on ground that there was already an order for restitution and *B* ought to have made an application for execution. On appeal:

Held: that the decision was wrong. The first application for restitution was filed by virtue of decision of the District Judge. That decision was upset in appeal. Therefore *B* could not maintain first application which had become infructuous. Till the decision in Letters Patent appeal *B* could not have applied for restitution. Therefore the second application for restitution after decision in the Letters Patent appeal was sustainable.

[P 174 C 2; P 175 C 1]

(b) Civil P. C. (1908), S. 144—Application—Form—Application need not be by execution petition as required by O. 21, R. 11.

Application for restitution may be made in such manner as the nature of each case might require and need not follow in every case the procedure in O. 21, R. 11, Civil P. C.: *A I R 1934 Pat 246, Rel. on.* [P 175 C 2; P 176 C 1]

B. Sitarama Rao, *E. Vinayaka Rao* and *Rangachari*—for Appellants.

C. S. Venkatachari and *V. N. Venkatavaradachari*—for Respondent.

Judgment.—The question raised in this appeal is whether an application for restitution made by the appellants for recovery of a sum of money deposited by them into Court for setting aside a sale under O. 21, R. 89, Civil P. C., is sustainable. The plaintiff-respondent in this appeal filed a suit, O. S. No. 440 of 1917, to recover a certain annuity from and out of the property in the schedule annexed to the plaint filed by him. The properties were owned by defendant 3 from whom defendant 1 purchased; and he in turn sold them to defendant 2. A decree was passed in the suit in favour of the plaintiff directing among other things payment of the amount by sale of the properties. Pending the suit the said properties appear to have been purchased by the appellants from defendant 2. In consequence of the said decree in the above suit the properties were brought to sale and purchased by the plaintiff decree-holder. The appellant made an application to set aside the sale under O. 21, R. 89, Civil P. C., by depositing the amount of the decree into Court and the sale was accordingly set aside. This was in or about June 1921. Against the decree in the said O. S. No. 440 of 1917 an appeal was preferred by the defendants and the decree in favour of the plaintiff was reversed in A. S. No. 186 of 1920 on the file of the District Court, Salem. This was on 2nd November 1921. In consequence of the said decision the appellants filed E. A. No. 74 of 1922 on 12th January 1922 for restitution of the moneys they deposited into Court. The application was dismissed on 4th April 1922. But on appeal the said order was reversed and the appellants were declared entitled to restitution. This was in or about 7th April 1924, and against this order C. M. S. A. No. 2 of 1925 was preferred to the High Court. Pending these proceedings against the decision in A. S. No. 186 of 1920, S A. No. 276 of 1922 was preferred to the High Court by the plaintiff. On 12th February 1925 the High Court reversed the decree of the appellate Court in A. S. No. 186 of 1920 and restored the decree in O. S. No. 440 of 1917. Against this decree a Letters Patent appeal was preferred being L. P. A. No. 98 of 1925 on the file of the High Court, and on 29th November 1927 the Letters Patent appeal was allowed and the result of the decision therein was that the decree of the appellate Court in A. S. No. 186 of 1920 was restored and the plaintiff's suit dismissed.

It may also be stated that the C.M.S.A. No. 2 of 1925 was also disposed of and the same was dismissed on the same date. On 19th November 1928, the decree in the Letters Patent appeal was amended as the cause-title was found to be defective in that the names of the legal representatives of defendant 1's representative were not in the cause-title of the decree as drafted, but the name of defendant 1, a dead man, was retained in the decree as originally drafted. Within three years from this date the appellants filed E. A. No. 611 of 1931 claiming restitution of the amount deposited by them with interest. They prayed that the Court may be pleased to grant restitution and direct the plaintiff-respondent to pay the petitioner the amount with subsequent interest. The District Munsif dismissed the application on the ground that the application is unsustainable in that there was already an order for restitution made in E. A. No. 74 of 1922 and the same prayer cannot be asked for again and further that there was "no prayer for execution." On appeal from this decision the learned District Judge summarily dismissed the appeal on the ground that an order for restitution had already been made and it was an executable order and further the Court must be moved in the appropriate way, and that is by an execution petition. Against this order the present second appeal has been preferred. It is contended by Mr. Sitarama Rao that both the lower Courts were wrong in the view they took, viz., that the appellants should have executed the order for restitution passed in E. A. No. 74 of 1922. It seems to me that Mr. Sitarama Rao is right in his contention. E. A. No. 74 of 1922 was filed by virtue of the decision in A. S. No. 186 of 1920. But the decision was upset in S. A. No. 276 of 1922. The result of the decision in the second appeal was that the appellants could not maintain successfully E. A. No. 74 of 1922 and the application must

be deemed to have become infructuous. Till the decision in the Letters Patent appeal established the rights of the defendants 1 and 2 the appellants could not have applied for restitution at all. It is only in consequence of the decree in the Letters Patent appeal that their right to apply accrued. The appellants were therefore in order in filing the present application for restitution.

The next contention is whether the appropriate way of moving the Court was by an execution petition and not in the form of an application in the manner filed by the plaintiffs. The argument seriously pressed on behalf of the plaintiff-respondent in this case which apparently prevailed in the Courts below is this: In a series of cases, by which I am bound, our High Court has consistently taken the view that an application for restitution is an application in execution of a decree and governed by Art. 182, Lim. Act. The only way in which an application can be made is by way of an execution petition framed in accordance with O. 21, R. 11, Civil P. C. The present petition does not fulfil the requirements of O. 21, R. 11, Civil P. C., and it is defective in a material particular as it does not state in what way the assistance of the Court is sought, whether by arrest of the plaintiff or attachment of his properties, and the application was rightly rejected by both the Courts. It is no doubt true that our High Court has taken the view that an application for restitution is an application for execution of the decree, whatever may be the view of the other High Courts and though there is much to be said in favour of the other view: *vide* 59 Cal 337[1] and A I R 1934 All 626.[2] The ground on which the application is said to be for execution of the decree is thus stated in 6 M L W 359[3]:

> What is sought to be enforced is the legal obligation arising from the decree itself and not an independent obligation. It seems to us that we must treat the application as an application for execution of the decree,

and this also accords with the view taken by the Bombay High Court in 45 Bom 1137,[4] where Sir Norman Macleod, C. J. says:

> It is the decree of the appellate Court which entitles the successful appellant to get back something which he had been deprived of by the decree of the lower Court under which the then successful party had actually received possession. In order therefore to get back what he has lost, the successful appellant must apply for execution of the order which entitles him to get back that possession.

But it is too much to argue from this that the application for restitution must strictly conform to the form prescribed for an execution petition and satisfy all the requirements of O. 21, R. 11, Civil P. C. It will be seen that under S. 144, before an order for restitution can be made, the form and the manner of restitution and the relief which the Court would grant for giving the benefit of the decree to the person who seeks the restitution of the property which he has been deprived of, have to be determined by the Court. In my opinion the form of an execution petition would be unsuitable in most cases. The actual amount to be restored will have to be determined; the Court will have to determine whether it will grant interest, and if so, at what rate; and if it is restoration of immoveable property the Court may have further to determine whether mesne profits have to be granted or not. It may be, conditions will have to be imposed upon the party who seeks restoration. After determination as aforesaid it will be then open to the Court to give the appropriate relief which the nature of the case may require and which may accord with such determination. In meeting the view that an application for restitution could not in the nature of things be an application for execution because the form of an execution petition could not be appropriately thought of for an application for restitution, Courtney-Terrell, C. J. observes in 13 Pat 411[5] (422-23) thus:

> It is true that the procedure for dealing with them differs in some respects from the procedure for carrying out other decrees of the Court notably in the fact that such applications must be made in the Court of first instance. But such matters are not in my opinion the criteria of the nature of the remedy for judicial classification any more than geographical habitat or nomenclature are criteria of zoological genus. Under S. 144 the Court is bound as a matter of law to order restitu-

1. Sarojbhushan Ghosh v. Debendranath Ghosh, A I R 1932 Cal 308=137 I C 302=59 Cal 337 =54 C L J 506.
2. Parameswar Singh v. Sitaladin, A I R 1934 All 626=150 I C 1096=1934 A L J 503 (F B).
3. Unnamalai Ammal v. Arunachalam, A I R 1917 Mad 1: 4=42 I C 530=33 M L J 413=6 M L W 359.
4. Syed Hamid Ali v. Ahmedalli, A I R 1921 Bom 67=62 I C 233=23 Bom L R 480=45 Bom 1137.
5. Bhaunath Singh v. Kadar Nath Singh, A I R 1934 Pat 246=148 I C 1180=13 Pat 411=15 P L T 173 (F B).

tion though the form of restitution may vary and it is by reason of the fact that the Court of first instance only is familiar with the circumstances of the case that as a matter of machinery it alone is given discretion to determine the form which the restitution may take. This fact does not, in my opinion, militate against the view that an application for restitution is an application in execution . . . . . The re-arrangement in the new Code has, in my opinion, not affected the essential nature of the remedy which remains as before a remedy in execution though subject to a special procedure.

These observations clearly indicate that an application for restitution need not be by an execution petition as required by O. 21, R. 11, Civil P. C. Mr. Sitarama Rao urges before me that even if the application is considered to be defective he can be given leave to amend the petition by adding a prayer for appropriate relief. Having regard to the circumstances of the case I think this is an eminently fit case in which I should grant him that relief. The Code of Civil Procedure does not prescribe the form of an application for restitution. There is no decision which enunciates what that form should be and there is still a conflict of opinion as to whether an application for restitution is an application for execution though no doubt our High Court has taken the view that an application for restitution must be an application for execution. But in none of the cases which have taken that view is there any indication of the form in which the application should be made, and whether it should conform to all the requirements of O. 21, R. 11, Civil P. C. It must also be noticed that the words "according to the rules for the execution of decrees" which were in S. 583 of the old Code have been omitted in the new Code. This seems to indicate that an application for restitution may be made in such manner as the nature of each case might require and need not follow in every case the procedure in O. 21, R. 11, Civil P. C.

It is seriously contended by Mr. Venkatavaradachariar, that I ought not in second appeal allow the amendment as in spite of the objection in the counter-affidavit the appellants have not chosen to amend the petition. But in the view both the lower Courts have taken, viz., that as there was an order in E. A. No. 74 of 1922 this application would not lie, an application for amendment would be of no avail. I therefore give leave to the appellants to make the necessary amendments in regard to the mode in which the assistance of the Court is required within one month from the date of the receipt of this order in the lower Court. In the result the appeal is allowed and the application remitted to the District Munsif's Court of Namakkal for disposal according to law; but in the circumstances I make the appellants pay the respondent the costs of these proceedings throughout. Leave refused.

C.R.K./W.D. *Appeal allowed.*

A. I. R. 1937 Madras 176

VARADACHARIAR AND MOCKETT, JJ.

R. M. P. R. A. P. R. Kasi Chettiar — Appellant.

v.

V. A. L. V. Ramasami Chettiar Firm —Respondent.

Appeal No. 74 of 1931, Decided on 11th August 1936, against decree of Sub-Judge, Devakotta, D/- 16th April 1930.

Mortgage — Paramount title — Issues regarding, where should be tried — Suit on mortgage against legal representative of mortgagor — Legal representative claiming title paramount to mortgaged property and denying right of mortgagor to bind over that property—Issue of paramount title should be tried in suit on mortgage.

A deceased person had mortgaged certain property in favour of the plaintiff. The mortgage not having been paid off and the mortgagor having died, the mortgagee brought a suit against the legal representative who was a nephew of the deceased to enforce his mortgage security. The legal representative contested the suit saying that mortgagor had no right to mortgage the property which was the self-acquired property of the defendant's father. Issues were framed regarding the paramount title of the defendant, but later on Court abandoned them on the ground that they should properly be tried in a separate suit :

Held : that the question whether issues of title paramount should or should not be decided in a mortgage suit was dependent on each particular case and the case under consideration was an eminently fit case where they should be tried and decided before the mortgage security is brought to sale : *7 I C 920; A I R 1918 Pat 356; A I R 1928 Mad 2, 199 & 764* and *A I R 1936 Mad 338, Ref.* [P 178 C 1]

K. Rajah Aiyer and *R. Rangachari* — for Appellant.

K. Patanjali Sastry and *T. K. Sundararaman*—for Respondent.

Varadachariar, J.—This appeal arises out of a suit brought to enforce the charge created by a security bond (Ex. H) dated 1st May 1925, executed by one Laksh-

manan Chettiar, the uncle of the defendant, to secure repayment of moneys due on dealings that had gone on for some years between Lakshmanan Chettiar and the plaintiff. The plaint stated generally in para. 2 that Lakshmanan Chettiar died without issue leaving no other heir except the defendant and that the defendant has succeeded to and has been enjoying the properties of the deceased Lakshmanan Chettiar as his heir. The defendant contended that he and Lakshmanan Chettiar were members of an undivided Hindu family, that, of the two items included in the security bond, item 1 was the self-acquisition of his father and could not therefore be subjected to a charge by Lakshmanan Chettiar, that item 2 was the joint property of the two branches to the extent of one-third and that the security bond could accordingly bind only Lakshmanan Chettiar's one-sixth share in item 2. Of the issues framed in the case, issues 1 to 3 related to the dealings alleged in the plaint and to the truth of the security bond. Issues 4, 5 and 6 raised the questions which we have above set forth from amongst the defences raised by the defendant. Issue 7 runs as follows :

> Whether the defendant is not estopped from questioning the title of the deceased Lakshmanan Chettiar to the properties detailed in the security bond.

We are not concerned in this appeal with the findings of the lower Court on issues 1 to 3. On issues 4, 5 and 6 the lower Court declined to record findings, holding that they must be agitated in a separate suit, because the questions raised by them were really in the nature of a plea of a title paramount. On issue 7 the lower Court held that the defendant in his character as the legal representative of Lakshmanan Chettiar was estopped from questioning Lakshmanan Chettiar's title to the mortgaged properties. The defendant who has appealed to this Court contends that there is no hard and fast rule by which the trial of issues 4, 5 and 6 should be relegated to another suit and it will be in the interests of all parties to have the questions raised by them decided in this suit, so that in one view he may have the opportunity of saving the property by paying off the amount due under the security bond and also that before the sale takes place in execution of the decree, all persons interested may know what exactly is being brought to sale. In the circumstances of the case, there can be little doubt as to what is the most convenient course. It will scarcely be worth the while of a Court auction-purchaser unless he is a speculator to purchase in execution of a decree directing the sale of the properties without knowing whether the mortgagor had any title thereto or not and the price fetched at such a sale will in all probability be so low as to cause loss both to the plaintiff and to the defendant.

On behalf of the respondent, Mr. Patanjali Sastri has however argued that the question of the propriety of trying these issues in this suit cannot be determined merely on grounds of convenience but must be decided in the light of the well established principle, that in a suit to enforce a mortgage any pleas in the nature of a claim by way of title paramount are not to be introduced. Our attention was drawn to several reported decisions wherein the Courts have held either that a plea should be excluded in the particular case or that the plea could be tried in the circumstances of the particular case. In some decisions learned Judges have stated that the rule as to the exclusion of a claim by way of a title paramount is not absolute or is subject to exceptions : *cf.* 13 C L J 85[1]; 45 I C 691.[2] The point has been dealt with in three or four recent judgments of this Court at some length and the leading cases have been reviewed : *see* A I R 1928 Mad 2,[3] A I R 1928 Mad 199;[4] A I R 1928 Mad 764[5] *and also* A I R 1936 Mad 338.[6] It is therefore unnecessary to refer to the cases again. Even if one should prefer not to state that the rule is subject to exceptions, much the same result will follow from holding that the reference to 'title paramount' in this connexion must be taken only to exclude a claim by strangers whose interest in the property can in no circumstances be

1. Nafar Chandra v. Ratnamala Debi, (1911) 13 C L J 85=7 I C 920.
2. Zakir Raza v. Madhusudan Dass, A I R 1918 Pat 356=45 I C 691.
3. Duraiswami Aiyangar v. Varadarajulu Naidu, A I R 1928 Mad 2=106 I C 838=53 M L J 647=39 M L T 459.
4. Muthia Servai v. Somasundaram Chettiar, A I R 1928 Mad 199=107 I C 814.
5. Ramasami Pillai v. Marimuthu Goundan, A I R 1928 Mad 764=113 I C 865.
6. Veeraraghavalu v. Suryanarayana, A I R 1936 Mad 338=163 I C 303.

affected by the act of the mortgagor. In view of the personal laws of the parties, such a clear cut distinction does not often exist in litigations in this country.

It often happens that in one set of circumstances a mortgagor would have had power to impose a charge upon certain properties even to the extent of binding of the interests of other persons therein but in another set of circumstances he might not have had such power; in such cases the defendant will stand to gain if the Court upholds his plea that the circumstances of the case were of the latter kind, whereas he would be bound by the mortgage if the circumstances were of the former kind. A claim of self-acquisition by a member of a joint Hindu family can by no means be put on the same footing as a claim by a stranger to the mortgage because even if that plea is negatived, the claimant will still have an interest in the property which may be bound by the decree in the suit. We are of opinion for the reasons above given that this is eminently a fit case for the questions raised by issues 4, 5 and 6 being tried before the security properties are brought to sale. We accordingly remand the case to the lower Court for the trial of issues 4, 5 and 6. Its finding on issue 7 must be understood as not to preclude the trial of these issues.

Mr. Patanjali Sastri suggests that if the question as to whether the security properties are joint family properties or not should be permitted to be tried in this action it is only fair that his client should have the opportunity of alleging and proving that the circumstances under which and the purpose for which the security bond was executed were such as to bind the whole interest of the joint family in those properties even if they were joint family properties. The plaintiff did not anticipate this line of defence and even after the written statement was filed no reply statement was filed raising this question; but as we are remanding the case for trial of issues 4, 5 and 6 the plaintiff may be given an opportunity to file any reply statement on the lines above suggested and the defendant will also be at liberty to file his answers thereto and, if necessary, additional issues may be framed with reference to the contentions thus raised. The lower Court will embody in its revised decree appropriate declarations in pursuance of its findings on issues 4, 5 and 6 and the new issues if any. The costs of this appeal will abide the result of the trial of issues 4, 5 and 6 and the new issues, and will be provided for in the revised decree of the lower Court. The memorandum of objections relates to the lower Court's direction as to costs, but on the footing on which the trial in the lower Court proceeded that order was appropriate. The memorandum of objections must therefore be dismissed with costs. The court-fee paid on the memorandum of appeal will be refunded.

C.R.K./B.D. *Case remanded.*

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* A. I. R. 1937 Madras 178

MOCKETT AND LAKSHMANA RAO, JJ.

Nimmagadda Mahalakshmamma and *another*—Appellants.

v.

Nimmagadda Ramayya—Respondent.

Appeal No. 524 of 1934, Decided on 27th October 1936, against order of Sub-Judge, Bapatla, D/- 17th July 1934.

*** Civil P. C. (1908), Ss. 144 and 151—Application claiming interest on refund of Court-fee paid in trial Court in pauper suit—Money paid to Government in pauper suit cannot be dealt with by way of restitution under S. 144—S. 151 is applicable, but power is discretionary.**

Restitution seems to imply money paid by one party to the other or to the credit of the other and a restoration of that money with interest to the person entitled to it by the person to whom or to whose credit it was originally wrongly paid under orders of Court. But money paid to Government in a pauper suit by way of court-fee cannot be held to be money liable to be dealt with by way of restitution under S. 144. An application by the petitioner claiming interest on the refund of the court-fee paid by him in the trial Court falls under S. 151, but it is discretionary to the Court to award it: *Rodger* v. *The Comptoir D'Escompte de Paris*, *(1871) 3 P C 465, Rel. on.* [P 179 C 1]

V. Subramaniam—for Appellants.

Y. Suryanarayana—for Respondent.

Mockett, J.—In this pauper suit the petitioners defendants were by the original decree ordered to pay Rs. 682-7-0 court-fee to Government. On appeal that order was reversed and the plaintiff was ordered to pay the court-fee. The petitioners applied to the trial Court under Ss. 144 and 151, Civil P. C., praying that interest on the above amount should be paid to

them by the respondent. We do not consider that money paid to Government in a pauper suit by way of court-fee can be held to be money liable to be dealt with by way of restitution under S. 144, Civil P. C. Restitution seems to imply money paid by one party to the other or to the credit of the other and a restoration of that money with interest to the person entitled to it by the person to whom or to whose credit it was originally wrongly paid under orders of Court. In this case the Government are the recipients of the money. But while holding the above we consider that S. 151 may well apply to such a case as this. The principle underlying the whole matter has been laid down in (1871) 3 P C 465[1] which case has been the subject of numerous decisions in India. But S. 151 is discretionary. We have perused the judgment of the appellate Court and we observe that the learned Judges agreed with the finding of fact imputing the putting up of a false case with regard to an adoption by the petitioners. They also made no order as to the costs of the memorandum of objections which related to the question of court-fee. For the above reasons and generally on a consideration of the facts we do not consider this is a case for awarding interest under S. 151, Civil P. C. The appeal is therefore dismissed with costs.

C.R.K./V.B.B. *Appeal dismissed.*

1. Rodger v. The Comptoir D'Escompte de Paris, (1871) 3 P C 465=40 L J P C 1=24 L T 111 =19 W R 449=7 Moo P C (N S) 314.

A. I. R. 1937 Madras 179

MENON, J.

Emperor

v.

Syed Kasim.

Criminal Appeals Nos. 234 and 235 of 1936, Decided on 12th October 1936, against acquittal by Second Presidency Magistrate, Madras, D/- 3rd January 1936.

Madras City Police Act (3 of 1888), Ss. 42, 43—Gambling—When search warrant may be issued — Omission of words "reason to believe" do not vitiate warrant when commissioner acts on information laid before him—Presumption under S. 43 does arise.

All that S. 42, Madras City Police Act, lays down is that if the Commissioner has reason to believe that any enclosed place or building is used as a common gaming house he may issue his warrant etc., which means that before issuing a warrant for search under that section the Commissioner must have reason to believe that a common gaming house is kept on the premises.

[P 180 C 1]

Where it was clear that the Commissioner acted on information laid before him, the omission of the words "has reason to believe" in warrant did not vitiate the warrant or render it in any way invalid and presumption under S. 43 did arise : *A I R 1926 Cal 966*; *A I R 1930 Cal 365* and *A I R 1935 Mad 648, Disting.*; *A I R 1935 Mad 98* and *A I R 1936 Mad 65, Rel. on.*

[P 180 C 2; P 181 C 1]

Crown Prosecutor—for the Crown.

M. A. T. Coelho—for Accused—Respondent.

Judgment.—These are appeals by the Crown prosecutor against the order of the Second Presidency Magistrate, Madras, acquitting the accused of offences punishable under Ss. 45 and 46, Madras City Police Act (3 of 1888). On information laid before him that a common gaming-house was being kept on the premises No. 40, Cemetery Road, Royapuram, the Assistant Commissioner of Police, who is a Justice of Peace, for the town of Madras issued a warrant, Ex. A, on 24th October 1935 to the Sub-Inspector of Police, Royapuram H-2 Station, authorising him to enter the said premises and to take into custody persons found therein and to seize all instruments of gaming etc., P. W. 1, the Sub-Inspector of Royapuram, Police Station, referred to in Ex. A accordingly went to the house in question and seized several articles. The accused and others who were found there were arrested and charges under Ss. 45 and 46, Madras City Police Act were laid against them. The tenant of the house was charged under S. 45 of the Act in the one case, and the others were charged under S. 46. The learned Presidency Magistrate, holding that as the warrant of arrest, Ex. A, was not a valid warrant, the presumption mentioned in S. 43 of the Act could not be raised, and that as there was no other evidence that the house was used as a common gaming house, acquitted the accused; hence the appeal by the Crown. The only question that is argued before me is that relating to the validity of Ex. A and to the presumption that could be raised under S. 43. Ex. A is on a printed form, the heading of which is "warrant for search of gaming house and arrest of persons found therein." And it proceeds :

Whereas information has this day been laid before the undersigned Assistant Commissioner of Police

and Justice of the Peace for the town of Madras, that a common gaming house is kept on the premises . . . . . etc.

and it is signed by G. Rangaswami, as Assistant Commissioner of Police and Justice of the Peace. There is no dispute about the authority of the person who signed it to issue a warrant under S. 42 of the Act. What is argued is (1) that it does not purport to be one issued under S. 42 of the Act, and (2) that it does not state that the Assistant Commissioner who issued it had reason to believe that a common gaming house was kept on the premises in question, and that therefore it is not a valid warrant on the strength of which the presumption mentioned in S. 43 could be raised. It is true that it is not specifically stated in the warrant that it was issued under S. 42 of the Act. But there can be no doubt that it was issued only under S. 42, for the heading of the warrant, as already observed, is that it was for the search of gaming house and arrest of persons found therein, and the form used clearly shows that it is one meant for the purpose referred to in S. 42. There is therefore no force in this contention. The next objection, as already observed, is that it does not state, that the Assistant Commissioner "has reason to believe" that a common gaming house was kept on the premises in question. There is nothing in the Act which lays down that it should be stated in the warrant that the Commissioner who issued it has reason to believe "that a common gaming house is kept on the premises." All that S. 42 lays down is :

If the Commissioner has reason to believe that any enclosed place of building is used as a common gaming house he may issue his warrant, etc.

This only means that before issuing a warrant for search, the Commissioner must have reason to believe that a common gaming house is kept on the premises. In this case, it is specifically stated in the warrant that information had that day been laid before the Commissioner that a common gaming house was kept on the premises. It is clear therefore that the Commissioner acted on the information so laid before him. And P. W. 1 says :

I had information in the beginning of October 1935 that accused 1 was conducting a common gaming house at the said house. I verified the information personally as well as through informers. I obtained Ex. A, search warrant from the Assistant Commissioner of Police, Northern Range.

And there is the evidence of P. W. 4, a cashier in the employ of the owner of the house, that accused 1 has been occupying that house under an agreement from 17th October 1935. Ex. D is the agreement referred to. It is clear therefore that it was on the information laid by P. W. 1 to the Assistant Commissioner that the latter issued the warrant. That the omission of the words "has reason to believe" in a warrant of this kind does not at all vitiate the warrant or render it in any way invalid has been laid down by this Court in two decisions, namely, 58 Mad 867[1] and 69 M L J 835.[2] The former was a case under S. 42, Madras City Police Act, and Mr. Cornish, J. observed :

Section 42, Madras Police Act, does not require a sworn information as a condition to the issue of a warrant. It is sufficient, therefore, in my opinion, that the warrant should state, as in the present instance, that the Deputy Commissioner has issued the warrant on information laid before him. It is not necessary for him to state that he had reason to believe the information.

And in the latter case, which arose under S. 5, Madras Gaming Act (3 of 1930), King, J. observed as follows :

It is argued that in this warrant the Stationary Sub-Magistrate who issued it does not say in the words of S. 5 that he had "reason to believe" that the place in question was used as a common gaming house. It seems to me, however, that the mere mention of these particular words in the warrant is by no means conclusive on this matter, and the real question is whether as a matter of fact, the Magistrate had or had not reason to believe.

The learned advocate for the accused, however, relies on the decisions in 68 M L J 421[3] and A I R 1930 Cal 365.[4] In the former case, S. 5, Madras Gaming Act (3 of 1930), had to be considered. In that particular case, the warrant did not purport to have been issued under that section, but was issued under S. 96, Criminal P. C. There was also the additional circumstance that there was no mention at all in the warrant that the Magistrate who issued it was satisfied that the house to be searched was a common gaming house, and that the finding was that it

1. *In re* Subbier, A I R 1935 Mad 98=1935 Cr C 151=154 I C 741=36 Cr L J 566=58 Mad 867.
2. *In re* Subramania Iyer, A I R 1936 Mad 65=1936 Cr C 54=161 I C 32=37 Cr L J 380=69 M L J 835.
3. Emperor v. Subramania Sastri, A I R 1935 Mad 648=1935 Cr C 927=155 I C 496=36 Cr L J 799=68 M L J 421.
4. Gangadas Banerjee v. Emperor, A I R 1930 Cal 365=1930 Cr C 541=126 I C 134=31 Cr L J 999=51 C L J 396.

was not used as a common gaming house but was used occasionally by people for playing cards, perhaps for money. In A I R 1930 Cal 365,[4] the search warrant issued under S. 5, Bengal Public Gaming Act (3 of 1867), did not state that the premises were used as a common gambling-house but only that the use of the premises was for unauthorized race gambling. And the learned Judge pointed out the difference between the two, and held that the warrant was not such as a presumption under S. 6 of the Act could be therefrom. The case in 53 Cal 718,[5] has also no bearing, for there the warrant was held to be defective, because the Commissioner had not complied with all the formalities required by S. 46, Calcutta Police Act, and because the statement in the warrant was that there was "cause to suspect" and not that the Magistrate had "reason to believe."

The decisions relied on by the accused therefore do not help him at all. As the Assistant Commissioner has sufficiently complied with the requirements of S. 42, when he issued the warrant, Ex. A, I must hold that it is valid. It follows that the presumption mentioned in S. 43 could be raised in this case. As the cases have not been fully tried by the learned Presidency Magistrate but were disposed of on the ground that Ex. A was invalid, and that no presumption under S. 43 could be raised, the cases have to go back for further enquiry. The appeals are therefore allowed, the orders of acquittal set aside, and the cases sent back to the lower Court for trial and disposal.

C.R.K./B.D. *Case remanded.*

5. Walvekar v. Emperor, A I R 1926 Cal 966=96 I C 264=27 Cr L J 920=53 Cal 718.

A. I. R. 1937 Madras 181

MOCKETT AND LAKSHMANA RAO, JJ.

In re *Pujari Hanumanthappa*—Petitioner.

Criminal Revn. No. 318 and Petn. No. 294 of 1936, Decided on 6th October 1936, from order of Court of Joint Magistrate, Hospet, D/- 23rd March 1936.

Criminal P. C. (1898), S. 428 — Object—Offence not established, evidence in support of it not being proved—Prosecution cannot try case all over again.

The object of S. 428, Criminal P. C., is not for the purpose of enabling the prosecution to produce evidence which could easily have been produced at the first trial. It is not to enable the prosecution having failed once to have an opportunity of trying the case all over again. Where, therefore, the offence under S. 58, Abkari Act of Madras, was not proved by reason of failure to prove essential evidence in support of it, the Magistrate could not make order for fresh evidence to try case all over again : *36 Mad 457* and *A I R 1930 Mad 189, Rel. on.* [P 181 C 2; P 182 C 1]

K. S. Jayarama Iyer—for Petitioner.

A. Narasimha Iyer for *Public Prosecutor*—for the Crown.

Mockett, J.—The accused was charged before the Stationary Sub-Magistrate, Hospet, with an offence under Ss. 55 (a) and 58, Madras Abkari Act. He was convicted under S. 58. He appealed to the Joint Magistrate, Hospet and on that appeal, the following took place. The Joint Magistrate found that it had not been proved that the arrack was illicit; that is shortly the effect of his finding. Certain evidence was given with regard to the arrack, but he said, and we think quite rightly that that evidence did not establish that the arrack was illicit. Now, proof that the arrack is illicit is the essence of the offence under S. 58 of the Act. The Joint Magistrate, having arrived at that finding, said:

> On the whole, I am not of opinion that on the evidence there are sufficient grounds for acquitting the appellant.

We are unable to understand that statement, because if the offence had not been proved, by reason of the failure of proof of its most essential factor, it is obvious that the appellant was entitled to an acquittal. However, having said that, the learned Joint Magistrate proceeded to express the opinion that it was desirable that there should be fresh enquiry into the case. He therefore set aside the finding and sentence of the lower Court, and remanded the case under S. 423 (b) (1), Criminal P. C., for a fresh enquiry. He presumably purported to act under S. 428. It has been laid down by this High Court in several cases—of which the following are examples: 36 Mad 457[1] and *Rathnavelu* v. *Emperor*[2]—that the object of S. 428 is not for the purpose of enabling the prosecution to produce evidence which could easily have been produced at the first

1. Jeremiah v. F. S. Vas, (1913) 36 Mad 457=12 I C 961=12 Cr L J 585=22 M L J 73=10 M L T 506.
2. A I R 1930 Mad 189=1930 Cr C 189=122 I C 497=31 Cr L J 422=1930 M W N (Cr) 47=1930 M W N 191.

trial. It is not to enable the prosecution, having failed once, to have an opportunity of trying the case all over again. That is substantially what has been done here. Moreover, the Public Prosecutor is not even able to assure us that the necessary additional evidence is in existence. Under these circumstances, the order for further enquiry is set aside and the petitioner is acquitted. His bail bond, if any, will be cancelled.

C.R.K./P.R. *Order set aside.*

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* A. I. R. 1937 Madras 182

VARADACHARIAR AND MOCKETT, JJ.

Anumolu Narayana Rao and *another* —Appellants.

v.

Ghattaraju Venkatapayya and *others*— Respondents.

Appeal No. 89 and Misc. Petn. No. 900 of 1931, Decided on 31st August 1936, against decree of Sub-Judge (Additional), Guntur, in O. S. 61 of 1928.

*** (a) Negotiable Instruments Act (1881), S. 118—Applicability — Suit against Hindu undivided son after father's death on pro-note by father—Son's liability arises only under pious obligation and on proof of existence of debt—S. 118 does not apply to such suit but a presumption under S. 114, Evidence Act is permissible—Burden of proof of existence of debt is on creditor.**

Section 118, Negotiable Instruments Act, is essentially a produce of Western law and the special rules of evidence laid down in S. 118 of the Act have been intended to apply only between the parties to instrument or those claiming under them. In other classes of cases, *e. g.*, in a suit against undivided sons of a father on the pro-note after his death, S. 118 is not applicable as the essential feature of liability under a negotiable instrument is absent in such suit, but a presumption under S. 114, Evidence Act, is permissible. [P 184 C 1, 2; P 189 C 2]

Where a suit is instituted against the undivided sons of Hindu promisor after his death on a pro-note executed by him, the suit cannot be regarded as one against the heirs or representatives of the promisor because it only seeks to enforce the Hindu law theory of pious obligation in respect of the property which the sons have taken by survivorship. The pious obligation can arise only on the assumption of the existence of debt due by father and in that case the onus of proof of existence of debt is prima facie on the creditor: *A I R 1934 Mad 350* and *22 Mad 49 (F B)*, *Rel. on.* [P 184 C 2]

(b) Negotiable Instrument—Liability under —Person is liable only if liability appears on face of instrument—Others can be made liable only on consideration and not on the note.

None can be held liable on a negotiable instrument unless his liability appears on the instrument itself, in a manner recognized by law. An heir or legal representative will of course be liable if his ancestor or predecessor was liable on the instrument. Any other person can be made liable only upon the consideration and not on the note. If a decree had been obtained against the father, his undivided sons may perhaps become liable to discharge the decree debt apart from any proof of the debt independently of the decree; and it might perhaps make no difference in such a case that the decree against the father was based on the presumption laid down in S. 118, Negotiable Instruments Act. Likewise, a decree thus obtained against the father may, by the operation of S. 53, Civil P. C., 1908, become executable against the interests of the sons in the family property leaving it open to them to escape liability only on proof of illegality or immorality without entitling them to call upon the creditor to establish the existence of a debt apart from the decree. No such special considerations apply to a case where no decree has been obtained against the father and the suit is brought after his death against his undivided sons: *23 Mad 597*; *A I R 1918 P C 146*: *A I R 1917 Mad 108*; *27 Mad 243 (F B)* and *A I R 1914 P C 132*, *Rel. on*; *A I R 1917 Mad 653*; *A I R 1917 Mad 61* and *A I R 1919 Mad 370*, *Dissent.* [P 185 C 1]

(c) Promissory note—Burden of proof — Evidence—Suit on father's pro-note—Burden of proof and evidence is not the same in respect of a claim against sons, as that against father.

In a suit on the father's pro-note, the burden of proof is not the same in respect of the claim against his sons as that applicable to the claim against the father. [P 185 C 2]

In a suit against executant and co-parceners, the cause of action as against the two sets of defendants cannot be said to be the same in the sense that evidence sufficient to establish the liability of the executant would necessarily and always suffice to establish the liability of the other set of defendants. The onus of proof resting on the plaintiff will not be same as against two sets of defendants in such suit: *A I R 1916 Mad 424*, *Disting.*; *23 Mad 597*, *Expl.* and *Rel. on*; *A I R 1934 P C 4*, *Ref.*; *23 Mad 292 (FB)*, *Expl.* [P 185 C 2]

(d) Promissory note—Original cause of action—Loan and note when contemporaneous, no cause of action arises independent of the note—Rule holds good only as between parties to note.

When the loan and the note are contemporaneous, there can be no cause of action independent of the note, because that is the only contract between the parties. But this proposition holds good only as between parties to the note: *A I R 1935 Mad 206* and *A I R 1936 Mad 179 (F B)*, *Rel. on.* [P 186 C 2]

(e) Negotiable Instruments Act (1881), S. 118 —Onus—Onus under S. 118 as to want of consideration need not be discharged by direct evidence.

Onus under S. 118 of the Act need not always be discharged by direct evidence by person sued on pro-note as to want of receipt of consideration:

A I R 1933 Lah 1029; *A I R 1923 All 214* and *A I R 1930 Mad 251*, *Rel. on.* [P 187 C 1]

(f) Evidence — Onus — Evidence on both sides adduced—Question of onus is material only under exceptional circumstances—Court can draw adverse inference against person who deliberately abstains from adducing better evidence, though he had opportunity to do so.

Where evidence has been adduced on both sides, the question of onus is a material or deciding factor only in exceptional circumstances. The Court can, not only base its conclusion on the effect of evidence taken as a whole, but it may also draw an adverse inference against a party who being in a position to adduce better evidence deliberately abstains from doing so: *A I R 1929 P C 8*; *A I R 1917 P C 6* and *A I R 1930 Mad 251*, *Rel. on.* [P 187 C 1]

B. Somayya and *C. Sambasiva Rao*—for Appellants.

Ch. Raghava Rao—for Respondents.

Varadachariar, J.—This appeal arises out of a suit for money instituted by the endorsee of a promissory note (Ex. A) dated 8th August 1925 for Rs. 5,000 executed in favour of defendant 4 by one A. Venkatarayudu, deceased, (hereinafter referred to as A. V.). The endorsement purports to have been made on 2nd July 1926, in consideration of the plaintiff undertaking to pay off the debt due by defendant 4 to one G. Venkatarayudu (hereinafter referred as G. V.) under Ex. B, a pro-note dated 2nd August 1924 for Rs. 4,000. It is common ground that after the suit note was endorsed to the plaintiff, a notice was sent through D. W. 4, a vakil of Guntur, demanding payment of the money, and that A. V. sent a reply stating that the pro-note was devoid of consideration. The reply notice is not now forthcoming and it is therefore not possible to say nor is D. W. 4 able to remember what more was stated in it as to the circumstances under which and the purpose for which the note was executed. Notwithstanding this reply which repudiated liability this suit was instituted only on the last day of the period of limitation and more than a year and a half after A. V.'s death.

The appellants, who were defendants 2 and 3 in the lower Court, are the two undivided minor sons of A. V.; defendant 1 is his undivided younger brother. In the written statements, the defendants set out in some detail the circumstances which according to their information and belief led to the execution of the suit note. Briefly stated, the story was to the effect that in certain domestic disputes between A. V. and G. V. who were brothers-in-law, defendant 4 a common friend and relation was requested to intercede with a view to persuade G. V. to take back his wife (the sister of A. V.), whom he had sent away or threatened to send away to A. V.'s house and that by way of assuring A. V. that both parties will act according to his advice in the matter, A. V. executed the suit note in favour of defendant 4 and a brother of G. V. (on G. V.'s part) executed a similar pro-note for Rs. 5,000 in favour of defendant 4. The written statement filed by defendant 1 was fuller in particulars than that filed on behalf of defendants 2 and 3 by their mother. In answer to the plaintiff's allegation that he was a holder in due course, it was stated that he had paid no consideration for the transfer and that he was not the real transferee but only acting on behalf of G. V. who on account of quarrels with the defendants' family was trying to harass them by taking a transfer of this note which he knew was not supported by consideration. It is not denied that before the institution of this suit, the relations between G. V. and the defendants had become very strained and had led to civil and criminal proceedings. It is also admitted by some of the witnesses examined on the plaintiff's side that G. V. had put away his wife (the sister of A. V.) and married another wife, but they would have it that this happened only after A. V.'s death and in consequence of the disputes between G. V. and defendant 1 and had nothing to do with the execution of Ex. A by A. V.

Among the issues framed on 13th February 1929, issue 1 raised the question whether the suit note was executed by A. V. and was supported by consideration. Defendant 1 had filed his written statement on 2nd February 1929 and on 8th April 1929, the plaintiff's pleader endorsed on the plaint that the claim against defendant 1 was given up. In explanation of this step it was stated that defendant 1 was in jail in consequence of a conviction in a Sessions case and that to avoid delay he was given up. The step that followed makes no suspicions as to the true reason for adopting this course. The later conduct of the litigation shows that the plaintiff was not prepared to examine either G. V. or defendant 4 as a witness in the case. The issue as originally framed cast on the plaintiff the onus of proving execu-

tion as well as consideration; and, that would have necessitated plaintiff leading evidence in the first instance. On 16th April 1929 a petition was filed on the plaintiff's side laying stress on the fact that defendant 1 had been given up and praying that as the written statements of defendants 2 and 3 practically admitted the genuineness of the note and raised in substance a plea of absence of consideration, issue 1 should be recast so as to throw the onus of proof on the defendants. The Court acceded to this suggestion and, overruling the objection of the appellants to such a course, recast the issue in its present form.

At the trial, two out of the three attestors to the suit note were examined as D. Ws. 1 and 2 and they supported the defendants' version as to the origin and purpose of the note. The remaining attestor, a brother of G. V. was examined as P. W. 4, and he deposed that the suit note was executed in the kottu or business place of defendant 4 who paid the consideration in cash to A. V. Evidence to the same effect was given by P. W. 1 a brother of defendant 4 (the promisee). The plaintiff as P. W. 3 spoke to the transfer in his favour being supported by consideration and stated that he had executed a paddu (or memo) to G. V. undertaking to discharge defendant 4's debt to G. V. under Ex. B. The learned Subordinate Judge expressed himself unable to accept the defendant's story as to the object of the execution of the suit pronote and held that it was supported by consideration. He also held that the plaintiff was a holder in due course and accordingly gave him a decree against the family properties in the hands of defendants 2 and 3. Hence this appeal by defendants 2 and 3. Plaintiff was also given a decree against defendant 4 (as endorser) who appears to have submitted to the decree.

It will be convenient to deal at the outset with the question of the frame of the issue and the onus of proof, which was argued before us at some length. S. 118, Cl. (a), Negotiable Instruments Act, provides that every negotiable instrument shall be presumed to have been made and endorsed for consideration; and according to Cl. (g), the holder of a negotiable instrument shall be presumed to be a holder in due course. Though this section is not, like Ss. 119 to 122 limited in terms to a "suit upon the instrument," it seems only reasonable to hold that the "special rules of evidence" laid down in S. 118 must have been intended to apply only as between the parties to the instrument or those claiming under them. In other cases, the presumption can only be in the terms enacted in S. 114, Evidence Act: (*vide* Ill. c) which by the use of the expression 'may presume' leaves it to the Court to apply the presumption or not according to circumstances. When a suit like the present is instituted against the undivided sons of a Hindu promisor governed by the Mitakshara law, the suit cannot be regarded as one against the heirs or representatives of the promisor, because it only seeks to enforce the Hindu law theory of pious obligation, in respect of property which the sons have taken by survivorship. The pious obligation can arise only on the assumption of the existence of a debt due by the father; and this way of stating the position would prima facie throw on the creditor the onus of proving the existence of a debt.

The inappropriateness of applying even as against the undivided sons of the executant the provisions of the Negotiable Instruments Act, can be shown by one or two illustrations. The sons can always avoid liability by proving the illegality or immorality of the debt; but no such defence is contemplated or permitted by the Negotiable Instruments Act. Again, take a suit by the endorsee of a promissory note executed by the father; it being presumed or proved that he is a holder in due course, the endorsee may be entitled to a decree against the executant (father) even after proof that as between the original parties to the note, there was no consideration at all. But in such a case when the absence of consideration has been proved, it will be preposterous to postulate the existence of a 'debt' and impose on the sons a pious obligation in respect thereof. If, as observed in 44 All 393[1] at p. 396, one has to reconcile oneself to 'the difficulty of applying the legislative provisions of Western law to the ancient customs and traditions of the law of the joint Hindu family,' one need not add to this difficulty by an unreasonable extension of the provisions of the Negotiable Instruments Act. With reference to the possibility of regarding the 'family' itself as the 'maker'

1. Krishnanand Nath Khare v. Raja Ram Singh, A I R 1922 All 116=66 I C 150=44 All 393 =20 A L J 233.

of a promissory note executed by the father or manager, *see* observations of Page, J. in 54 Cal 380.[2]

It must now be taken as established by the decision of the Judicial Committee in 46 Cal 663,[3] that none can be held liable on a negotiable instrument unless his liability appears on the instrument itself, in a manner recognised by law. An heir or legal representative will of course be liable if his ancestor or predecessor was liable on the instrument. Any other person can be made liable only upon the consideration and not on the note. If a decree had been obtained against the father, his undivided sons may perhaps become liable to discharge the decree debt, 27 Mad 243[4] apart from any proof of the debt independently of the decree; and it might perhaps make no difference in such a case that the decree against the father was based on the presumption laid down in S. 118, Negotiable Instruments Act. Likewise, a decree thus obtained against the father may by the operation of S. 53, Civil P. C. of 1908 become executable against the interests of the sons in the family property leaving it open to them to escape liability only on proof of illegality or immorality without entitling them to call upon the creditor to establish the existence of a 'debt' apart from the decree. No such special considerations apply to a case where, as in the present, no decree has been obtained against the father and the suit is brought after his death against his undivided sons. In this class of cases, it seems to me right to hold that the onus of proving the existence of a debt must prima facie be laid upon the creditor who can of course call in aid the presumption permissible under the general law of evidence, namely S. 114, Evidence Act.

On behalf of the plaintiff-respondent, Mr. Raghava Row relied on the decision in 1915 M W N 217,[5] as supporting his contention that in a suit on the father's note, the burden of proof is not different in respect of the claim against the sons from that applicable to the claim against the father. On the facts it may be pointed out that in that case the suit had been instituted during the father's lifetime. This is what made it possible for the learned Judges to say that the sons had been added only to give them an opportunity of proving, if they can, that the debt was incurred for illegal or immoral purposes. Similar language cannot be appropriately used where the suit is instituted after the father's death and the sons are the only defendants. If the learned Judges intended to lay down the rule in broad terms, so as even to cover a case like the present, I am with all respect to them, unable to concur in that view. Their conclusion is mainly based on the decision in 23 Mad 597,[6] but as we read the judgments of Shepherd and Subramania Ayyar, JJ. in the last mentioned case, their reasoning far from leading to such a conclusion seems to us to suggest the contrary result.

The actual decision in 23 Mad 597[6] related to the propriety of joining in the same action a claim for a personal decree against the executant of a promissory note and a claim to recover the debt from the shares of his coparceners in the joint property of the family. While holding such joinder to be permissible, both Shepherd and Subramania Ayyar, JJ. clearly recognize that the liability of the executant is on the note while the liability of the other coparceners is on the debt and is an obligation arising under the Hindu law (*see also* 67 M L J 393[7] and 22 Mad 49[8] at pp. 62 and 63). I am unable to agree in such cases the cause of action as against the two sets of defendants can be said to be the same in the sense that evidence sufficient to establish the liability of the executant would necessarily and always suffice to establish the liability of the other set of defendants. In the Full Bench judgment in 23 Mad 292,[9] there is no doubt language employed which may seem to support the contention that the cause of action is the same as against both father and son. But the question then under discussion was whether a separate

2. Ramagopal Ghose v. Dhirendra Nath Sen, A I R 1927 Cal 376=101 I C 573=54 Cal 380=31 C W N 397.
3. Sadsuk Janki Das v. Sri Krishen Pershad, A I R 1918 P C 146=50 I C 216=46 I A 33 =46 Cal 663 (P C).
4. Periasami Mudaliar v. Seetharama Chettiar, (1904) 27 Mad 243=14 M L J 84 (F B).
5. Nachiappa Chetty v. Dakshinamurthy Servai, A I R 1916 Mad 424=28 I C 345=1915 M W N 217=17 M L T 232.
6. Krishna Iyer v. Krishnaswami Iyer, (1900) 23 Mad 597.
7. Seshayya v. Sanjeeva Raidu, A I R 1934 Mad 350=150 I C 885=67 M L J 393.
8. Ramaswami Nadan v. Ulaganatha Goundan, (1899) 22 Mad 49=8 M L J 312 (F B).
9. Mailesam Naidu v. Jugala Panda, (1900) 23 Mad 292 (F B).

cause of action accrued as against the sons after the father's death or the cause of action against both accrued once for all during the father's lifetime.

Mr. Raghava Rao contended that so far as the creditor was concerned, the same evidence would suffice to establish the liability both of the father and of the sons and the only difference between them was that by way of defence, the sons can plead the illegal or immoral character of the debt. He also laid emphasis on the circumstances that the extinction of the father's liability or its unenforceability on the ground of limitation will equally avail the sons as a defence. But this contention ignores the fact that for purposes of joinder as also the continued subsistence of the liability, the decision in 23 Mad 597[6] draws no distinction between the claim against the sons and the claim against the other coparceners of the executant; nevertheless there can be no doubt that in respect of the claim against the co-parceners who are not sons, there lies on the plaintiff-creditor himself, the further burden of proving that the suit debt was incurred for family purposes: *cf.* A I R 1934 P C 4.[10] In this view, the decision in 23 Mad 597[6] even if it can be read as laying down that the cause of action as against the non-executants is the same as that against the executant of the note, will not support the conclusion that as against all the defendants joined in a suit of the kind there contemplated the onus of proof resting on the plaintiff will be the same. Reliance was placed by Mr. Raghava Rao on 3 M L W 463,[11] 32 M L J 354[12] and 37 M L J 369[13] in support of the contention that the liability even of non-executants may be described as one on the note. The observations in these cases are opposed not only to the judgments in 23 Mad 597,[6] 1912 M W N 1011[14] and 40 Mad 727,[15] but to the principle of the decision of the Judicial Committee in 46 Cal 663.[3] The assumption in 32 M L J 354[12] and 37 M L J 369[13] that the decision of the Privy Council in 39 Bom 261[16] supports the view that even non-executants can be held liable on the bill or note, seems to us with all respect unwarranted, because, as pointed in 40 Mad 727,[15] their Lordships expressly say that the suit should not be regarded as one on the bill, but must be treated as "an action of accounting against both Rashid and Karin." Reference has been made in some of the judgments relied on by Mr. Raghava Rao to the principle that when the loan and the note are contemporaneous, there can be no cause of action independent of the note, because that is the only contract. Judicial opinion is by no means unanimous as to this proposition: *see* 67 M L J 912[17] and 59 Mad 268,[18] but in any event, that proposition can hold good only as between the parties to the note and has, therefore, no bearing on the question now under consideration.

In 58 Mad 735[19] there is no doubt an observation that the difference between the claim on the note and the claim on the debt is a verbal distinction and not one of substance. The observation may perhaps be justified where as in 39 Mad 915[20] the distinction was insisted on merely with reference to the interpretation of the frame of the suit, though even in this respect the Privy Council in 46 Cal 663[3] insisted on the distinction. It seems to us too sweeping to say that for all purposes the distinction is unsubstantial. To take one instance, the difference will be very material when the Court is called upon to apply the provisions of Ss. 120 and 121, Negotiable Instruments Act.

Some of the cases above referred to also bear on the question whether the plaintiff, as endorsee of the note, is limited to the remedy available on the note or can

10. Abdul Majid Khan v. Saraswati Bai, A I R 1934 P C 4=147 I C 1=61 I A 90=30 N L R 60 (P C).
11. Ayyaswami Pillai v. Guruswami Naicken, A I R 1917 Mad 653=33 I C 691=3 M L W 463.
12. Nataraja Naicken v. Ayyaswami Pillai, A I R 1917 Mad 61=38 I C 339=32 M L J 354.
13. Thanakammal v. Khunhamma, A I R 1919 Mad 370=53 I C 878=37 M L J 369.
14. Seetharama Chetty v. Seshiah Chetty, (1912) M W N 1011=17 I C 417.
15. Shanmuganatha Chettiar v. Srinivasa Iyer, A I R 1917 Mad 108=35 I C 219=40 Mad 727.
16. Karmali Abdulla v. Karimji Jeevanji, A I R 1914 P C 132=26 I C 915=42 I A 48=39 Bom 261 (P C).
17. Chinnayya Naidu v. Srinivasa Naidu, A I R 1935 Mad 206=156 I C 250=67 M L J 912.
18. Ramaswami Pillai v. Murugiah Padayachi, A I R 1936 Mad 179=161 I C 273=59 Mad 268=70 M L J 267 (F B).
19. Satyanarayana v. Mallayya, A I R 1935 Mad 447=155 I C 581=58 Mad 735=68 M L J 540 (F B).
20. Padma Krishna Chettiar v. Nagamani Ammal, A I R 1916 Mad 677=30 I C 574=39 Mad 915=18 M L T 216.

also claim to recover the debt from the property of non-executants, on the ground of their liability under the Hindu law. Judicial opinion is divided on the point ; but, as we have come to the conclusion that this appeal must succeed on the merits, even on the assumption that the plaintiff is entitled to recover the debt from the undivided sons of the executant and even on the footing that he is entitled to invoke the aid of S. 118, Negotiable Instruments Act, we do not pause to consider the necessity or desirability of obtaining the opinion of a Full Bench on the questions above discussed. It has to be borne in mind that when evidence has been adduced on both sides, the question of onus is a material or deciding factor only in exceptional circumstances (*cf.* 56 M L J 287[21]) and that even the onus under S. 118, Negotiable Instruments Act, need not always be discharged by direct evidence adduced by the defendant: 79 I C 464,[22] 124 I C 717[23] and A I R 1933 Lah 1029.[24] Not merely can the Court base its conclusion on the effect of the evidence taken as a whole but it may also draw adverse inferences against a party who being in a position to adduce better evidence deliberately abstains from doing so: 40 Mad 402,[25] 42 Mad 629[26] and 30 M L W 966[27] at p. 971.

In dealing with the evidence, we are obliged to refer at the outset to certain defects and omissions in the lower Court's discussion of it which are so material as seriously to impair the value of the judgment under appeal. Even in cases where the defendant is the heir-at-law of the obligor and as such bound by the recitals contained in the document executed by his predecessor, the Court will, in weighing the evidence, be justified in taking into account the fact that the defendant was not himself a party to the transaction and the plaintiff and those supporting the plaintiff are thus placed in a position of advantage. The disparity arising from this circumstance becomes all the greater when the defendants are minors. And yet, the learned Judge has in this case made strong comments on the omission of the defendants to disclose the source of their information as to the circumstances attending the execution of the suit pronote and upon the difference in details between the written statement of defendant 1 and the written statement filed by the mother on behalf of defendants 2 and 3. On the other hand, it does not appear to have occurred to him at all that the omission of the plaintiffs to call defendant 4 and G. V. to give evidence in the case was, in the circumstances, of great significance.

Defendant 4 was undoubtedly in embarrassed circumstances even at the time of Ex. A : his note Ex. B in favour of G. V. carried interest at Re. 1-0-6 per cent per mensem and had been outstanding for about a year by the date of Ex. A, and yet we are asked to accept the story that the money he brought for paying off G. V. was with little ado lent away to A. V. on a promissory note carrying interest at Re. 0-12-0 per cent per mensem. If the plaintiff intended to rely on the statutory presumption, why should he have called defendant 4's brother as P. W. 1 instead of calling defendant 4 himself ? On a perusal of the evidence of P. W. 1 we are not satisfied that P. W. 1 was at all present at the execution of Ex. A. It is the story of P. W. 1 that the money lent under Ex. A was advanced at defendant 4's place of business and he admits that defendant 4 kept accounts. Why have not these accounts been summoned ? If the note was executed in a place like the business quarters of Guntur (as P. Ws. 1 and 4 would have it) where plenty of respectable people would have been available, why should attestors of the status of D. Ws. 1 and 2 have been called in, even if (as suggested by P. W. 4) these persons happened to be going along the road at the time? Reliance was placed by Mr. Raghava Rao on the fact that Ex. B also has been attested by D. W. 2; but we have not been told anything as to the place where it had been executed, so that we are not in a position to say whether in the circumstances he was a natural attestor to Ex. B or not.

21. Yellappa Ramappa Naick v. Tippana, A I R 1929 P C 8=114 I C 13=56 I A 13=53 Bom 213=56 M L J 287 (P C).
22. Mohamad Sharif Khan v. Muhammad Moozzum Alikhan, A I R 1923 All 214=79 I C 464.
23. Singer Kunwar v. Basdeo Prasad, A I R 1930 All 568=124 I C 717.
24. Bishambar Das v. Ismail, A I R 1933 Lah 1029=149 I C 605.
25. Murugesa Pillai v. Gnana Sambanda Pandarasannadhi, A I R 1917 P C 6=39 I C 659=44 I A 98=40 Mad 402 (P C).
26. Gurusami Nadar v. Gopalaswami Odayar, A I R 1919 Mad 444=50 I C 775=42 Mad 629=36 M L J 568.
27. Raghavendra Rao v. Venkataswami Naicken, A I R 1930 Mad 251=124 I C 277=1929 M W N 752=30 M L W 966.

As regards the payment of consideration by plaintiff for the transfer of Ex. A the only evidence in support of it is that of the plaintiff himself. Even according to him, there was no payment in cash at the time but only the execution of a paddu in favour of G. V. The paddu has not been produced, though the plaintiff offered to produce it, if required. It is the plaintiff's story that sometime later, the paddu was discharged by payment; but one important circumstance bearing on this part of the case has not even been adverted to by the learned Subordinate Judge. As stated already, a notice was sent through D. W. 4 demanding payment even during the lifetime of A. V. The plaintiff would have us believe that D. W. 4 told him of the receipt of some reply even two or three months before the death of A. V. but not of the terms of the reply; but in another part of his deposition, he states that he filed this suit within four or five months after D. W. 4 told him of the receipt of a reply. The two statements are irreconcilable because this suit has been filed nearly 20 months after the death of A. V. The importance of this part of the plaintiff's story arises by reason of its bearing on the alleged payment of cash to G. V.; because after receipt of a repudiation by A. V., plaintiff was hardly likely to have parted with such a large amount. Even if he had undertaken a legal liability of G. V. by a kind of novatio, it is incredible that he would not have cared to inform himself what kind of reply A. V. gave to the notice sent through D. W. 4. The delay of 20 months in instituting the suit is hardly consistent with the hypothesis that the plaintiff had incurred any kind of liability in this connexion. Even according to the plaintiff, he did not take a transfer of Ex. A in the ordinary course of commercial business or even in satisfaction of a claim he had against defendant 4 which he had no other means of recovering. He voluntarily undertook defendant 4's liability under Ex. B in return for the transfer of Ex. A.

The evidence of D. W. 4 is not as helpful to the Court as it might have been, in view of its status; but reading through it, one cannot resist the suspicion that the notice was probably sent by him at the instance of G. V. himself, who was admittedly his standing client. The bearing of this circumstance of the appellant's case that plaintiff is only a benamidar for G. V. is obvious. In any event G. V. would undoubtedly have been the best witness to speak to these matters as well as to the time when differences arose between himself and his wife and attempts were made to settle those differences.

Mr. Raghava Rao contended that it was the duty of the appellants to call G. V. and defendant 4, if they thought their evidence material. We are unable to appreciate this argument, in view of the fact that according to the appellants it is G. V. who is really conducting the suit in the plaintiff's name and defendant 4 has transferred the note to the plaintiff benami for G. V. and in breach of the understanding on which it had been executed. On the other hand the plaintiff has nowhere suggested that G. V. and defendant 4 are antagonistic to him. Reviewing the evidence with due regard to the considerations above set forth, we are of opinion that the evidence given by two of the attestors (D. Ws. 1 and 2) in support of the appellant's story was at least sufficient to shift the onus on to the plaintiff and that the latter has deliberately chosen not to place the best evidence before the Court. That the third attestor (P. W. 4) supports the plaintiff does not count for much in the circumstances of this case, because that witness is a brother of G. V. and according to the appellants, G. V. is behind the plaintiff in this suit. The episode that P. W. 2 has denied does not seem to us such a vital part of the defendant's case, that the discrediting of that episode on the strength of her testimony must of itself disprove the substance of the defendant's case. Her evidence has to be weighed in the light of the admitted fact that the house in which she lives has long been and still continues to be under mortgage to G. V. and it is curious that she was in the first instance summoned on the appellant's side. We must also observe that we are not satisfied with the reasons given by the learned Judge for discrediting D. W. 3 who appears to be a man of respectability and not merely of "professed" respectability. A. V. was no doubt the witness's aunt's daughter's son but that may itself be a reason for his being informed of domestic matters arising in A. V.'s family. We do not see any change as the learned Judge seems to find between the version given by D. W. 2 and that spoken to by D. W. 3. Their stories relate to different stages. Mr. Raghava Row rightly urged that

the learned Subordinate Judge has had the advantage of seeing the witnesses before him and has expressed himself favourably impressed by the demeanour of P. Ws. 2 and 3 in the witness box. The cases referred to in this connexion do not profess to lay down a rule of law limiting the powers of the appellate Court but only indicate a rule of caution for its guidance. We have duly borne this caution in mind, but for the reasons we have already given, we find ourselves unable to give the same weight to the lower Court's judgment in this case as we should be disposed to do in other circumstances. In the view that we take as to the effect of the whole evidence adduced in the case, this appeal must be allowed and the suit dismissed as against defendants 2 and 3 with costs here and in the Court below, payable by the plaintiff. A petition (C. M. P. No. 900 of 1931) has been filed on behalf of the appellants for the admission of two documents in appeal. One of them is said to be a draft of a notice alleged to have been sent by A. V. to P. W. 2. We see no justification for admitting such a document at this stage. The other is a certified copy of a deposition given by A. V. in which he denied that any money was due under the suit pronote. That is only a self-serving statement. If all that appellants desire to show by this document is that the plea of non-liability was put forward by A. V. himself and not invented by them for the purposes of this suit, that is sufficiently established by the evidence of D. W. 4 and it is therefore unnecessary to admit this deposition of A. V. C. M. P. No. 900 of 1931 will accordingly be dismissed.

Mockett, J.—I agree. As to the questions of fact which arise in this appeal, I have nothing to add to what my learned brother has said. It is very apparent that the trial Judge has failed to direct his mind to the proper aspect of some of the salient features of this case especially the remarkable omission by the plaintiff to call defendant 4 and Gadde Venkatarayudu. It is possible no doubt that the general handling of this case was due to the frame of the issues. But in any event when the whole facts were before the Court, the absence from the witness box of the two persons to whom must have been known the real facts should have been a helpful guide to the Court in arriving at a decision; but this feature of the evidence seems to have been given little, if any, attention. The suggestion thrown out in this appeal that the defendants should have called defendant 4 and Gadde Venkatarayudu is to me wholly unconvincing. Mr. Raghava Row and Mr. Sambasiva Rao have addressed us fully on the question of onus of proof and a number of cases have been cited. It is suggested by Mr. Raghava Row that there is a conflict of authority with regard to the position but it seems to me that the matter now directly before us has not been concluded by authority. The whole difficulty arises from what is described in 44 All 393[1] at p. 396 as

> applying the legislative provisions of Western law to the ancient customs and traditions of the law of the joint Hindu family.

Section 118, Negotiable Instruments Act, is essentially a product of Western law. Long before the provisions of the Bills of Exchange Act of 1882, it was one of the rules of the Law Merchant that consideration was presumed in the case of negotiable instruments. The Indian Evidence Act of 1872 allows the Court to presume that a bill of exchange was accepted or endorsed for good consideration and S. 118, Negotiable Instruments Act of 1881 introduces a statutory presumption that all negotiable instruments are made or drawn for consideration. An exmination of the Indian case law shows that complications which have arisen in suits apparently founded on promissory notes brought against members of joint Hindu family have been matters really of pleading and joinder of parties and causes of action. No such difficulties arise in England and no English cases have been cited in argument.

It is natural that from Indian case law should guidance be sought when a relic of the Law Merchant as to burden of proof is intermingled with the doctrine of family necessity. Much reference has been made to 17 M L T 232[5] which at first sight appears to be in favour of the respondents in the case. But it must be observed in that case that the father at the time of the suit was alive and his sons were joined with him as defendants. The suit was primarily against the maker of the negotiable instrument, a party to the instrument. Now in this case the essential features of liability under a negotiable instrument is absent. The decision of the Judicial Committee in 46 Cal 663[3] is clear that in order to make a person liable on a

promissory note it must be shown that his name appears upon it. The decision of the Judicial Committee in 39 Bom 261[16] does not seem to be in the least at variance with 46 Cal 663.[3] At p. 273 their Lordships point out that the action is one for an account. In this case the defendants' names do not appear upon the instrument; their father's name appears upon it but they are not sued as the legal representatives of their father. They are sued under the provisions of the Hindu law by which sons are liable for their father's debts. In other words the suit is on a debt and not on the promissory note at all. When that distinction is borne in mind, it seems to me that this case presents little difficulty. My learned brother has examined the cases and I do not wish to repeat his analysis. It will be. seen that the point now raised has never before come for decision in the clear cut form in which it is now presented to us. As stated in 58 Mad 735[19] the difference between a claim on a promissory note and a claim on a debt may in certain cases be lacking in substance and I think Ramesam, J., in delivering the judgment of the Full Bench, had such circumstances in mind. But in a case such as is before us the form of the suit is of vital importance to the defendants and for the reason that if the burden is on them to negative the acts of their father they are in a difficult if not in a hopeless position. The defendants are mere children without any knowledge of the facts.

The plea therefore in this case as to the form of the action is, as I have said, of great importance and I imagine, must always be so in suits brought after the death of the father against the sons ostensibly on a promissory note. As pointed out by my learned brother some doubt has arisen in this matter owing to the observations made in 3 M L W 463,[11] 32 M L J 354[12] and 37 M L J 369.[13] I am inclined however to think that Coutts-Trotter, J. in 3 M L W 463[11] had in mind the importance of the promissory note rather as evidence of the debt and in none of these cases was the question of burden of proof given any prominence. So far as 32 M L J 354[12] is concerned, personally I see nothing very extraordinary in a suit being framed on the note against the maker and under the Hindu law against the members of the family. On the other hand I find it much more difficult to contemplate a suit on a negotiable instrument against anybody not a party to it. The distinction as to the form of pleading is pointed out by Page, J. in 54 Cal 380[2] where a suit in the alternative is discussed by the learned Judge at p. 393. In 67 M L J 393,[7] Cornish, J. indicates the two sorts of liabilities by the maker on the note and by the coparcener on the debt under Hindu law. No doubt the observations in reported cases suggest a difference of opinion on the subject. In this respect it must be repeated that the short question as to onus of proof in such a case as this was never considered in any of those cases and a careful examination of the cases shows that what was being considered was the question of the sons' liability for the amount of the note. But it has now to be considered and answered and I take the view that to hold that the onus of proof as to consideration rests on a defendant sued on a promissory note on which his name does not appear, is contrary to the view of the Judicial Committee as clearly expressed in 46 Cal 663.[3] I find it impossible to suppose that the presumption as to consideration was intended to operate except as between parties to a negotiable instrument. Although Hindu law may make a defendant son liable for the amount of a negotiable instrument signed by his father, nothing except his written name thereon can make him a party thereto, liable as a party, and subject to the statutory presumption affecting consideration between parties. When as here the signatory father is dead and it is sought to make any one other than his legal representatives as such liable for money lent under a promissory note, it seems to me that any subtleties found by the Court in 32 M L J 354[12] disappear and the suit can only be on the debt of which the promissory note is evidence and personally I have little difficulty in holding that that being so, the burden of proof from the beginning must be on the plaintiff to prove the debt like any other debt.

The above view is not, I think, contrary to any actual decision of this Court nor does it affect any question of liability for a debt; and it is only necessary to state it in a case such as this when a nice question of burden of proof involves the allocation of a form of action to its precise legal category.

C.R.K./M.D. *Appeal allowed.*

* A. I. R. 1937 Madras 191

VARADACHARIAR AND HORWILL, JJ.

Hiralal Jindani—Appellant.

v.

Official Assignee, Madras and *another*—Respondents.

O. S. Appeal No. 14 of 1936, Decided on 12th October 1936, from order of Wadsworth J., D/- 24th February 1936.

*** Criminal Trial—Refund of fine—Sentence on insolvent accused imposing fine—Fine paid by some person other than accused—Sentence subsequently reversed—Person paying fine is not entitled to refund—His remedy would be only against insolvent's estate.**

There is no provision in the Criminal Procedure Code, that on reversal of the sentence the Crown must return the amount to anybody other than the accused, even if the amount had been paid by such person. The proper assumption to make in such cases is that at the time of the payment of the fine all parties agreed that the money might be treated as the property of the accused.

[P 191 C 2]

So where the sentence on an insolvent accused imposed a fine which was paid by a third person and on reversal of the sentence the person paying the fine brought a suit for the refund of the amount paid by him :

Held: that he was not entitled to the refund of the amount. His only remedy thereafter would be against the insolvent's estate; and whether he would be entitled to claim it back in whole or in part would depend on whether he made a present of it to a relative in trouble or whether he merely lent it and if so, on what terms.

[P 191 C 2; P 192 C 1]

Ch. Raghava Rao and *S. Sitharama Ayyar*—for Appellant.

V. V. Srinivasa Ayyangar, V. Varadaraja Mudaliar and *P. S. Kodandapani*—for Respondents.

Varadachariar, J.—This is an appeal against the order made by Wadsworth, J., on an application presented by the appellant in the insolvency of one Abbeyamul Sowcar, asking for a declaration that the sum of Rs. 1,000, which had been paid by the insolvent as fine when he was convicted in C. C. No. 939 of 1933 on the file of the Court of the Presidency Magistrate, Madras, is money belonging to the applicant and that he is entitled to a refund of the same. For reasons which we need not state in detail, the application underwent a number of adjournments and when it came on for hearing on 24th February 1936 the applicant was not able to be present to give evidence. The record however shows that as part of the evidence which he proposed to adduce, a pass-book of the applicant relating to his account with the Indore Bank had been produced in terms of a consent order passed by Mockett, J. to show that at or about the relevant time the applicant withdrew the sum of Rs. 1,000 from his own account with the Indore Bank. This apparently was intended to answer the allegation in the Official Assignee's report that the applicant was not in a position to find Rs. 1,000 himself and that the amount must have been paid out of the insolvent's funds. We may here mention that Abbeyamul Sowcar was adjudged insolvent on 1st February 1934, that he was convicted in the Magistrate's Court on 9th April 1934, that the fine of Rs. 1,000 imposed upon him was paid on 14th April 1934 and the sentence was reversed by this Court on appeal on 11th September 1934.

The applicant relies on the fact that the receipt granted by the Magistrate at the time of the payment of the fine states that the money was paid on behalf of the accused by the applicant. Wadsworth, J. has held that the onus prima facie lies upon the applicant to prove that the money belongs to him and as there is no evidence to establish that fact, the application must fail. Without adopting the same formula the same result would nevertheless be reached by another course of reasoning as well. Assuming for the sake of argument that this sum of Rs. 1,000 was drawn by the applicant from his own account in the Indore Bank, it would not follow therefrom that the applicant is now entitled to this amount. At the time when it was paid into the criminal Court in payment of the fine imposed on the accused, the money must in law be deemed to have become the property of the accused because title thereto must pass to the Crown. There is no provision in the Criminal Procedure Code, that on reversal of the sentence the Crown must return the amount to anybody other than the accused, even if the amount had been paid by such other person. We think the proper assumption to make in such cases is that at the time of the payment of the fine all parties agreed that the money might be treated as the property of the accused. In this view any proof by the appellant that he found the money in the first instance will not suffice to entitle him to get it back. His right thereafter will be only against the insolvent's estate; and whether he will be entitled to claim it back in whole or in

part will depend on whether he made a present of it to a relative in trouble or whether he merely lent it and if so, on what terms. These are matters which cannot be taken to be proved either by the receipt granted by the Magistrate or by the production of the Indore Bank pass-book. The insolvent might have been examined as a witness on behalf of the applicant but that course has not been adopted.

Mr. Raghava Rao requested us to give his client an opportunity to examine himself and to adduce other evidence in support of the application; but the record shows that more than one adjournment had been obtained in the lower Court and on one occasion the application was even dismissed for default and subsequently restored. We quite sympathise with the applicant who has to come down all the way from Indore for the purpose of giving evidence in this case. That is perhaps the very reason why he did not think it worth while. In these circumstances, we are not prepared to interfere with the order of our learned brother refusing to grant any further adjournment in the matter; and on the record as it stands, his order is right. This appeal fails and is dismissed with costs of the Official Assignee.

C.R.K./V.B.B. *Appeal dismissed.*

A. I. R. 1937 Madras 192

WADSWORTH, J.

Official Assignee, Madras—Petitioner.

v.

R. Krishnaswami Naidu and *others*—Opposite Parties.

Petition No. 267 of 1931, and Appln. No. 182 of 1936, Decided on 28th September 1936.

Insolvency — Setting aside alienations—Multifariousness — Application by Official Assignee to set aside number of alienations made by insolvent—Alienations alleged to be outcome of one scheme of fraud and conspiracy between insolvent and alienees—Alienations held could be attacked in one application and proceeding.

An insolvent made a number of alienations during a fortnight to his friends, relations and partisans. It was also alleged that these transactions were the outcome of a general scheme of fraud and conspiracy between the insolvent and the alienees. The Official Assignee attacked all these alienations in one application:

Held: that the alienations which were the outcome of a conspiracy could be attacked in one and the same proceeding as it would be necessary to consider each alienation in relation to other: *A I R 1934 Cal 232, Disting.*; *A I R 1926 Mad 911, Rel. on.* [P 192 C 2; P 193 C 1]

K. Rajah Aiyar and *P. Srikantam*—for Petitioner.

K. Thiruvenkatachari and *K. M. Venkatavaradachariar*—for Opposite Parties.

Order. — The preliminary question to be decided is whether the application by the Official Assignee to set aside a number of alienations made within a period of about one fortnight by the insolvent is bad for multifariousness and whether he should be required to file separate applications in the case of each alienation. My attention has been drawn to various cases on the subject of clubbing in one proceeding claims for separate reliefs against a number of different persons. There is a judgment of Panckridge, J. reported in 60 Cal 1367,[1] in which the practice of applying in one proceeding to set aside a number of alienations is deprecated. As regards that judgment, there is nothing to show that there was any allegation of conspiracy or collusion between the various alienees. That the Court can try in one suit the question whether numerous alienations by a trustee to various persons are bad was held in the Full Bench decision reported in 49 Mad 836;[2] this decision proceeding on the basis that, when there is unity of title in the plaintiff and a number of similar alienations, the validity of which depends upon the powers of the trustee, are all in question, the same evidence and arguments will apply in the case of all these alienations and the various causes of action can conveniently be tried together.

Now, in the present case the allegation is that the insolvent in the course of about a fortnight made six separate alienations to persons, all of whom are alleged to be friends, relations and partisans and who are alleged to have acted together in collusion with the insolvent to screen his properties. It is also alleged that these transactions are the outcome of a general scheme of fraud and conspiracy entered into between the insolvent and the respondents. In the face of such allegations of conspiracy and collusion between the various alienees to carry out a comprehensive scheme of fraud, I do not see how it

1. *In re* Binjraj Harnandrai, A I R 1934 Cal 232 =149 I C 995=60 Cal 1367.
2. Govindaraja Mudaliar v. Alagappa Thambiran, A I R 1926 Mad 911=97 I C 212=49 Mad 836 (F B).

can be held that the various alienations which are alleged to have been the outcome of this scheme cannot be attacked in one and the same proceeding. For obviously in order to establish the case put forward by the Official Assignee, it will be necessary, as regards each of these alienations, to consider it in its relation to the other alienations. I therefore hold that this application can properly cover the various alienations which it attacks. The application will be posted for trial in three weeks.

C.R.K./S.C. *Order accordingly.*

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* A. I. R. 1937 Madras 193

VENKATARAMANA RAO, J.

Goteti Bayyapparaju Sarma and *others* —Appellants.

v.

Tadanki Subba Lakshmamma — Respondent.

Second Appeal No. 1786 of 1931, Decided on 21st September 1936, against decree of Sub-Judge, Narasapur, in A. S. No. 81 of 1930.

*** Hindu law—Widow—Right of residence —Distinction between right of residence and right of maintenance—Mortgage of family dwelling house by adult member for personal purposes—Portion of house allotted to widow for residence for life — Auction-purchaser cannot eject her from her residence.**

The right of a female member to reside in the family dwelling house as well as her right of maintenance is based upon her husband's right to share in the family property. So far as the right to maintenance is concerned, unless it is asserted and the obligation is made charge on some property it cannot prevail over bona fide purchaser for value in execution of a decree obtained against the adult members of the family. But so far the right of residence is concerned the purchaser must show that the debt was incurred under such circumstances as would bind her i. e. the debt or the alienation was made under circumstances which would justify an alienation of joint property. [P 194 C 2]

Where, therefore, an adult member mortgages the family dwelling house for personal purposes and not for purposes binding on family and a portion of the house is allotted to the widow for her residence during her life-time, the auction-purchaser cannot eject her from her residence: *27 Mad 45* and *A I R 1931 Lah 718*, *Rel. on*; *12 Mad 260 (F B)*, *Expl.* [P 195 C 1]

V. Suryanarayana—for Appellants.

A. Satyanarayana and *S. Venugopala Rao*—for Respondent.

Judgment.—The main question in this second appeal is whether the plaintiffs who are the auction-purchasers of a house in execution of a mortgage decree in O. S. No. 91 of 1923 on the file of the Sub-Court, Narasaraopet are entitled to eject the defendant who claims a right of residence in a portion of the said house. The plaintiff's father obtained a mortgage on 19th April 1911 of the said house from the son of the defendant. On 23rd February 1913, the defendant appears to have obtained a document from her son in and by which among other things she was entitled to reside in the eastern portion of the said house during the period of her natural life. The suit on the mortgage was instituted long thereafter and the decree was obtained on 6th May 1924. The defendant was not a party to the said suit. When the plaintiffs sought to take possession of the house they were obstructed by the defendant. To remove the said obstruction the plaintiffs filed an application under O. 21, R. 97, Civil P. C., but the application was disallowed. Thereupon the plaintiffs filed the present suit to recover the property. Various defences were raised by the defendant. Both the lower Courts have negatived the plaintiffs' claim on the ground that as the defendant was not a party to the suit the decree would not bind her, her right of redemption therein not having been affected thereby. On 1st November 1935 when the second appeal was argued before me, I called for findings as to whether the mortgage debt is binding on the defendant and whether it was in fraud of her claim and if the plaintiffs' father had notice of the defendant's right of residence in the suit property at the time of the mortgage in his favour.

The learned Subordinate Judge has submitted his findings to the effect that the mortgage debt is not binding on the defendant not having been contracted for family necessity, that the mortgage was executed not with an intention of defeating or delaying the defendant's claim for maintenance or residence and that the plaintiffs' father had no notice of the defendant's right of residence in the suit house. It is contended by Mr. V. Suryanarayana that in the mortgage suit the sons of the defendant raised a plea that the mortgage was not executed for any antecedent debts binding on them but their contention was negatived and therefore it must be taken that the debt was a binding debt of the family. He relies very

strongly on 12 Mad 260,[1] and contends that it is an authority for the proposition that when adult members of the family incur a debt, it must be prima facie deemed to be binding on the female members of the family and any sale in execution of a decree obtained on the footing of the same would defeat their rights unless it is shown by them that such a debt is not binding on them. It seems to me that the said contention is untenable and there is nothing in 12 Mad 260[1] to support this view. In that case the widow of a coparcener sued for a declaration that she was entitled to reside in the family dwelling house which had been sold in execution of a decree obtained against her sons and grandsons. A finding was called for when the matter came in second appeal to the High Court as to whether the debt was incurred for the benefit of the family and the finding was in the affirmative. Then the question was referred to the Full Bench whether in view of 6 Mad 130[2] the widow can resist the claim of the auction-purchaser. It was held that she was not entitled to do so on the ground that the debt was a debt binding on the family including herself. Muthuswami Ayyar, J. points out the distinction between the right to maintenance and the right to residence, that while the former is not referable to any specific property the latter is a right inherent in her incident to her status and there is no indefiniteness as to the specific property to which it is referable. He explained the principle which ought to guide a Court in dealing with the matter thus :

> The right of residence of Hindu females is ordinarily referable to the family house and a purchaser may be presumed to have notice of that fact. It is reasonable to hold that he is not a bona fide purchaser entitled to eject her, unless it is proved that the sale is valid as against her, either because, as in this case, it is made in liquidation of a debt binding on her or an ancestral debt, or with her consent or in circumstances which would sustain a plea of equitable estoppel against her. The consideration that a real right is not a specific charge, unless that right is referable to specific property, has no application in the case of a family dwelling.

Mr. Suryanarayana contends that the order of reference to the Full Bench was made in circumstances similar to the one in the present case and the decision of the Full Bench must be deemed to have been based on the view that the debt incurred by the other coparceners would be a binding family debt, but I think this view is negatived by the following observation of Muthuswami Ayyar, J. :

> It is found that the judgment debt is a family debt, and I take it that the debt, though contracted only by the male coparceners, was contracted by them, not for their exclusive benefit, but for the benefit generally of the joint family consisting of themselves and their mother.

The proposition contended by Mr. Suryanarayana if accepted would practically nullify the rights of the female coparceners to reside in the family dwelling house. It would be open to the adult members of the family to contract debts for their personal purposes and most often without notice to the female members of the family and thus render them helpless. Mr. Suryanarayana has not been able to cite any case in support of his contention. It seems to me that it is hardly consistent with principle to hold in favour of this view. The right of a female member to reside in the family dwelling house as well as her right of maintenance is based upon her husband's right to share in the family property. Of course so far as the right to maintenance is concerned, decided cases have taken the view that unless the right has been asserted and the obligation is made a charge on some property it cannot prevail over a bona fide purchaser for value in execution of a decree obtained against the adult members of the family. But so far as the right of residence is concerned, it is well established that the purchaser must show that the debt was incurred under such circumstances as would bind her, i. e., the debt or the alienation was made under circumstances which would justify an alienation of the joint family property. This is what is meant when it is said that it must be a debt binding her interest in the family. In 27 Mad 45,[3] Bhashyam Ayyangar J. explained the ratio of the decision in 6 Mad 130,[2] where the right of a widow to reside in the family house against an auction-purchaser was upheld thus :

> In 6 Mad 130,[2] the son after the death of the father, incurred considerable debts and on mortgage bonds executed by him suits were brought and the properties brought to sale in execution of decrees passed in such suits. It was not shown that the debts were incurred for purposes which

1. Ramanadhan v. Rangammal, (1889) 12 Mad 260 (F B).
2. Venkatammal v. Andyappa Chetti, (1883) 6 Mad 130.
3. Jayanti Subbiah v. Alamelu Mangamma, (1904) 27 Mad 45.

could bind his mother who on the death of her husband had a right of maintenance against her son quoad the share of her husband in the joint family property which the son mortgaged for a debt of his own and which was brought to sale for realisation of such debt. It was held that the house must be sold subject to her right to continue to reside in the house which she had been occupying till then.

A similar view was taken in a recent decision of the Lahore High Court in A I R 1931 Lah 718,[4] and the right of residence was upheld in circumstances similar to the one in the present case. I therefore overrule the contention of Mr. Suryanarayana. In this view it is unnecessary to consider whether the defendant was a necessary party to the mortgage suit and the decree is not binding on her. I accept the finding that the mortgage in favour of the plaintiff's father was not executed for a purpose binding on the defendant and the plaintiff is therefore not entitled to eject the defendant from the portion allotted to her under Ex. 2. He is only entitled to get possession of the same after her lifetime. In the result the second appeal fails and is dismissed with costs. Leave refused.

C.R.K./P.R. *Appeal dismissed.*

4. Jamiatrai v. Mt. Malan, A I R 1931 Lah 718= 133 I C 62=13 Lah 41.

A. I. R. 1937 Madras 195

VARADACHARIAR AND MOCKETT, JJ.

V. K. Nataraja Iyer and *others* — Appellants.

v.

S. L. Lakshman Iyer and *others* — Respondents.

Appeal No. 105 of 1931, Decided on 24th April 1936, against decree of Sub-Judge, Trichinopoly, in O. S. No. 16 of 1929.

(a) Hindu Law—Debts— Father — Trade— Father incurring debts for business started by him — Family character of business put aside—Debts sought to be justified by creditors on ground of necessity by independent evidence — Proof must amount to proof of necessity ordinarily known to Hindu law.

Father of a joint family in which there were some minor members, started a new business and incurred a debt for it. His creditors tried to bind his sons with the liability on the contention that apart from assumed ancestral character of business, the debts themselves were borrowed in circumstances or for purposes that will make them binding on the family by independent evidence:

Held : that when the family character of the business was put aside and the transaction was sought to be justified on ground of necessity, no difference could turn on the fact that the debts were incurred by the father and not by any other manager. The proof must therefore amount to proof of necessity in the sense ordinarily known to Hindu law. [P 197 C 1]

(b) Hindu Law—Debts—Necessity—Benefit to estate — Benefit must at least be certain and business free from any risk or danger.

Even in cases of family business where "benefit" should be recognized apart from "necessity" in ordinary sense, the benefit must be certain and the business free from any risk or danger. [P 197 C 1]

(c) Hindu Law—Debts—Father—New business—Father starting rice mill— Transaction held not justified by family necessity.

A father of joint Hindu family, which consisted of minor members, incurred debts by starting rice mill with a view to give them more comforts than the normal income of the family properties would make possible :

Held : that father was neither obliged to adopt nor was justified in adopting this course on the ground of family necessity. [P 197 C 2]

(d) Transfer of Property Act (1882), S. 78— Mortgagee giving title-deeds to mortgagor knowing that latter required them to effect sale — Mortgagee held guilty of negligence under S. 78 but no estoppel arose against him.

The mortgagee parted with the title-deeds relating to the properties when he had sufficient reasons to think that the mortgagor required them for the purpose of effecting a sale of the properties :

Held : that the mortgagee was guilty of negligence under S. 78 of the Act in having allowed the mortgagor to defraud a purchaser but no estoppel under S. 115, Evidence Act, arose against him. [P 199 C 2]

A. V. Narayanaswami Iyer, S. Panchapakesa Sastri and *S. Hanumantha Rao*—for Appellants.

C. S. Venkatachariar, V. Rajagopala Iyer, T. V. Ramiah and *M. E. Rajagopalachariar*—for Respondents.

Varadachariar, J. — This is an appeal by defendants 2 to 4 in a suit brought to enforce a security bond executed by defendant 1 in favour of the plaintiff in July 1918, (Ex. C). Defendants 2 to 4 are the sons of defendant 1, and they were all minors at the date of Ex. C. Ex. C itself does not refer to any particular debt but provides that defendant 1 wished to have debit and credit transactions with the plaintiff for a period of five years from that day to the limit of Rs. 5,000 both separately and jointly with other persons on promissory notes and on account. The properties specified in the schedule were offered as security for any sum of principal and interest that might become due

to the plaintiff as a result of such transactions. The suit has been laid for recovery of the amounts remaining due on foot of the two promissory notes, Exs. A and B, dated respectively 28th September 1920 and 31st May 1921; and it is claimed that in respect of the amounts due under these two documents plaintiff is entitled to enforce the security under Ex. C.

In the plaint it was alleged that the moneys claimed were borrowed to discharge antecedent debts and for other necessary purposes binding on the family. It was also added that defendant 1 was conducting a rice mill business "for which also the sums borrowed appear to have been utilized." Defendants 2 to 4 contended that the security created by Ex. C should not be held to be binding on their shares in the property because they are admittedly joint family properties and there was no antecedent debt or family necessity. The question of the availability of Ex. C as against defendants 2 to 4 was raised by issue 2a, in the case, though the issue is not strictly correct in form in throwing the onus on the defendants. The learned Subordinate Judge did not adopt the suggestion in the plaint that Ex. C was executed for the discharge of any antecedent debts; following the decision of this Court in 52 Mad 227,[1] he held that the rice mill business started by defendant 1 was a family business and that securities created for the repayment of moneys borrowed in connexion with that business by the father would be binding on the sons' shares in the joint family property.

There was no definite evidence to connect the suit debts with the rice mill business nor any very clear evidence as to the profitableness or otherwise of that business; but as defendant 1 who must presumably be in possession of the accounts relating to that business did not produce them in spite of notice to do so given by the plaintiff, the learned Judge drew the inference that the moneys were likely to have been used for that business and the business must have been a profitable one. He also observed that having regard to the evidence that in the ordinary course the family lands would have yielded only an income of about Rs. 1,000 per annum, defendant 1 was justified in starting the mill to increase the family income so that its members may live in comfort. For these reasons, he held that the security bond was enforceable against the shares of defendants 2 to 4 as well. He also adverted to the fact that when in 1928 some items of family properties were sold for paying off a portion of the amount due to the plaintiff under Ex. C as well as another transaction between the parties, viz., Ex. F, defendant 2 who had attained majority by that time joined in the sales and from this circumstance, the learned Judge drew the inference that defendant 2 had ratified his father's transactions.

In this appeal, it has been argued on behalf of the appellants that the view taken by this Court in 52 Mad 227,[1] can no longer be held to be good in law in view of the decision of the Privy Council in 54 All 564.[2] It was accordingly contended that so much of the lower Court's reasoning as rested on 52 Mad 227[1] must be held to be erroneous. It was next argued that when the family was in possession of an ordinary income of Rs. 1,000 per annum, it was not open to a father in a family which was not a trading family by hereditary profession to start a business merely with a view to increase the income of the family and add to its comforts. The passing observation of the learned Subordinate Judge on the question of ratification need not be seriously dealt with, because no issue on the question of the alleged ratification was raised, and we are not in possession of all the circumstances attending the sales of 1928, so as to justify us in finding on the plea of ratification in plaintiff's favour. On behalf of the respondent, Mr. Venkatachariar agreed that after the decision of the Privy Council in 54 All 564,[2] we could not follow the decision in 52 Mad 227.[1] But he argued that the fact that the debts might have been incurred in connexion with the rice mill business does not preclude him from showing that apart from the assumed ancestral character of the business, the debts themselves were borrowed in circumstances or for purposes that will make them binding on the family by independent evidence. We are prepared to follow the opinion of the Full Bench of the Allahabad

1. Venkatasami Naicker v. Palaniappa Chettiar, A I R 1929 Mad 153=117 I C 716=52 Mad 227=56 M L J 380.

2. Benares Bank, Ltd. v. Hari Narain, A I R 1932 P C 182=137 I C 781=59 I A 300=54 All 564 (P C).

High Court in 57 All 605,[3] which supports this contention of Mr. Venkatachariar, but in dealing with this contention, it must be remembered that when the family character of the business is put aside and the transaction is sought to be justified on the ground of necessity, no difference can turn on the fact that the debts are incurred by the father and not by any other manager. The proof must therefore amount to proof of necessity in the sense ordinarily known to the Hindu law.

In the Allahabad case, reference is made to the possibility that in certain circumstances a business, though not an ancestral business, may in view of the conduct of the parties, be reasonably regarded as joint business. This might be possible in cases where the other members of the family are adults but not where, as in the present case, they are minors. It may be that a manager who uses family assets for the purpose of a business started by him will expose himself to the 'liabilities' of a manager of a family business if the minor members choose to claim the benefit of that business; but he cannot by his conduct alone or by the use of the family funds impose upon them against their will the character of a joint business on a business started by him. Further, when considering the question whether moneys required in connexion with such a business can be said to be moneys required for 'family necessity,' the learned Judges suggest that necessity need not be restricted to transactions of a purely 'defensive nature.' There is some conflict of opinion on this point, but for the purpose of this case it seems to us unnecessary to canvass that question, because even assuming that a category of 'benefit' may be recognised in this connexion apart from 'necessity' in the ordinary sense, the cases referring to such benefit also recognise that the benefit must at least be certain and the business free from any risk or danger. It is difficult, in the present case, to say that the starting of a rice mill business by a person situated in the position of defendant 1 is not attended with risk or danger to the family properties. One has only to examine the transactions disclosed by the documents exhibited in this case to see how the family is in danger of losing all its patrimony as a result of defendant 1's management.

Assuming that defendant 1 was actuated by the motive of increasing the family income by adding to it the profits derived from the business, we do not think a family manager who is in charge of the estate of junior members, all of whom are minors, is either obliged to adopt or is justified in adopting a course of this kind with a view to give them more comfort than the normal income of the family properties would make possible. We are therefore unable to hold that Ex. C is operative against the shares of the appellants either on the ground of family necessity or benefit or on the ground that it was executed in connexion with an ancestral business in the sense in which the expression is known to the Hindu law.

Mr. Venkatachariar next tried to support the transaction on the footing that Ex. C was really executed to secure antecedent debts. In the first place, the language of Ex. C is by no means in favour of that construction. The list of debts which Mr. Venkatachariar has made out no doubt suggests that by the date of Ex. C, there have been borrowings by defendant 1 from the plaintiff to the extent of about Rupees 1,200 and another borrowing by defendant 1 jointly with one Vembu Iyer to the extent of Rs. 2,200. We are unable to understand why if Ex. C was intended to secure pre-existing liabilities as well, no reference whatever is made to these transactions in Ex. C. Assuming however for the sake of argument that Ex. C can be made available for antecedent debts, it is not by any means clear that the sum of Rs. 2,200 due on the promissory note executed by Vembu Iyer and defendant 1 could ever have been intended to be covered by Ex. C. It is fairly clear from the evidence of the plaintiff himself that when a document is executed by two persons it is the first executant that must have been the real borrower, and we find in the present case that this sum of Rs. 2,200 and its subsequent renewals are brought not into defendant 1's accounts but into a separate account in the joint names of defendant 1 and Vembu Iyer. Later on, when a renewal note, Ex. B, was executed in respect of this Rs. 2,200 and the interest accrued upon it, it is executed by defendant 1 and Vembu Iyer's son, the present defendant 5. The plaintiff's evidence shows that there have been

3. Ram Nath v. Chiranji Lal, A I R 1935 All 221 =155 I C 136=57 All 605=1935 A L J 177 (F B).

settlements of accounts between the plaintiff and defendant 1 and defendant 5 in respect of transactions wherein Vembu Iyer or defendant 5 was the first executant and another settlement of accounts in respect of transactions where defendant 1 was the first executant. We are not satisfied that we have before us the whole evidence relating to these complicated transactions or the arrangements between Vembu Iyer and defendant 1 as a result whereof these joint notes were executed. There is some force in the suggestion made on the side of the appellants, which is also supported by Ex. 2 and the evidence of D. W. 1 that about the time that this Rs. 2,200 was borrowed Vembu Iyer celebrated his daughter's marriage. We are not therefore prepared to say that on any construction, Ex. C can be made available for recovery of the debt due under Ex. B. As regards the other amount of about Rs. 1,200 which might perhaps be regarded as an antecedent debt, it is sufficient to say that under Ex. A in which this sum of Rs. 1,200 has been incorporated along with a number of other items which cannot in any sense be regarded as antecedent debts, the plaintiff has received payment of more than Rupees 5,000 out of which at least Rs. 4,000 odd had been paid by a mortgage of joint family property executed by defendant 1 and defendant 2 and by defendants 3 and 4 represented by defendant 1. In these circumstances we do not think that we are denying any just claim to the plaintiff when we hold that even if Ex. C could be regarded as available to the plaintiff for recovery of this sum of Rs. 1,200, he has received very much more than Rs. 1,200 from the joint sharers under Ex. F, and there is accordingly no reason why the claim now said to be remaining due under Ex. A should be held to be binding against the shares of defendants 2 to 4.

Great stress was laid by Mr. Venkatachariar on the non-production of the business accounts by defendant 1 and he drew our attention to the fact that the learned Subordinate Judge holds that defendant 1 is supporting defendants 2 to 4. We are willing to give full effect to this argument, but making all allowance for it, the only inference we can draw is that the sums borrowed by defendant 1 from the plaintiff are likely to have been applied for the purpose of the business. But, for the reasons that we have already given, that will not suffice to entitle the plaintiff to the decree which the lower Court has given in his favour as regards the shares of defendants 2 to 4. Some suggestion was vaguely made about marriages in the family; but on the question put by us it has been elicited that it is impossible to connect any of the suit items with any marriage in first defendant's family. It was next claimed by Mr. Narayanaswami Iyer that we must investigate the account put forward by the plaintiff as regards the amounts due on foot of Exs. A and B and fix the sum for which a personal decree could be given against the father, because in execution of that decree it might be sought to proceed against the sons' shares in the family property as well. We do not however think that this is the proper stage to deal with that matter. The lower Court has only given a decree for sale and we are allowing the appeal to the extent of excluding the shares of defendants 2 to 4 from the security. As the father has not appealed, we are not called upon to reduce the liability of his share. It is true that in execution of the personal decree to be obtained against the father after the sale of his share, joint family properties may be brought to sale; but we think the proper stage for determining the extent to which the family properties may be made liable even on the basis of the sons' liability under the pious obligation doctrine will be when the plaintiff applies for the passing of a personal decree. We will only add that on such an application the Court must in circumstances of this case give notice to defendants 2 to 4 so that they may have an opportunity of substantiating their objections to the amount claimed by the plaintiff. The declaration of amount in the preliminary decree of the lower Court must not be treated as concluding the question. The appeal is accordingly allowed with costs to be paid by the plaintiff-respondent 1. The decree of the lower Court will be modified by excluding the shares of defendants 2 to 4 from liability for sale.

There is a memorandum of objections filed by defendant 6 who is respondent 4 in this appeal. She is the purchaser of some of the items included in Ex. C. These were sold to her under Ex. 3, on 19th December 1918 for a sum of Rupees 3,977-8-0. The plaintiff admits that the title deeds relating to the properties comprised in Ex. 3 were in the first instance

handed over to him at the time of the execution of Ex. C and were afterwards taken from him by the mortgagor. He does not suggest that there was any fraudulent misrepresentation by the mortgagor in that connexion. He also admits that on 21st December 1918, that is, two days after the sale to defendant 6, defendant 1 paid to him a sum of Rs. 3,150. It is true that in the plaintiff's accounts this sum of Rs. 3,150 is entered under two heads, one of Rs. 1,150 applied in discharge of the liability under Ex. C and another of Rs. 2,000 carried to the credit of defendant 1 in current account. If however, we are justified in drawing an inference that the plaintiff knew, in that defendant 1 took from him the title deeds relating to these properties with a view to sell them and pay the sale proceeds to the plaintiff, we do not think that any arrangement between the plaintiff and defendant 1 as to the way in which the proceeds thus paid in should be appropriated in the accounts can make any difference in law. We are not prepared to accept the plaintiff's statement that he came to know of the sale only in 1923. If he was for the first time then apprised of the fact of one of the items of the property having been sold away and the title deeds taken from him by defendant 1 were never returned, he is hardly likely to have left the matter there. It seems to us reasonable in the circumstances to hold that defendant 1 must have taken the title deeds from the plaintiff after informing him that it was for the purpose of selling the property and paying the sale proceeds to him. From the price stated, it is clear that the price was paid for the full value of the property and not merely for the value of the equity of redemption. It is a legitimate inference from these circumstances that the understanding must have been that the plaintiff must release these properties and receive their value instead. On that inference it would follow that the plaintiff will not be justified in seeking to sell the properties over again.

Mr. Venkatachariar however contends that the case in the written statement of defendant 6 was put not as one of release but of estoppel, and he relied on the fact that defendant 6 alleged in the written statement that she was not even aware of the encumbrance in favour of the plaintiff. So far as the plea of estoppel is concerned, it must be said that there may not arise here an estoppel in the sense of S. 115, Evidence Act; but the plaintiff's conduct is akin to the kind of negligence contemplated by S. 78, T. P. Act. It is true that cases in this Court have held that in view of the system of registration of mortgages prevalent in the mofussil, the mere omission to take charge of the title deeds or even parting with the title deeds by the mortgagee may not always amount to the negligence; but if, as the circumstances here suggest the plaintiff parted with the title deeds relating to these properties when he had sufficient reason to think that the mortgagor required them for the purpose of effecting a sale of the properties, we do not see any reason why the plaintiff should not be held guilty of negligence in having allowed the mortgagor to defraud defendant 6. The sale deed, Ex. 3, expressly recites that there is no encumbrance on the property and that the title deeds relating to the property are being handed over to the vendee.

If, on the other hand, we should hold that notwithstanding the denial in the written statement of knowledge of the existence of the encumbrance in the plaintiff's favour, defendant 6 must at the date of Ex. 3 have been aware of the encumbrance, it is unlikely that she would have parted with the full value of the property except on an assurance that the property purchased by her should be released from the security. It is not unreasonable to infer that it was at her instance that the mortgagor must have taken possession of the title deeds from the plaintiff promising to give him the sale proceeds of the property. If this is a correct inference, defendant 6 might legitimately claim that the plaintiff is no longer entitled to hold this property liable for the charge under Ex. C. The principle of the decision in 68 M L J 91[4] clearly supports that position. No difficulty about registration arises in this case, because there is no document of release; nor is there any problem under S. 92 (4), Evidence Act, because, in the circumstances, the mortgagor must be taken to have acted on behalf of the intending purchaser. The memorandum of objections must therefore be allowed and the properties covered by Ex. 3, must also be released from the decree for sale. The

4. Munusami Mudaliar v. Govindaraja Chettiar, A I R 1935 Mad 113=153 I C 668=58 Mad 371=68 M L J 91.

plaintiff will pay the costs of defendant 6 both here and in the Court below.

C.R.K./M.D. *Appeal allowed.*

A. I. R. 1937 Madras 200

VENKATARAMANA RAO, J.

S. M. A. M. S. Meyyappa Chettiar—Appellant.

v.

Seethachi Achi and *others*—Opposite Parties.

Appeal No. 261 of 1934, Decided on 2nd September 1936, against order of Sub-Judge, Devakotta, D/- 19th April 1934.

(a) Civil P. C. (1908), O. 1, R. 10 and O. 22, R. 10—Application under O. 1, R. 10 to be impleaded as party—Court treating it also under O. 22, R. 10—Appeal lies against the order.

Where an application is made under O. 1, R. 10 but it is dealt with by the Court also under O. 22, R. 10, an appeal lies against the order. [P 206 C 1]

(b) Practice—Parties—Addition of parties—Party can be added to suit if there has been assignment, creation or devolution of interest within meaning of O. 22, R. 10, Civil P. C.—Interest means interest in subject matter of litigation—Words "has come or devolved" connote interest in praesenti and must be vested in applicant on date of application and not merely contingent.

In order to implead a person as a party to a suit, Court must see whether there has been an assignment, creation or devolution of interest within the meaning of O. 22, R. 10, Civil P. C. 'Interest' means interest in the subject matter of the litigation. The words "has come or devolved" connote an interest *in praesenti*. It must be vested in the applicant on the date of the application to implead him a party to the suit and not merely contingent. [P207 C 1]

(c) Practice—Parties—Addition of parties—When to be made—Guiding principle.

The underlying principle regarding the addition of parties is that there must be finality to litigation and to secure that purpose it would be incumbent upon the Court to add a party whose presence would be necessary to put an end to all the controversy in the litigation finally: *5 Mad 52*; *A I R 1929 Mad 443* and *A I R 1934 Mad 337, Rel. on*; *A I R 1926 Mad 836, Disting.* [P 207 C 1, 2]

(d) Practice — Additional issues — Court's power to frame issues is not restricted to facts existing on date of suit—It can also frame issues on events happening subsequent to institution of suit and mould relief accordingly—Fact of adjournment of suit by valid compromise brought to notice of Court—Court is bound to raise and try issue regarding it.

Ordinarily a suit must be tried on a cause of action alleged in the plaint and on the state of facts on the date of the institution of the suit. But it is not a rigid rule. The Court must take notice of subsequent events and mould relief, if necessary, according to the state of circumstances existing on the date of the decree. When a suit has been adjusted by a valid compromise and it is brought to the notice of the Court, it is bound to raise an issue in respect of the compromise and proceed to determine it: *19 Mad 100, Rel. on.* [P 207 C 2; P 208 C 1]

(e) Practice — Addition of parties—Discretion—Person not party to suit applying to be joined as party to suit, to enforce compromise between parties to suit and by which he alleged to have obtained interest in the subject matter of suit—Neither party to suit seeking to enforce compromise—It is not proper discretion to add such third person under such circumstances—Such person has remedy of suit to declare compromise binding on parties to suit.

Where a person not a party to the suit alleges that he has acquired rights under a compromise between parties to the suit and he applies for being made a party to the suit for the purpose of enforcing the compromise as he has taken by transfer interest in the subject matter of litigation, but the parties to the suit impeach the compromise itself and do not seek to enforce it, it will not be proper exercise of discretion to add such third person as party to suit, at his instance as the mere addition of such third person as party to the suit will not enable the Court to effectually and completely adjudicate the question as to compromise. Such third person has the remedy of a separate suit to declare his rights under the compromise as binding on parties to the suit. [P 208 C 1]

S. Srinivasa Aiyengar, S. Parthasarathy and *V. K. Thiruvenkatachari*—for Appellant.

Nugent Grant, V. Rajagopala Aiyar, T. V. Ramiah, T. M. Krishnaswami Aiyer and *K. S. Desikan*—for Opposite Parties.

Judgment.—This is a Civil Miscellaneous Appeal against an order refusing to make the appellant a party defendant to the suit, O. S. No. 56 of 1930, on the file of the Subordinate Judge of Devakotta. There is another connected C. M. A. No. 313 of 1934 refusing to record a compromise alleged to have been entered into between the parties to the said suit and also the appellant. There is another C. R. P., No. 1061 of 1934, arising out of the same matter permitting withdrawal of the suit by the plaintiff. These matters have been dealt with by no less than three Subordinate Judges and have come up to the High Court in some form or other and were dealt with by no less than five learned Judges of this Court. The result has been that some of the orders are not reconcilable one with the other, and when

the matters came up for final disposal it caused not a little embarrassment to the trial Judge so as to prevent him from having a correct approach to the several questions presented to him for decision. Before dealing with the contentions advanced on either side by the learned counsel it is necessary to advert briefly to the history of this litigation. There were four brothers who formed a joint family, namely Soliyappa, Arunachala, defendant 1 in O. S. No. 56 of 1930, Muthuveerappa and Ramaswami, defendant 3 in the said suit. The plaintiff is the widow of the said Muthuveerappa and the appellant in this case, Meyappa, is the son of Solayappa who died in or about 1908. The appellant had a brother Natesa alias Ramaswami who was given in adoption to defendant 1 in this case, and he is also now defendant 2 in the said suit. The family appears to have owned considerable property. Apart from immoveable properties it carried on extensive trade in Rangoon, Penang, Saigon and other places. In or about 1924 the parties became divided with the aid of arbitrators. It appears that an arrangement was entered into at that time, that having regard to the incapacity of Muthuveerappa, the properties and moneys that fell or would fall to the share of Muthuveerappa should be taken care of and managed by defendants 1 and 3, and in pursuance of the said arrangement they did really undertake that duty and have been in possession of the said properties and moneys.

The said Muthuveerappa died on 6th January 1928, and on 8th January 1928 a document came into existence from which it is evident that the management was continued by defendants 1 and 3. The document provides that an arrangement should be made for an adoption to the said Muthuveerappa. It also purports to cut off the widow with a sum of Rs. 31,000 for her maintenance. The plaintiff was apparently dissatisfied with the treatment accorded to her by defendants 1 and 3 and misunderstandings arose. It also appears that there were misunderstandings between the appellant Meyappa and defendants 1 and 3, and there were two suits filed as the result of such misunderstandings between Meyappa and defendants 1 and 3 being O. S. No. 42 of 1927 and O. S. No. 75 of 1929 on the file of the Sub-Court of Devakotta. The plaintiff was contemplating a litigation against defendants 1 and 3. Meyappa took this opportunity and offered financial assistance to her as is evident from Ex. 1 under which he agreed to finance to the extent of Rs. 20,000. With his aid the said suit, O. S. No. 56 of 1930, was launched, and it is in evidence that he engaged a law agent, one Venkatachala Aiyar, to assist her in the conduct of the litigation. He also engaged one Mr. V. S. Lakshmi Narayana Ayyar as Vakil and it is also in evidence that he was giving instructions on her behalf. In the suit filed by the plaintiff she prayed for an account of the management by defendants 1 and 3 and for delivery to her of all the documents, securities, title deeds and moneys in their possession. According to her a very large amount would be due and owing by defendants 1 and 3 to the extent of about 20 lakhs. In the plaint she stated that her husband had given her authority to adopt. The defence was a denial of this authority and that the plaintiff had no right or claim in regard to her husband's estate in view of the fact that she had also received a sum of Rs. 31,000 in full quittance of her claims. The suit was filed in or about April 1930 and issues were settled on 6th September 1930. It does not appear how it originated but attempts at settlement of all the litigations between the parties were set on foot in or about March 1931. It was obviously to the interests of defendants 1 and 3 to have not only O. S. No. 56 of 1930, the suit filed by the plaintiff, but also two other suits pending between them and Meyappa should be settled.

There seems to be no doubt that the object of defendants 1 and 3 was to somehow get at the estate of Muthuveerappa and not to let it go into the plaintiff's hands. It may also be presumed that Meyappa was anxious to have not only the litigations which he was involved in settled but also to get some share of Muthuveerappa's estate. It is also evident, Meyappa being the next reversioner in degree to defendants 1 and 3, any arrangement entered into by defendants 1 and 3 in regard to the estate may be attacked by Meyappa when the succession really opened and the participation of Meyappa in any such settlement to be arrived at in regard to the estate would have been thought of by the parties; and further Meyappa actively helped the plaintiff, and in view of the fact that the deed between

Meyappa and the plaintiff provides that no compromise should be entered into in the said suit O. S. No. 56 of 1930 without the consent of Meyappa, Meyappa would be a necessary party to be consulted in regard to any compromise that may be arrived at between the plaintiff and defendants 1 and 3 in the said suit. Rajah Sir Annamalai Chetti being the most influential member of the community to which the parties belong was naturally looked up to as the person with whose aid and intervention the matters in dispute between the parties may be adjusted. Thus we find about the end of March 1931 the parties assembling in the house of Raja Sir Annamalai and discussing the ways and means of a settlement of the various litigations between the parties. The undisputed facts are that all the parties to the suit, the appellant and the Vakils of respective parties were present in Rajah Sir Annamalai's house in or about March 1931; some draft of a compromise was also made; it does not appear by whom it was prepared; it is also in evidence that the draft was seen by Sir Alladi Krishnaswamy Iyer, the Advocate-General, and also by Mr. K. V. Ramaswami Iyer of Madura, but that draft is not forthcoming.

It is not possible to know what the terms embodied therein are. It is also not disputed that again on 16th April 1931 there was a meeting of the parties in the house of Rajah Sir Annamalai in Kanadukathan, that on that day the defendant, the appellant, Vakil Lakshminarayana Aiyar, O. A. P. Arunachalam Chetty and the Rajah were all present. On that day certain documents came into existence, a deed of compromise, Ex. A in the case, and a petition, Ex. B, and an affidavit in support thereof to enable the appellant to be a party to the suit. The affidavit was sworn before the Rajah Sir Annamalai. The said compromise was signed by the appellant and also by defendants 1 and 3 and their signatures appear to have been attested on the said date. Similarly the petition, Ex. B, also appears to have been signed by both the appellant and defendants 1 and 3 on the said date. Originally the case was, the plaintiff also signed on the 16th and the appellant swore falsely in chief examination in regard thereto but subsequently gave it up. And it is a fact that her thumb impression was taken only on the next day, the 17th. It is also in evidence that on that date the Rajah was not in the village but came away to Madras, and when the thumb impression was taken nobody on her behalf was present except Venkatachala Aiyer. Both the razinamah and the petition to make the appellant a party ultimately reached the hands of the Rajah and remained with him until 20th January 1931 when, by the direction of the Rajah, the papers were handed over to the appellant. The appellant immediately filed two applications: one to make him a party to the suit and another to record the compromise and pass a decree in accordance therewith. The former petition was numbered as I. A. No. 673 of 1931, the latter petition was numbered as 674 of 1931. The applications were opposed both by the plaintiff and defendants 1 and 3. The case of the plaintiff as set out in her counter-affidavit is that given in para. 5:

> I was told that the Kumbabhisbekam of the temple at Virkadi in which the family of the parties was interested had to be performed and for that defendants 1 and 3 and the applicant had to co-operate and for that purpose my mark had to be taken to a paper which contained some arrangement between them. I was requested to affix my thumb impression to a paper that was placed before me by the applicant. Relying on the express assurance that nothing would be done without the consent of my aforesaid relatives and without knowing anything about the contents of the paper to which I was asked to affix my thumb impression I made my thumb impression and then the paper was left with Kumara Rajah M. A. Muthiah Chettiar. The paper was not read over to me nor were its contents translated or explained. I was not informed of its terms, purport or import; and I was absolutely kept in the dark about its contents. Further I was told that the paper would be left with Rajah Sir M. A. Annamalai Chettiar and his son, the said Muthiah Chettiar, pending final settlement between the parties and the obtaining of the consent of my aforesaid relatives. I had no independent advice in the matter and I never assented to the giving up of my right to make an adoption. I never consented to the partition of my husband's estate.

The case of defendants 1 and 3 is quite different. They had not repudiated the terms of the compromise in so far as the plaintiff was concerned. But they allege that there was no final compromise in that the arrangement should only form part of other arrangements still remaining to be effected between themselves and the appellant, that not only this rajinamah and the petition to make the appellant a party were brought into existence on that date, but there was also a letter of reference executed on the same date, 16th April 1931, in and by which the matters in dispute in

O. S. No. 42 of 1927 and O. S. No. 75 of 1929 were referred to the arbitration of Rajah Sir Annamalai Chetty, one Murugappa Chetty and another Arunachalam Chetty, that the present compromise would not be said to be operative till those outstanding matters are also settled by arbitrators and that those papers were left with Sir Annamalai only on the said condition but somehow by misrepresentation the appellant got the papers from him and filed the same into Court. The plaintiff and defendants 1 and 3 have also taken the legal pleas that as the appellant was a stranger to the suit he has no *locus standi* to present either of the petitions and he can neither be made a party to the suit nor can the compromise be enforced at his instance. On 26th September 1931 the then Additional Subordinate Judge, Mr. R. Rangaswami Iyengar, first dealt with both the applications. He was inclined to the view that before a suit is terminated by a decree that question whether a suit has been lawfully adjusted in part or in whole by an agreement outside the Court will be a matter in controversy in the suit, and if third parties are involved in such an agreement it would be unjust to decide on the question of the truth and validity of the compromise in the absence of such a third party and the third party should be added so that the Court may be enabled to adjudicate effectively and once for all on the questions raised relating to the compromise. He accordingly declined to reject the petition *in limine* and directed that the evidence should be gone into, and proposed to deal with both the applications together.

Against this order a revision petition was filed being C. R. P. No. 1514 of 1931, and Madhavan Nair, J. dismissed this application holding that he cannot interfere at that stage as no final order was passed by the learned Subordinate Judge and it would be open to the parties to bring up the order in revision after he passed a final order after taking the necessary evidence. It may be stated that the evidence of the plaintiff was taken on commission between 11th September and 25th September 1932 and after the return of the commission both the petitions were taken up for hearing. The then Subordinate Judge, Mr. Parthasarathy Iyengar, made an order in and by which he directed that the plaintiff must adduce evidence first and then defendants 1, 3 and 4. In pursuance of that order I find R. Ws. 2 and 3 were examined and evidence of defendant 3 as R. W. 4 was taken in part. Against this direction by the learned Subordinate Judge while the case was proceeding, a revision petition was filed in the High Court being C. R. P. No. 1440 of 1932. Krishnan Pandalai, J. stayed proceedings of the lower Court and the said C. R. P. was taken up for hearing on 27th October 1932, and by his order bearing the said date he dismissed the C. R. P. but gave certain directions in regard to the conduct of the suit. He was of opinion that the two matters namely that covered by I. A. No. 673 of 1931 and that covered by I. A. No. 674 of 1932 must be separately dealt with and decided each on its own merits and in regard to both he made the following observation :

> The petition to implead Meyyappa Chetty must be disposed of first on its own merits in which one of the matters to be considered will be whether the parties have freely and genuinely agreed to that course. The matter of the compromise, which involves first of all the fact of a valid and complete agreement free from such faults and taints as are alleged against it, and second its legal validity even if an agreement is proved are matters that will arise only if and after the party petition is allowed. For none of the parties on the record have put forward any compromise, and unless Meyyappa Chettiar is added it is difficult to see how a stranger to the record can enforce a compromise of a pending suit except of course by separate suit.

In my opinion this order, with great respect to the learned Judge, has caused not a little difficulty, uncertainty and confusion in the further conduct of the litigation. While taking the view that the two matters must be separately dealt with, in regard to the petition to implead a party the learned Judge directs that one of the matters to be considered should be "whether the parties have freely and genuinely agreed to that course." The petition to add a party to the suit, it will be seen, is one of the terms of the deed of compromise itself and was part and parcel of the same transaction as the compromise. It is not possible to comprehend how the two matters can be dissociated one from the other and how the question "if the parties have freely and genuinely agreed to that course" could be investigated without going into the truth and validity of the compromise. Again it is difficult to understand the observation of the learned Judge "how a stranger to the record can enforce a compromise except of course by

this order the C. M. A. has been preferred. A preliminary objection has been taken by Mr. T. M. Krishnaswami Iyer appearing on behalf of defendant 3 that no appeal lies on the ground that the appellant had filed the application in the lower Court under O. 1, R. 10, and no appeal lies against an order made under that section. Mr. Sreenivasa Iyengar contends the learned Judge also dealt with the application under O. 22, R. 10 and he filed both a C. M. A. and a C. R. P. When both the matters came on for admission before Burn, J. he admitted the C. M. A. taking the view that an appeal lay and dismissed the C. R. P. on the ground that in view of the fact that an appeal lies no revision can lie. It would have been better if the learned Judge had kept both of them on the file, but as it is, there is only the appeal before me. Mr. Sreenivasa Iyengar stated that he would argue this appeal on the footing that the application is sustainable under O. 22, R. 10 but should he fail to convince me in regard to that he would request that the appeal may be treated as a revision petition against an order made under O. 1, R. 10 and that he would satisfy me that the application made by his client is sustainable also under the said rule. It seems to me, on reading the judgment of the lower Court, the learned Judge, though he purported to deal with the application under O. 1, R. 10, still he proceeded to treat the application as having been made also under O. 22, R. 10. I will first deal with the matter on that footing. It seems to me that when the learned Judge took up the matter for final hearing he was bound to have followed either the course indicated by Krishnan Pandalai, J. or that indicated by Sundaram Chetty, J. I do realize that in following the course indicated by Krishnan Pandalai, J., one is naturally placed in considerable difficulty in following the directions indicated by that learned Judge.

The learned Subordinate Judge has followed neither the one nor the other. In doing so I am inclined to agree with Mr. Sreenivasa Iyengar considerable prejudice has been caused to his client in regard to the finding relating to fraud and coercion and the incomplete nature of the agreement arrived at by the learned Judge. The learned Judge having elected to deal with the matter under O. 22, R. 10 and proceeded to inquire into the question whether there was a binding compromise and whether it was arrived at by the plaintiff as a free agent having independent advice free from undue influence or coercion, it was his bounden duty to have intimated to the parties and called on them to let in all the evidence they can relating to this matter. When the learned Judge proceeded to deal with the matter the state of the record was this: The evidence on behalf of the plaintiff was taken in regard to both the petitions but before the evidence was concluded there was a direction by the High Court that both the matters must be dealt with compartmentally. It was on this footing that the evidence of defendant 3 was expunged from the record. The plea of the plaintiff, if closely analysed, is a two-fold one: (1) a plea of *non est factum*, that is, that she affixed her signature to Exs. A and B believing that it dealt with a matter relating to Kumbabhishekam and not that it purported to be an arrangement relating to compromise, and (2) that she had no independent advice in the matter and that she was led to sign the document which she did under fraud, misrepresentation and coercion. As to the plea of *non est factum*, so far as I can gather from the judgment of the learned Subordinate Judge, it has not been found in favour of the plaintiff though he specifically does not deal with it.

In one portion of the judgment he contents himself with the remark: "It is doubtful if it is wholly true." But in regard to the other questions though the learned Judge has found in her favour, on the present state of the evidence having regard to the course the proceedings took, it will be difficult to sustain the findings. Relevant evidence has not been let in. In my opinion the evidence of disinterested persons like Rajah Sir Annamalai Chetty, K. V. Ramaswami Iyer, V. S. Lakshminarayana Iyer, will be very material in arriving at the truth of the pleas raised by the plaintiff and defendants 1 and 3 as to the legality and validity of this compromise. Their evidence would be absolutely material and one or the other of the parties would have let in the said evidence if the parties understood that a finding as to these matters will be given. But as it is the parties must be deemed to have been misled, no doubt partly owing to the conflicting orders which led the Court and the parties to

believe that such evidence will not be taken in the party petition which was being enquired into first. Therefore the findings in regard thereto must be set aside. I should have been disposed to remand this matter for necessary evidence being taken had it not been for the fact that I am not allowing this party petition on the other grounds.

Apart from any question as to the truth or validity of the compromise, the question is whether the appellant fulfills the requisites required under O. 22, R. 10 in order to enable the Court to implead him as a party to the suit. Has there been an assignment, creation or devolution of interest within the meaning of R. 10 ? "Interest" means interest in the subject matter of the litigation. The words "has come or devolved" connote interest *in præsenti*. It must be vested in the applicant on the date of the application to implead him a party to the suit and not merely contingent. On a careful reading of the compromise I am of opinion that there was no transfer of any interest in favour of the appellant in the estate which was the subject matter of the said suit and compromise. So far as defendants 1 and 3 are concerned, it may be that the deed was intended to operate as a present surrender of the estate and a consequent vesting thereof in defendants 1 and 3. But so far as the appellant is concerned, it is only an agreement to convey one-third of the estate which was vested in them. No doubt under Cl. 8 in regard to the properties which were allotted to the plaintiff there was a contingent interest created in favour of the appellant. But in my opinion that would not be enough to enable the plaintiff (appellant ?) to come on record because no interest has come to or devolved on the plaintiff (appellant ?) within the meaning of O. 22, R. 10. Therefore if the application of the appellant is viewed purely as one under O. 22, R. 10, it is unsustainable. The next question is whether under O. 1, R. 10 the applicant will be entitled to ask the Court to make him a party thereto. Under the said rules before the Court can exercise its discretion the presence of a party must be felt by the Court to be necessary to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit. The words "all the questions involved" in the rule have been variously interpreted. In 50 Mad 34,[1] Srinivasa Iyengar, J. was inclined to think that it only relates to questions between the parties to the litigation, but a different view was taken in 5 Mad 52.[2] There Turner, C. J. observed :

> To accept the more restricted interpretation involves the addition of words which we do not find in the section, namely, between the parties to the suit, and there can be few if any questions which cannot be determined between the parties to the suit one way or the other, and of which the determination, if they be material, will, as between the parties to the suit, not be final. On the other hand, the interpretation warranted by the terms would enable the Court to avoid conflicting decisions on the same question which would work injustice to a party to the suit, and finally and effectually to put an end to litigation respecting them.

The underlying principle regarding the addition of parties is that there must be finality to litigation, and to secure that purpose it would be incumbent upon the Court to add a party whose presence would be necessary to put an end to all the controversy in the litigation finally. This is the view taken by a Division Bench of this Court in 57 Mad 892,[3] in this very case where Sundaram Chettiar, J. relying on 5 Mad 52[2] observed :

> If there is a question common to the parties on record and a stranger, as regards the subject matter of the suit or any portion thereof, it should be tried once for all by allowing the stranger to be made a party.

This is also the view taken by Venkatasubba Rao, J. in A I R 1929 Mad 443.[4] This in my view would be the correct interpretation of the rule. Now, is the question whether a suit has been terminated by a valid compromise a question involved in the suit ? Ordinarily a suit must be tried on a cause of action alleged in the plaint and on the state of facts on the date of the institution of the suit. Viewed from that standpoint it cannot be said that whether a suit has been terminated by a compromise subsequent to the institution of the suit is a question involved in the suit. But it seems to me that it would be taking a narrow view of the rule. Further it is not a rigid rule that a suit

1. Vaithalinga Pandara Sannidhi v. Sadasiva Iyer, A I R 1926 Mad 836=95 I C 214=50 Mad 34=51 M L J 148.
2. Vaidhyanadayya v. Sitaramayya, (1878-80) 5 Mad 52.
3. Seethai Achi v. Meyyappa Chettiar, A I R 1934 Mad 337=150 I C 582=57 Mad 892=66 M L J 517.
4. Secy. of State v. Murugesa Mudaliar, A I R 1929 Mad 443=118 I C 780=29 M L W 753 =1929 M W N 67.

must be tried only on the state of facts existing on the date of the suit. The Court very often has to take notice of events which happened subsequent to the institution of the suit and mould relief according to the state of circumstances existing on the date of the decree. When a suit has been adjusted by a valid compromise and it is brought to the notice of the Court, as has been held in 19 Mad 100,[5] the Court is bound to raise an issue whether the suit has been adjusted by a valid compromise and proceed to determine it. In that case the learned Judges, Collins, C. J. and Benson, J., observed thus :

> When the defendants alleged a compromise for consideration in the course of the suit and the plaintiffs denied it, an issue arose between them and the District Munsif was right to record it and determine it, so as to enable him to deal with the suit under S. 375, Civil P. C.

By reason of subsequent events the issue as to compromise has become a question involved in the suit. If in regard to that matter in the opinion of the Court the presence of a third party would be necessary to enable it to effectually and completely adjudicate that issue it is open to the Court to do so. Viewed even on that footing it would be difficult to maintain that the mere addition of the appellant would enable the Court to effectually and completely adjudicate the question as to compromise. The Court cannot forget to notice the fact that the plaintiff had made an adoption before the compromise was made a decree of the Court. When the compromise itself is impeached on one ground or other by either party to the litigation and none of the parties seeks to enforce it, I do not think it would be a proper exercise of discretion at the instance of a third party who alleges that he has acquired rights thereunder to make him a party for the purpose of enforcing the compromise especially in the view I have taken that there is no transfer of any interest in the subject matter of the litigation in his favour. The matters relating thereto can and ought to be properly determined in a suit. Further I find a suit has been instituted by the appellant for a declaration that the compromise is binding on all the parties to the said suit and wherein the adopted son is also a party and the necessary issues have been framed thereunder. Mr. T. M. Krishnaswami Iyer on behalf of defendants 2 and 3 has also intimated to me that in regard to none of the issues raised in the said suit his clients would press the plea of res judicata. As therefore all the questions relating to the compromise will be gone into in the suit and the appellant's rights thereunder will be declared, I am not inclined to accede to the request of Mr. Sreenivasa Iyengar to implead his client as a party defendant under O. 1, R. 10, Civil P. C. In the result the Civil Miscellaneous Appeal fails and is dismissed with costs.

C.R.K./K.B. *Appeal dismissed.*

5. Vijayanagram Maharajah v. Sitarama Raju, (1896) 19 Mad 100.

A. I. R. 1937 Madras 208

PANDRANG ROW, J.

In re *Pattanathan* — Accused — Petitioner.

Criminal Revn. No. 384 and Petn. No. 355 of 1936, Decided on 9th November 1936, from order of Sub-Divisional First Class Magistrate, Cuddallore, in C. A. No. 3 of 1936.

Sea Customs Act (1878), S. 167 (78)—Obstruction—Failure to stop when asked to stop by custom officer is not obstruction within meaning of section 167 (78) — Obstruction implies actual resistance.

Mere evasion or disobedience to a lawful order is not an obstruction to the officer who issues the order. Obstruction implies some actual resistance offered to the public servant in the discharge of his duties. [P 209 C 1]

A person who was riding the bicycle was asked to stop by some customs peons who were stationed on the road to watch and arrest smugglers. The person did not stop but rode fast. The person was convicted of an offence under S. 167 (78):

Held : that the mere failure to stop when asked to stop by the customs officer was not obstruction within meaning of S. 167 (78). [P 209 C 1]

T. E. Ramabhadrachari and *K. Rama Ayyangar*—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner in this case has been convicted of an offence punishable under S. 167, Cl. 78 of Sea Customs Act (8 of 1878), according to which the offence is defined as follows :

> If any person intentionally obstructs any officer of customs or other person duly employed for the prevention of smuggling, in the exercise of any powers given under this Act to such officer or person, ...

The sentence imposed on the petitioner was modified in appeal into one directing him to execute a bond for his good behaviour for one year. The only question

that is argued in this petition, and that is an important question, is whether the facts as alleged and proved by the prosecution constitute the offence in question, or to put it more clearly whether the facts constitute obstruction. The facts are briefly as follows: Two customs peons who were stationed on a road to watch and arrest smugglers who were expected to pass along the road saw a bicycle being driven very fast along the road and they shouted that they were customs men and wanted to search. In spite of this the cycle was ridden fast along a side track and did not stop. It is alleged that this non-stopping of the cycle of which the petitioner was the rider constitutes obstruction to the Customs Officer. It is not alleged that anything else was done by the petitioner which constitutes obstruction. The point therefore for decision is whether failure to stop when asked to stop by Customs Officer who has the right to stop suspected smugglers is an obstruction to the Customs Officer. I have no doubt that this question has to be answered in the negative. Mere evasion or disobedience to a lawful order is not an obstruction to the officer who issues the order. Obstruction implies some actual resistance offered to the public servant in the discharge of his duties. Obstruction is under certain circumstances an offence under S. 186 and under certain other circumstances an offence under S. 225. I have been referred to two decisions relating to each of the two offences, namely 15 Mad 221[1] and 38 All 506.[2] In my opinion reference to authorities is hardly required in dealing with a simple point like this. It seems to me hardly arguable that when a man runs away when asked to stop, he is obstructing the man who asked him to stop. It follows therefore that the facts alleged and proved in this case do not constitute the offence of which the petitioner has been convicted. The conviction of the petitioner must therefore be set aside. The direction to the petitioner to execute a bond for his good behaviour for one year is set aside and that bond is cancelled and the petitioner is acquitted.

C.R.K./S.C. *Conviction set aside.*

1. Queen Empress v. Somanna, (1892) 15 Mad 221=2 M L J 120=1 Weir 133.
2. Emperor v. Aijaz Hussain, A I R 1916 All 53 =35 I C 973=17 Cr L J 413=38 All 506=14 A L J 731.

A. I. R. 1937 Madras 209

MOCKETT, J.

In re *Elukuri Seshapani Chetti* — Petitioner.

Criminal Revn. No. 220 and Petn. No. 202 of 1936, Decided on 16-10-1936.

(a) Penal Code (1860), S. 266—Essentials of.

For a conviction under S. 266, the person in possession of false weight must be proved to be aware of the false nature of the weight and that he intended to use it. [P 210 C 1]

(b) Criminal Trial—Essential ingredient of offence should be proved by prosecution evidence itself—Admission in accused's statement should not be used to fill up this gap.

The essential ingredients of an offence should be proved by the prosecution at the stage when the evidence for the prosecution is called. The prosecution cannot seek to use an admission in the accused's statement to fill up the gap in the prosecution evidence which the prosecution themselves had not proved : *27 Mad 238, Rel. on.* [P 210 C 1]

(c) Criminal Trial—Confession— Statement to police when amounts to confession and when an admission — Test of admissibility explained.

A useful test as to the admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution rely on the statements of the accused to the police as being true, then they may, probably in many cases will, be found to amount to confessions. If, on the other hand, the statements of the accused are relied on not because of their truth but because of their falsity, they are admissible as admissions : *A I R 1915 Cal 256, Foll.* [P 210 C 2]

(d) Criminal Trial—Confession to police—Confession of one crime during investigation of another—Confession is inadmissible.

The whole spirit of S. 25, Evidence Act, is to exclude confessions to the police and the moment a statement is found to amount to a confession, it matters not in the slightest of what crime it is said to be a confession. Hence a confession made to the police in the course of investigating crime *A* although it relates to another crime *B* is equally inadmissible: *A I R 1932 Mad 24, Rel. on.* [P 210 C 2]

Nugent Grant and *K. Srinivasa Rao* —for Petitioner.

A. Narasimha Iyer—for the Crown.

Order.—The petitioner has been convicted under S. 266, I. P. C., for being in possession of a false weight knowing it to be false. The facts are slightly unusual. It appears that the police were investigating in Kurnool a case relating to the receipt of stolen goods. In the course of that investigation they went to the shop of the petitioner who is a shroff. They did not find any stolen goods but the cupboard was not wholly bare. In a tin which I think may be said to be in the

possession of the petitioner was found a rupee which has been produced. While having the appearance of a single rupee it is in fact two sides of two rupees joined together and it weighs more than an ordinary rupee. In order to convict the petitioner the prosecution were bound to prove the possession of a false rupee known to be false and intended to be fraudulently used. They proved it as follows : Before the Magistrate the prosecution called as their principal witness the police officer who went to the petitioner's shop. He stated as follows : I have not the evidence before me but I am told that the evidence given corresponds to what was stated in the complaint :

> I questioned him (petitioner) as to what the tin kept by his side contained and the accused told me that it contained rupees and other coins for his use in weighing the silver and gold purchased or sold by him. I opened the tin and found only the coins used for weighing as stated by the accused (including the rupee).

That and the production of the rupee were all the evidence against the petitioner at the stage when the evidence for the prosecution had been called and I think it is clear that at that stage the Magistrate should have dismissed the case because the all important ingredient viz., that the petitioner knew the rupee to be false was not present. But the petitioner put in a statement in which he stated that two days before the police officer came to his shop the rupee had come into his hands and he knew it to be false. This statement was used to fill up the gap in the prosecution evidence which the prosecution themselves had not proved. With regard to this I have been referred to the decision of Sir Arnold White, C. J. in 27 Mad 238.[1] In that case at the close of the case for the prosecution the all important element viz., the publication of a defamatory statement had not been proved and was sought to be proved because an admission of it was contained in the accused's statement under S. 342, Criminal P. C. That is a case exactly in point and I think on that ground this criminal revision case should succeed. It is quite clear that at the close of the evidence for the prosecution proof of 'scienter' was lacking, an essential ingredient, and the accused should have been discharged. Instead as in 27 Mad 238[1] the evidence was supplied by questioning him. But there is another ground to which I attach far greater importance. There is no doubt in my judgment that the statement made by the accused to the police officer should not have been admitted in evidence because it is clearly a confession. The accused told him, he says, that the tin contained rupees and other coins for his use in weighing the silver and gold purchased or sold by him. The moment one of these is shown to be false it seems to me that that is a confession and not as the Public Prosecutor has argued a mere statement of fact. I respectfully agree with the statement as to what is a good test whether a communication to the police is a confession or a mere statement of fact contained in 41 Cal 601[2] at p. 612. The learned Judges after distinguishing between admissions of fact and confessions of guilt go on to say :

> In fact a useful test as to the admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution rely on the statements of the accused to the police as being true, then they may, and probably in many cases will, be found to amount to confessions. If, on the other hand, as in the case of the statements to which we have just referred, the statements of the accused are relied on not because of their truth but because of their falsity, they are admissible as admissions.

In my judgment this is clearly a confession as I have already said and as has been pointed out by Jackson, J. in A I R 1932 Mad 24,[3] a confession made to the police in the course of investigating crime *A* although it relates to another crime *B* is equally inadmissible. The whole spirit of S. 25, Evidence Act, is to exclude confessions to the police and the moment a statement is found to amount to a confession I do not think it matters in the slightest of what crime it is said to be a confession. A consideration of this case shows that this conviction rests on : (1) a statement by the accused at a stage when there was no *prima facie* case against him; and (2) a confession to a police officer. By reason of these, the grave infirmities in the prosecution case, I am constrained to allow this criminal revision case. The conviction and sentence are set aside and the fine, if collected, will be refunded.

C.R.K./B.D. *Revision allowed.*

1. Mohideen Abdul Kadir v. Emperor, (1904) 27 Mad 238=2 Weir 408.

2. Emperor v. Kangal Mali, A I R 1915 Cal 256=26 I C 161=15 Cr L J 713=41 Cal 601.

3. Kodangi v. Emperor, A I R 1932 Mad 24=1932 Cr C 4=135 I C 590=33 Cr L J 173=61 M L J 860.

A. I. R. 1937 Madras 211

CORNISH, J.

Lanka Venkaya—Petitioner.

v.

Sree Meerza Raja, Sree Pooshavati Alaka Narayana Gajapati Raju Maharaju Manya Sultan Bahadur Varu, Zamindar of Vizianagaram and *another*—Opposite Parties.

Civil Revn. No. 1104 of 1933, Decided on 14th September 1936, from decree of Dist. Munsif, Rajam, D/- 5th December 1932.

Jurisdiction—Civil and Revenue Courts—Suit by landlord to recover expenses of distress for arrears of rent—Matter exclusively cognizable by Collector under Madras Estates Land Act—District Munsif exercising original civil jurisdiction has no jurisdiction to entertain suit.

In matters where the jurisdiction has been expressly given to the Revenue Court to the exclusion of the civil Court, the civil Court has no power to adjudicate. The determination of the amount of distress expenses, which the distrainer is entitled to recover against his tenant, is, under the Madras Estates Land Act, a question entirely within the jurisdiction of the Revenue Court. Therefore the District Munsif in exercise of original civil jurisdiction has no jurisdiction to entertain landlord's suit in respect of expenses of distress for arrears of rent. [P 212 C 1]

B. Jagannatha Das—for Petitioner.

S. Venkatesa Iyengar — for Opposite Parties.

Order.—The petitioner in this Civil Revision Petition is defendant 1 in the suit brought by the landlord against him and defendant 2. The suit was to recover a sum of Rs. 204 odd, being the balance of expenses of distress levied by the landlord upon the moveable property of defendant 1. In that suit defendant 1 was ex parte and defendant 2 was exonerated. The result was that a decree was passed ex parte against defendant 1 for a sum of Rs. 204 representing the landlord's claim for expenses of the distraint. The facts were that defendant 1 was a raiyat of the plaintiff, and having fallen into arrears with his rent to the extent of Rs. 48, his landlord exercised the right of distraint under S. 77 (ii), Madras Estates Land Act, and distrained a cart and a cow belonging to defendant 1. For some reason which does not appear, although the distraint was made in July 1931, the sale did not take place till November. At the time of the sale the landlord exhibited to the sale officer particulars of expenses incurred by him in keeping the cow. The expenses amounted to a sum of Rs. 289, whereas the cow with the cart at the sale only realized a sum of Rs. 32. After deducting the expenses of the sale the balance was handed over by the sale officer to the plaintiff.

The question which is raised in this Civil Revision Petition is whether the Court of the District Munsif exercising Original Civil Jurisdiction had jurisdiction to entertain the landlord's claim. There is no doubt that the claim was one which was recoverable under the procedure laid down by the Estates Land Act. If the only means of recovering these expenses were the means provided by the Estates Land Act, clearly the District Munsif in the exercise of his original civil jurisdiction had no jurisdiction to entertain and adjudicate upon this suit. A landlord under S. 77 of the Act may recover arrears of rent either by means of a suit before the Collector or he may, upon his own responsibility, distrain the moveable property of the defaulting raiyat. This responsibility is very real; for S. 81 provides that the distress shall not be excessive and that the value of the property distrained must as nearly as possible be equal to the amount of the arrears due and the costs of the distress. S. 86 provides that in the case of the distraint of cattle the distrainer shall provide necessary food for the cattle, and the cost thereof shall be a charge against the defaulting raiyat and shall be recoverable as a cost of the distress. And under S. 88 the distrainer will be liable for damages if the property distrained is by his negligence stolen, damaged or destroyed. It seems to me that the possibility of the distress yielding less than the expenses of the distraint is also a risk which the distrainer undertakes when he levies a distress.

Section 106 contains the provisions for recovery of the expenses of a distraint. It provides first of all that from the proceeds of every sale of the distrained property the sale officer shall make a deduction on account of the costs of the sale; and that he shall pay to the distrainer the expenses incurred on account of the distraint including the expenses, which under S. 86, the distrainer is entitled to recover as the cost of the distress. The remainder shall be applied to the discharge of the arrear for which the distraint was made; and

then, should it happen that any balance remains from the sale proceeds, that balance is to be paid to the defaulter. It is admitted that apart from the Act a landlord levying a distress has no right to charge against the defaulting tenant the expenses of the distraint. The distrainer is not a bailee of the property which he takes under a distraint. He has therefore none of the rights of a bailee. The rights to distrain and the remedy for recovering the expenses of the distress are alike the creatures of the Act. There is no right to recover the expenses of a distress except in the manner provided by the Act. This is made quite clear by S. 189 which says :

> A Collector or other Revenue Officer specially authorized under this Act shall hear and determine as a Revenue Court all suits and applications of the nature specified in parts *A* and *B* of the Schedule, and no civil Court in the exercise of its Original Jurisdiction shall take cognizance of any dispute or matter in respect of which such suit or application might be brought or made.

Schedule B includes an application to be made under S. 106 (5) for the determination of distress expenses, and this application has to be made within three months from the date of the sale officer's decision. The whole policy of the Act is that in respect of any suit or application of the nature of those specified in the two Schedules the jurisdiction of the civil Court is expressly excluded. It seems to me, therefore, to follow that in matters where the jurisdiction has been expressly given to the revenue Court to the exclusion of the civil Court, the civil Court has no power to adjudicate. Being of opinion that the determination of the amount of distress expenses which the distrainer was entitled to recover against his tenant is a question entirely within the jurisdiction of the revenue Court, I must hold that the action of the District Munsif in entertaining the present suit was without jurisdiction. The result is that the petition is allowed and the decree of the District Munsif set aside. I think that as defendant 1 failed to appear in the trial Court and raise the question of jurisdiction the petition should be allowed without costs.

C.R.K./P.R. *Petition allowed.*

A. I. R. 1937 Madras 212

CORNISH, J.

Secretary of State—Appellant.

v.

Alex Pinto and *others*—Respondents.

Second Appeal No. 89 of 1932, Decided on 15th February 1936, against decree of Dist. Court, South Kanara, in A. S. No. 150 of 1927.

(a) Madras Land Encroachment Act (3 of 1905), S. 2—Burden of proof—Person claiming against Government land not falling within excepted land of S. 2—Claimant must prove his possession for full statutory period—Rule applies even when his possession is attacked by Government.

The effect of S. 2, Land Encroachment Act is to throw upon the person who claims land which does not fall within the excepted property included in S. 2, by a prescriptive title against Government to prove it, and such proof will be necessary even in cases where the claimant's possession is attacked by the Government. [P 213 C 1]

The onus lies on the person claiming land against Government to prove his and his predecessor's-in-title possession for the requisite statutory period. He is not relieved of that burden by showing his possession for something less than the statutory period : *A I R 1916 P C 21* and *A I R 1932 P C 46, Rel. on.* [P 213 C 1]

(b) Madras Land Encroachment Act (3 of 1905), S. 2—Warg land—Presumption that waste land, if cultivated becomes warg land, whether can be drawn (*Quaere*).

Quaere.—There is an undoubted presumption that waste and forest lands are the property of Government. But if such lands are at any time cultivated, whether in view of the emphatic provisions of S. 2, a presumption can be drawn that they are warg lands : *28 Mad 257* and *A I R 1924 P C 150, Ref.* [P 213 C 2]

Govt. Pleader (*K. S. Krishnaswamy Ayyangar*) and *N. Srinivasa Ayyangar*—for Appellant.

B. Sitarama Rao—for Respondents.

Judgment.—The question in this appeal is whether a certain strip of land in South Kanara running between land undoubtedly the property of the plaintiff and a stream is part of the plaintiff's warg. It arises in this wise : The Government claiming the strip to be poramboke, the site of a public foot-path, took proceedings under the Land Encroachment Act 3 of 1905, to evict the plaintiff from this strip. Therefore the plaintiff brought his suit for a declaration that the strip belonged to him in warg right. The plaintiff alleged that he and his predecessors-in-title had been in possession of the suit land for more than the statutory period of 60 years. It has been found by both Courts that the plaintiff has

not been able to prove a title to the disputed strip. But the lower appellate Court, having found that plaintiff has been in possession between 30 and 40 years, has held that the presumption may be drawn in his favour of having been in possession for the full statutory period. I think there is no doubt that this conclusion cannot be justified. It rests upon the decision of this Court in 33 Mad 1,[1] which was expressly negatived by the Privy Council in 39 Mad 617,[2] where their Lordships said:

Nothing is better settled than that the onus of establishing title to property by reason of possession for a requisite period lies on the person asserting such possession.

Therefore the onus was on the plaintiff who asserted a title by possession for 60 years to prove it; and he was not relieved of that burden of proof by showing a possession for something less than the prescribed period. But apart from this, there is the Land Encroachment Act of 1905, S. 2 which declares (inter alia) "all standing and flowing water, and all lands, wherever situated," to be the property of Government, save in so far as the same are the property of any of the persons specified in the section. The Act applies to the whole of the Presidency. Its effect is to throw upon the person who claims lands other than lands falling within the excepted property included in S. 2, by a prescriptive title against Government to prove it. "That Act" said their Lordships of the Judicial Committee in 55 Mad 268,[3]

with its general and sweeping enactments has certainly the effect that in future, when there is a contest as to the right of water, the opponent of the Government will be put to prove his title. He will not be able, as he otherwise would have been when attacked by the Government, to put them to proof of his title.

It will be found that this principle is also enunciated by the learned Judges (Pakenham Walsh, Varadachariar and Pandrang Row, JJ.) who were parties to the unreported A. S. No. 453 of 1929. I may quote from Varadachariar, J.'s judgment where he says:

It may also be conceded that what is commonly spoken of as 'possessory title' founded on the mere fact of possession, cannot prevail against Government, because a possessory title can avail only against persons who are not the true owners, and under the Madras Act 3 of 1905 Government must be presumed to be the owner until a title is established in another.

Mr. Sitarama Rao, the learned advocate for the respondent-plaintiff, has sought to give an exception from this general rule of prescription in favour of land in South Kanara. He has referred to 28 Mad 257[4] and to the Privy Council ruling in 47 Mad 572,[5] where it was held that there was an undoubted presumption that waste and forest lands in South Kanara belonged to Government. He has moreover relied on a passage in 28 Mad 257[4] at p. 286, where it is said in contradistinction to this particular presumption that land which has been at any time cultivated may generally be presumed to be warg land. I doubt whether any such presumption can be drawn in view of the emphatic provision of S. 2 of Act 3 of 1905. But, however that may be, there is no evidence in this case that the suit strip was cultivated by the plaintiff. On the contrary, it appears from the lower appellate judgment that the suit strip is covered with thorny shrubs and plants which make it impassable to passengers. For these reasons I think that the plaintiff having failed to prove a prescriptive title against the Government, his suit was rightly dismissed by the trial Court. It follows that the appeal must be allowed with costs here and in the lower appellate Court. Leave refused.

C.R.K./W.D. *Appeal allowed.*

1. Sri Raja Chelikani Rama Rao v. Secy. of State, (1910) 33 Mad 1=5 I C 882.
2. Secy. of State v. Chelikani Rama Rao, A I R 1916 P C 21=35 I C 902=43 I A 192=39 Mad 617 (P C).
3. Secy. of State v. Subbarayudu, A I R 1932 P C 46=136 I C 413=59 I A 56=55 Mad 268 (P C).
4. Secy. of State v. M. Krishnayya, (1905) 28 Mad 257=15 M L J 147.
5. Ambu Nayar v. Secy. of State, A I R 1924 P C 150=80 I C 835=51 I A 257=47 Mad 572 (P C).

A. I. R. 1937 Madras 213

KING, J.

Kunnumprath Payyanatan Govindan, Karnavan and Manager of the Tarwad—Appellant.

v.

J. S. DeSilva—Respondent.

Second Appeal No. 512 of 1932, Decided on 20th April 1936, against decree of Dist. Court, North Malabar, in A. S. No. 70 of 1931.

Res judicata — Applicability — *B* holding property of *A* under marupat executed by his predecessor-in-title in favour of *A* over which *A* granted melcharath—Suit both by *A* and melcharathdar for eviction of *B*—Decree

passed in favour of melcharathdar who did not execute it—*A* subsequently filing suit for eviction of *B*—Decree in previous suit held did not bar *A*'s subsequent suit.

B held certain property under a marupat executed by his predecessor-in-title in favour of *A*. *A* afterwards granted a melchrath over the same property. A suit for eviction was filed by both *A* and the melcharthdar in which a decree was passed in favour of the latter that if within three years he paid into Court the value of *B*'s improvements *B* should surrender possession of the property to him. Such payment was never made and *B* remained in possession. Subsequently a suit was filed by *A*, the jenmi, to evict *B* and the defence was that the suit was barred by reason of the previous decree in which *A* was a party:

Held: that the decree in the previous suit did not bar the suit by *A* inasmuch as the decree in the previous suit was in favour of the melcharthdar and not of *A* and *A* could not himself execute that decree and that by reason of the melcharathdar failing to execute the decree *A*, jenmi, would not lose his right to redeem: *25 Mad 300, Held overruled by A I R 1934 P C 205; A I R 1934 P C 205, Rel. on; A. A. O. No. 317 of 1916, Dissent.* [P 214 C 2]

O. T. G. Nambiar and *A. Achuthan Nambiar*—for Appellant.

B. Sitarama Rao—for Respondent.

Judgment. — This appeal relates to certain property held by the defendant under a marupat of 1889 executed by his predecessor-in-title in favour of the plaintiff. In 1913 plaintiff granted a melcharth over the same property. In 1915 a suit for eviction was filed by both plaintiff and melcharthdar in which a decree was passed in favour of the latter on 12th January 1916, that if within three years he paid into Court the value of defendant's improvements the defendant should surrender possession of the property to him. Such payment was never made and defendant remained in possession. In 1929 the present suit was filed by plaintiff, the jenmi, to evict the defendant and the main question in issue was whether this suit was barred by reason of the previous decree. The first Court held that the suit was barred, but on appeal the learned District Judge of North Malabar held that it was not, and the usual preliminary decree for payment of the value of improvements has been passed. Defendant appeals.

There is no reported authority dealing with precisely similar facts, but my attention has been drawn to the judgment in A. A. O. No. 317 of 1916 where the facts were similar and it has been held that in such circumstances the jenmi has lost his right to redeem. That judgment is based upon the facts that even though the jenmi in the former suit obtained no decree personally in his own favour he was a plaintiff and was bound by the decree. The Full Bench ruling in 25 Mad 300[1] therefore applies to him as well as to the melcharthdar, and inasmuch as the melcharthdar failed to execute his decree, the jenmi also has lost the right to redeem. It seems to me rather doubtful whether 25 Mad 300,[1] which depends upon the principle of res judicata, can be reasonably applied against a party, who, though a plaintiff in name, obtains no decree in his own favour and cannot himself execute the decree which is obtained. But it is unnecessary to discuss this point further, as the learned advocate for the respondent has quoted a recent ruling of the Privy Council reported in 56 All 561,[2] which in my opinion overrules 25 Mad 300[1] itself. It is there pointed out that the principle of res judicata does not apply to such cases and that plaintiff's right to redeem is barred only if the decree in the former suit declares it to be so. It was further contended in this appeal that plaintiff's suit was barred by limitation. Two decisions of this Court, (1913) M W N 339[3] and (1916) 2 M W N 324[4] clearly negative this argument. The appeal fails and is dismissed with costs. Leave to appeal granted.

C.R.K./R.W. *Appeal dismissed.*

1. Vedapurathi v. Vallabha Valiya Raja, (1902) 25 Mad 300=12 M L J 128 (F B).
2. Raghunath Singh v. Hansraj Kunwar, A I R 1931 P C 205=151 I C 37=61 I A 362=56 All 561 (P C).
3. Kumatha Vittil Kunji Kuthalai Haji v. Rev. Antonio Goveas, (1913) M W N 339=19 I C 563=24 M L J 472.
4. Eronna Menon v. Sankunni Menon, A I R 1918 Mad 887=38 I C 651=(1916) 2 M W N 324.

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* A. I. R. 1937 Madras 214

FULL BENCH

VARADACHARIAR, BURN AND PANDRANG ROW, JJ.

Polpakara Manakkal Viroopakshan Nambudripad—Appellant.

v.

Pulipre Tarwad Karnavan and *others*—Respondents.

Second Appeal No. 1416 of 1931, Decided on 16th November 1936, against decree of Sub-Judge, Ottapalam, in A. S. No. 136 of 1929.

*** Mortgage—Redemption—*B*, assignee of jenmi, obtaining decree for possession conditional on payment of money for improvements made by tenant—Failure of *B* to execute decree—Jenmi applying for extension of time for payment—Application rejected—Subsequent suit by jenmi for redemption of same property—Jenmi held not precluded from bringing suit even though he had applied for extension of period in previous suit by assignee.**

A suit for redemption was instituted by assignee of jenmi and a decree was passed for possession conditional on payment of certain sum of money for improvements made by tenant. The decree-holder did not care to execute the decree but jenmi made application for extension of time for payment; two applications were granted but the third one was rejected. Jenmi subsequently brought a suit for redemption of the same property:

Held: that the jenmi was not precluded from bringing second suit for redemption merely because he applied for extension of time in previous suit or because the decree for redemption obtained in a former suit had not been executed: *25 Mad 300, Held overruled by A I R 1934 P C 205; A I R 1934 P C 205, Foll.* [P 216 C 1, 2]

K. Kuttikrishna Menon—for Appellant.

K. P. Raman Menon—for Respondents.

Varadachariar, J.—This case has been posted before this Bench in consequence of a contention raised on behalf of the appellant that the decision of the Full Bench in 25 Mad 300[1] should not be followed after the decision of the Privy Council in 56 All 561.[2] The second appeal arises out of a suit instituted by a jenmi for redemption of properties in the possession of the Kanomdar. Various objections were raised, of which it is necessary to refer only to those raised by issues 1 and 3.

Issue 3 was framed with reference to what happened in O. S. No. 670 of 1923 on the file of the Ponani Munsif's Court. That suit was instituted by the assignee of a melcharthdar, who is defendant 17 in the present suit. A decree for possession was passed in that suit conditional on payment of a certain sum of money for compensation for the improvements effected by the tenant. The decree-holder, however, did not care to deposit the amount and take possession. Some months after the date of the decree, he sent a registered notice to the jenmi, which has been marked Ex. 6 in the present case, wherein he stated that the suit had been instituted by him really at the instance of the jenmi and he accordingly called upon the jenmi to take steps to deposit the compensation amount and recover possession. We are not in a position if and how far the allegations in Ex. 6 are true. It is however in evidence that the jenmi made two or three applications for extension of time to deposit the compensation amount, as he was under the impression that if he did not do so, his right might once for all be extinguished. On two occasions extension seems to have been granted, but on the third occasion his application for further extension of time was rejected by order dated 7th September 1925. No reasons have been stated for the rejection. It has been contended in the Courts below and before us, on behalf of the Kanomdars, that these proceedings taken in O. S. No. 670 of 1923 operate as a bar to the present suit on two grounds: (1) on the general principles laid down by a Full Bench of this Court in 25 Mad 300[1] and (2) in view of the special provisions in the Malabar Compensation for Tenants Improvements Act.

It has not been disputed that in the ordinary course the jenmi will not be precluded from instituting a suit merely because he was one of the defendants in a former suit instituted by the Melkanomdar for redemption of the Kanom. The Courts below recognize that the decisions in 35 Mad 42[3] and 24 M L J 534,[4] are against any such contention. But it has been argued that because the present plaintiff applied to the Court in O. S. No. 670 of 1923 for extension of time to pay the money and extension was granted on two occasions, he must be held to have put himself in the position of the plaintiff in that suit and therefore to be governed by the principle laid down in 34 M L J 167[5] and that if he had allowed his remedy by way of execution to become barred, he would not be entitled to bring a second suit. The decision in 34 M L J 167[5] was based upon the principle of 25 Mad 300[1] and on that ground dissented from the earlier decision in 29 I C 559.[6] We are unable to agree with the contention that

1. Vedapuratti v. Vallabha Valiya Raja, (1902) 25 Mad 300=12 M L J 128 (F B).
2. Raghunath Singh v Hansraj Kunwar, A I R 1934 P C 205=151 I C 37=61 I A 362=56 All 561 (P C).
3. Raman Namboodri v. Achutha Pisharodi, (1912) 35 Mad 42=14 I C 415.
4. Veerappudayam v. Muthu Karuppan Thevan, (1913) 24 M L J 534=19 I C 589.
5. Mayan Kutti v. Kunhammad, A I R 1918 Mad 370 = 44 I C 110=41 Mad 641=34 M L J 167.
6. Chowakkaran Keloth v. Karuvalote Parkum, A I R 1916 Mad 975=29 I C 559.

merely because the jenmi applied for extension of time in O. S. No. 670 of 1923, he must be precluded from maintaining a second suit. It does not appear from the record that his right to execute the decree in O. S. No. 670 of 1923 was adjudicated upon by the Court. The mere fact that he expected that if he deposited the money he might be able to take possession will not by itself suffice to create in him a disability which would not otherwise arise under the law. Nor do we think that the statements made in Ex. 6 by the plaintiff in O. S. No. 670 of 1923 can operate as a legal assignment to the jenmi of the decree obtained by the plaintiff in O. S. No. 670 of 1923. It has not been contended and Ex. 6 cannot be regarded as evidence that the melcharth itself was a benami transaction and that the jenmi was in substance and truth the plaintiff in the former litigation.

As regards the objection based upon the principle of 25 Mad 300[1] that even assuming that after a decree for redemption the relationship of mortgagor and mortgagee continues, a second suit for redemption will nevertheless not lie, it seems to us that that view can no longer be maintained in the face of the decision of the Privy Council in 56 All 561.[2] Their Lordships point out that unless as contemplated by S. 60, T. P. Act, the right of redemption has been extinguished in one of the modes contemplated by the statute, the mere fact that a decree for redemption obtained on a former occasion has not been executed, will not prevent the mortgagor from maintaining a subsequent suit for redemption. The judgments in 25 Mad 300[1] themselves refer to the conflict of judicial opinion on the point that existed prior thereto, and the view now laid down by their Lordships of the Judicial Committee seems rather to approve of the opinion which the Full Bench overruled in 25 Mad 300.[1] We are unable to agree with the contention of the learned Counsel for the respondents that because 25 Mad 300,[1] has not been in terms overruled by their Lordships, it must still be taken to be good law. So far as we can gather from the report, the Full Bench decision seems to have been cited before their Lordships. In any event the way their Lordships stated the points for consideration clearly indicates that the ground of res judicata on which the Full Bench rested their conclusion, was intended to be dealt with by their Lordships. At the top of p. 567 they observe:

> If the appellants fail to establish under their third point that the old decree extinguished the right to redeem, there is, in their Lordships' opinion, no ground for saying that the old decree operated by way of res judicata so as to prevent the Courts, under S. 11, Civil P. C., from trying the present suit.

After this expression of opinion by their Lordships, it is not possible to maintain that the ground of decision adopted by the Full Bench in 25 Mad 300[1] is any longer available. The other ground suggested in 25 Mad 300,[1] viz., the bar by *lis pendens* will not avail when by reason of the bar of limitation or from other causes relief can no longer be had by proceedings taken in the former suit. So far as the decision in 34 M L J 167[5] is based not merely on the principle of 25 Mad 300[1] but upon the special provisions of the Malabar Compensation for Tenants Improvements Act which do not contemplate a preliminary decree and a final decree and which contain indications in S. 6 that the right conferred by the decree should be worked out only by proceedings in execution, it may be a question how far that view can be maintained after the judgment in 56 All 561[2]; but it is not necessary for us to decide that point in this case because, as we have already observed, the present plaintiff was not the plaintiff in the former suit and cannot therefore be held to be precluded from maintaining the present suit. As regards the objection raised by issue 1, namely, that during the period of the melcharth the plaintiff has no right to maintain the present suit, there are two answers to it: (1) that even that period has expired during the pendency of the appeal and (2) apart from that on the principle recognized in 35 Mad 42[3] the jenmi will be entitled to maintain the present suit, because the melcharthdar has precluded himself from recovering possession in pursuance of that decree.

The result is that the second appeal is allowed and the decree of the District Munsif restored with costs here and in the lower appellate Court.

C.R.K./S.C. *Appeal allowed.*

A. I. R. 1937 Madras 217

FULL BENCH

VARADACHARIAR, BURN AND PANDRANG ROW, JJ.

Rajah of Vizianagaram—Petitioner.

v.

Dindi China Thammanna and *others*—Opposite Parties.

Civil Revn. No. 1063 to 1070 of 1933, Decided on 16th November 1936, from decrees of Dist. Munsif, Vizagapatam, in S. C. S. Nos. 1373, 1372, 1378, 1370, 1371, 1376, 1375, 1374 of 1932.

(a) Madras Local Boards Act (14 of 1920), S. 88—Possession of land by inamdar does not preclude his being intermediate landholder in view of proviso (1) to S. 88— Inam lands not being included in assets of Zamindari, inamdar is landholder holding directly under Government — When not so included, inamdar is merely intermediate landholder.

The possession of the land itself by the inamdar does not preclude his being an intermediate landholder within the meaning of S. 88, because the first proviso to that section contemplates cases where the intermediate landholder may or may not have a right of occupancy. This proposition applies whether the inam is a pre-settlement inam or a post settlement inam. In case of pre-settlement inam, the decisive fact is whether the lands have been excluded from or included in the assets of zamindari when the Permanent Settlement was made : *A I R 1932 Mad 410, Rel. on.* [P 217 C 2]

(b) Madras Local Boards Act (14 of 1920), S. 88—Construction —Words 'under-tenure created, continued or recognized by a landholder' do not refer merely to post settlement inams but also to pre-settlement inams.

The words 'under-tenure, created, continued or recognized by a landholder' in the first proviso to S. 88 do not refer merely to post-settlement inams but refer also to pre-settlement inams. Having regard to the policy of the Permanent Settlement and the scheme of the Local Boards Act such pre-settlement inams are not excluded from assessment or the zamindar cannot be made to pay the whole cess in respect thereof. [P 218 C 1, 2]

(c) Madras Local Boards Act (14 of 1920), S. 88—Applicability—Provision for payment of cess is not necessary to bring inam under first proviso.

It is not necessary for applicability of proviso (1) to S. 88 that payment of kattabadi, jodi, poruppu or quit rent should be provided for in respect of the inam. [P 218 C 2]

(d) Limitation Act (1908), Art. 120—Suit for recovery of cess from intermediate landholder under S. 88, Madras Local Boards Act—Suit is not one for recovery of rent nor one based on contract but to enforce liability under statute—Art. 120 applies.

A suit for recovery of cess from intermediate landholder under S. 88, Madras Local Boards Act, is not one for rent nor is it based on any contract express or implied. It is a suit to enforce a liability created by statute. The suit is therefore governed by Art. 120, Limitation Act. [P 218 C 2]

S. Venkatesa Ayyangar—for Petitioner.

G. Lakshmanna and *G. Chandrasekhara Sastriar*—for Opposite Parties.

Varadachariar, J.—The point arising for decision in these petitions is whether the holder of a pre-settlement inam in a zamindari can under any and if so what circumstances be dealt with as an "intermediate landholder" from whom the zamindar can claim to recover the whole or a portion of the cess paid by the zamindar to Government under S. 88, Madras Local Boards Act. So far as we are able to gather from the materials now before us the inam to which these petitions relate seems to have been granted long prior to the Permanent Settlement and, in some of the reports filed in the case the purpose of the inam is described as "Veeti Koluvu." This expression has not been very much elucidated either by the translation of it in Brown's Dictionary or by the translation adopted by the District Munsif. We prefer to leave it in the vernacular form so that the matter may be better investigated by the lower Court to which we are remanding these cases. It appears from the evidence, and on that circumstance one of the chief contentions raised by the defendants in the lower Court was based, the holders of these inams are in actual occupation of the land. It was accordingly contended that they cannot be regarded as intermediate landholders within the meaning of S. 88. It has been held in 55 Mad 646[1] that the possession of the land itself by the inamdar does not preclude his being an intermediate landholder within the meaning of S. 88, because the first proviso to that section contemplates cases where the intermediate landholder may or may not have a right of occupancy. In 55 Mad 646[1] the inamdar, no doubt, held a darimilla or post-settlement inam ; but it does not appear to us that the decisive fact is whether the inam is a pre-settlement inam or post-settlement inam, but whether, even in the case of a pre-settlement inam, the lands have been excluded from or included in the assets of the zamindari when the Permanent Settlement was made.

The scheme of the Local Boards Act is that when the inam lands have not been

1. Bhupati Raju v. Subba Rao, A I R 1932 Mad 410=141 I C 752=62 M L J 472=55 Mad 646.

included in the assets of the zamindari, the inamdar is himself a landholder holding directly under the Government. But if the assets include the inam lands as well, he has no direct relation with the Government, but the Government collects the cess from the landholder and the landholder re-imburses himself from the inamdar treating him as an intermediate landholder. In the plaint as originally filed in the suit inam was described as darimilla inam but the written statement pointed out that the inam had been granted long before the Permanent Settlement. The plaint apparently made a mistake on account of the way in which the estate accounts have referred to this inam. Some time after the written statement was filed and the mistake was pointed out, an application was filed on behalf of the plaintiff to amend the plaint. (I. A. No. 291 of 1933 and similar applications in the rest of the batch) but the District Munsif dismissed it. We do not think that in the circumstances the amendment petition really attempted to change the cause of action. We accordingly allow the amendment to be made as prayed for, but in the circumstances we also think it right to allow an opportunity to the defendants to raise any additional pleas that they may think fit to raise with reference to the plaint thus amended. The lower Court will then decide the question whether or not the suit inam lands had been excluded from the Permanent Settlement. There is an observation in the District Munsif's judgment that the Freese report shows that they have been excluded.

From the portion now made available to us we do not think that it is so. Mr. Lakshmanna, the learned counsel for the respondent, has not been able to draw our attention to any such portion in the report. That observation of the District Munsif will accordingly be ignored and the question tried afresh. Mr. Lakshmanna suggested that there is some lacuna in S. 88, Local Boards Act, and that pre-settlement inams, even if they had been included in the assets, should not be held to be covered by the expression "under-tenure created, continued or recognized by a landholder," in the first proviso to S. 88 because, according to him, those three words must be held to refer only to post-settlement grants. It does not appear to us that these words are in their natural meaning so limited nor have we been shown any reason why having regard to the policy of the Permanent Settlement and the scheme of the Local Boards Act such pre-settlement inams should be excluded from assessment or the zamindar be made to pay the whole cess in respect thereof. A further point was made by Mr. Lakshmanna that it is only when payment of kattubadi, jodi, poruppu or quit rent is provided for in respect of any inam that it will come under that proviso. We do not think that it is the proper construction. All that the proviso enacts is that where kattubadi, jodi, poruppu or quit rent is in fact paid, one-half of the cess calculated with reference to such payment shall be deducted and the balance will be the amount which the landholder is entitled to recover from the intermediate landholder. Where no such payment is made, the landholder will be entitled to recover the cess from the intermediate landholder without any such deduction.

Tho other question dealt with in the judgment of the District Munsif is one of limitation. He has held the suits to be barred in respect of certain items on the footing that such a suit is governed by the three years' rule of limitation. We see no warrant for applying the three years' rule. The suit is not one for rent nor is it based on any contract express or implied. It is to enforce a liability created by statute. In such a case the course of decisions in this Presidency has been to the effect that the suit will be governed by Art. 120. In this view no portion of the suit claim will be barred by limitation. The plaintiff claims interest on the amount sued for. We see no basis on which the plaintiff can claim interest prior to the date of the plaint. The plaintiff will only be entitled to interest at six per cent per annum (such amount as may be decreed in his favour) from and after the date of the plaint. The decrees of the Court below are set aside and the cases sent back for re-trial in the light of the above observations. In the circumstances there will be no order as to costs in the Civil Revision Petitions. Costs in the lower Court will be provided for in the revised decrees.

C.R.K./K.B. *Case remanded.*

* A. I. R. 1937 Madras 219

MADHAVAN NAIR AND STODART, JJ.

Sendattikalai Pandia Chinnathambiar and *another*—Appellants.

v.

Sangili Veerappa Pandian and *others*—Respondents.

Appeal No. 485 of 1930, Decided on 2nd October 1936, against order of Sub-Judge, Tuticorin, D/- 5th September 1928.

*** Transfer of Property Act (1882), S. 36—Rent due from occupancy tenants of impartible estate—S. 36 is applicable to transfer of interest inter vivos and not to devolution of interest by succession—Principle of S. 36 is however made applicable to such case on principle of justice, equity and good conscience—Limited owner of impartible estate dying before instalment of rent fell due—Rent of whole agricultural year is apportionable — Person succeeding to estate is not entitled to whole of unrealised rent.**

Section 36 is applicable only to transfers of interest inter vivos and not to cases of devolution of interest by succession. Principle underlying S. 36 is however made applicable to such cases on principle of justice, equity and good conscience. [P 220 C 2]

The rent due from occupancy tenants of impartible zamindari is made payable in instalments for the convenience of tenants and in spite of instalments, the landlord is entitled to rent when the crops are standing. [P 220 C 1, 2]

During the agricultural year the limited owner of an impartible estate died a month before the first instalment of rent fell due and the person who succeeded as the next reversioner to the estate claimed the whole of the unrealised rent to the exclusion of the personal heirs of the limited owner :

Held : that the rent for the whole of the agricultural year, though payable in instalments, accrued from day to day and was therefore apportionable on grounds of justice, equity and good conscience. The person succeeding to the estate was therefore not entitled to the whole of the unrealised rent except part of rent which accrued till the death of the limited owner, since the commencement of the year, as it was divisible between the person succeeding to the estate and the personal heirs of the limited owner : *26 Mad 540; A I R 1916 Mad 768; A I R 1918 Mad 557; A I R 1935 Cal 39* and *A I R 1924 Pat 451, Rel. on ; A I R 1923 P C 171, Discussed* and *distinq.* [P 220 C 1; P 222 C 1]

A. S. Visvanatha Aiyar—for Appellant.

S. Ramaswamy Aiyar, K. Rajah Ayyar and *K. S. Rajagopalachari*—for Respondents.

Madhavan Nair, J.—The plaintiff in O. S. No. 27 of 1914 on the file of the Court of the Subordinate Judge of Tuticorin (the petitioner in the lower Court) is the appellant. The appeal arises out of an application for passing a final decree in that suit. In O. S. No. 27 of 1914 the plaintiff as reversioner claimed for himself the zamindari of Sivagiri on the death of the then zamindar Ramalinga who died in the year 1914. The claim was made against the mother of the zamindar who took possession of the zamindari on his death. Along with this suit was tried another suit, O. S. No. 48 of 1914, the plaintiff in which admitting the right of the Rani claimed that he was the next reversioner entitled to the zamindari on her death. The Rani died on 23rd November 1916 while the suits were in progress and the plaintiff in O. S. No. 48 of 1914 was then made defendant 2 in O. S. No. 27 of 1914. The decrees passed in these two suits were appealed against to the High Court and the judgments are reported in 44 Mad 1.[1] For the purpose of this appeal it is enough to say that the High Court held that the Rani succeeded to the zamindari in preference to the plaintiff and that the income accruing from it during her lifetime was her property and that after her death the plaintiff, as one of her heirs, can claim only one-sixth of what was left. The decree of the lower Court was modified by the High Court giving to the plaintiff as one of her heirs only one-sixth share in her estate, including the profits that accrued from the impartible estate up to her death, he of course being entitled to the whole of it thereafter. In the partible properties and in the outstandings and in the past profits that accrued during the Rani's lifetime there was a declaration that the plaintiff and defendants 2 and 6 are each entitled to one-sixth share and a final partition decree was ordered to be drawn up by the Subordinate Judge regarding them. It is not necessary to refer to the other portion of the decree : *see* 44 Mad 1[1] at p. 34.

In the present case we are concerned only with the partition of the income which the Rani was entitled to on account of the land revenue and leases from tope and forests for fasli 1326. It may be mentioned that a receiver was in possession of the property during the lifetime of the zamindarini. Fasli 1326 commenced from 1st July 1916, and as the Rani died on 23rd November 1916 we are concerned with five-twelfths of the income due to the Rani which amounted to Rs. 21,079.

1. Gurusami Pandiayan v. Chiuna Thambiar, A I R 1921 Mad 340=61 I C 242=44 Mad 1.

Plaintiff claimed that the rents and profits of the estate for Fasli 1326, including that part of them which remained unrealised at the death of the Rani, should go with the estate and should be paid to him. The respondents contended that the said rents and profits should be divided, part going to the personal heirs of the Rani (of whom plaintiff is one) in proportion to the period during which the Rani was in possession, namely from 1st July 1916 to 23rd November 1916. On one calculation the plaintiff gets the whole ; on respondents' calculation he gets, as co-heir with defendants 2 to 6 only one-sixth of the income which is attributable to the aforesaid period. The lower Court in drawing up its final decree decided in respondents' favour holding that plaintiff had withdrawn his objections at the stage when the Commissioner's report came up for consideration. It is now agreed that plaintiff never did this. On plaintiff's appeal we have to decide the question as one of first instance.

The rents and profits of the estate in the Fasli in question consisted of money due by leases of topes and forests and money due as rent from occupancy raiyats in respect of their lands. It is now agreed that the former became payable at the beginning of the Fasli and are divisible in the proportion stated by the respondents. Then remains the rents due by occupancy tenants which became payable in instalments beginning in December, the month following the death of the Rani. We may say at the outset that whatever rule may be applicable to rents payable on the dates certain in respect of ordinary leases, the rents payable by occupancy tenants stand on a different footing. In theory landlord and tenant are co-owners. The rents payable by the latter represent a share of the crop and there are still estates where the landlord takes his share by division of the actual grain at the threshing floor. Where the landlord—properly called the landholder in the case of such estates —receives his rent in money, the time when it is made payable is fixed by custom with a view to the convenience of the occupancy tenant and not in pursuance of any contractual agreement between the parties. In this view it might be said that the landholder becomes entitled to his rent—considered as a sum paid in commutation of his share of the produce—even while the crops are on the ground. The plaintiff contended in the lower Court—and the same contention is urged before us—that he is entitled to the whole income, the ground being that in law the income for the Fasli cannot be apportioned. The law as to the apportionment of periodical payments on determination of the interest of the person entitled is provided for in India in S. 36, T. P. Act, which runs as follows :

> In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends, and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

In England under the common law there was no apportionment in respect of time except in the case of interest which accrued from day to day. As to rent and other periodical payments, the contract being considered as distinct and entire, no apportionment was allowed : *see* the judgment of Lord Eldon in (1818) 36 E R 412,[2] and the note appended to the report by Mr. Swanston. This rule in England was altered by the Apportionment Act of 1870, S. 2 of which says :

> From and after the passing of this Act all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

The law enacted in S. 36, T. P. Act, is limited to transfers inter vivos and does not, strictly speaking, apply to cases of devolution of interest on succession. It is therefore argued that inasmuch as S. 36 does not apply in terms, the law of apportionment applicable to the present case is the old English common law under which there cannot be any doubt that apportionment in the case before us is impossible. But in a series of cases of this Court, though S. 36 was held inapplicable, the principle underlying the section has been applied consistently on the ground of equity and good conscience. In 26 Mad 540,[3] a tenant-for-life leased immoveable property to tenants at a rent which was payable in half-yearly instalments. Four days before an instalment was due, the tenant-for-life died, and the assignee of

2. *Ex parte* Smyth, (1818) 36 E R 412.
3. Lakshminaranappa v. Meloth Raman Nair, (1903) 26 Mad 540.

his interest sued the tenants for the rent. It was held that he was entitled to recover. Subramania Ayyar, J. pointed out:

> It seems to me, therefore, that in the absence of a specific rule applicable to cases like the present in this country, we are entitled to follow the broad and just principle underlying the English Statute Law culminating in the Apportionment Act of 1870, and hold that, as a matter of equity and good conscience, the plaintiff in this case is entitled to the apportionment made by the decree of the lower appellate Court . . . .

Davis, J., without relying on the broad principle of equity, referred to by Subramania Ayyar, J., held that the plaintiff was entitled to recover on the ground that half-yearly instalment had fallen due prior to the death of the tenant-for-life though the right to sue for it might not have accrued until four days after. In 38 Mad 86[4] it was held that an assignee from a lessee is entitled to claim as against the lessor apportionment of rent accruing due after the date of assignment to him up to the time of a transfer (if any) of his interest as assignee to a third person. The learned Judges pointed out, after referring to the statutory law and the common law of England, that in India there is no reason for not applying to rent the principle adopted in England in the case of interest. In 41 Mad 370,[5] a decision of three Judges, it was pointed out that though according to S. 2 (d), T. P. Act, the Act does not apply to sales in execution, yet the principle of S. 36 of the Act which embodies a rule of justice, equity and good conscience can be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease. The decision in 3 Pat 367,[6] in which the law of apportionment was allowed by the Patna High Court, was a case of devolution of interest on succession. So also was the case in 61 Cal 711,[7] where in an elaborate judgment, after referring to the English and the Indian cases already cited, the learned Judges came to the conclusion that though S. 36 of the Act would not apply to the case before them, yet on grounds of equity, apportionment might be allowed. In that case the question was : Whether the plaintiffs (the widows) were entitled to rents and royalties which fell due during the lifetime of Raja Durga Prasad.

The Raja died on 7th March 1916 before the year was out and rents and royalties had not then fallen due to him ; and the decisions turned upon the question whether such rents and royalties could be apportioned under the Act. The learned Judges held that :

> The plaintiffs are entitled to such rents and royalties due up to the date of the death of Raja Durga Prasad,

that is to say, till 7th March 1916 and no distinction was made between agricultural tenancies and colliery leases both being treated on the same footing. In all these cases the principle underlying S. 36, T. P. Act, was applied on grounds of justice, equity and good conscience. The counsel for the appellant says that the above cases should now be held to have been wrongly decided in the light of the Privy Council decision in 47 Bom 790.[8] In that case, after stating that the English Apportionment Act of 1870 does not apply to India nor do any of the earlier English Apportionment Act, and that it is common ground that the principle which applied in that case was that of the original English law as it stood apart from statute, their Lordships observed as follows :

> The older English law on the subject was stated by Lord Eldon in (1818) 36 E R 412[2] and is amplified in the learned note appended to the report of that case by Mr. Swanston. The latter traces it to the two propositions, that an entire contract cannot be apportioned, and that under such an instrument, as for instance, a lease with a reservation of periodically payable rent, the contract for each portion is distinct and entire. The rule however, while applicable to periodical payments becoming due at fixed intervals, did not apply to sums accruing *de die in diem*. It did not, for example, apply to annuities or to debts. The distinctions drawn were often fine. But it is not necessary for their Lordships to discuss them, because it is plain that, however clear the principle which governed the character of proprietary and contractual rights, it was always open to a testator or settlor, with full power of disposition, to exclude its practical consequences.

And their Lordships began to consider:

> Whether there is not in the trust deed language which, by implication, imports that apportionment was directed by the settlor to take place.

The learned Judges in 61 Cal 711[7]

4. Kunhi Sou v. Mulloli Chattu, A I R 1916 Mad 768=17 I C 933=38 Mad 86=23 M L J 695.
5. Rangiah Chetty v. Vajravelu Mudaliar, A I R 1918 Mad 557=43 I C 78=41 Mad 370 = 33 M L J 618.
6. Aparna Debi v. Sree Sree Shiba Prasad Singh, A I R 1924 Pat 451 = 83 I C 623 = 5 P L T 111=3 Pat 367.
7. Shivaprasad Singh v. Prayag Kumari Debee, A I R 1935 Cal 39=154 I C 479=61 Cal 711.
8. Phirozshaw Bomanjee v. Bai Gool Bai, A I R 1923 P C 171=76 I C 929=50 I A 276 = 47 Bom 790 (P C).

distinguished the Privy Council case on the ground that what was decided in the case was a question of intention as evidenced by a deed of settlement as to whether income derived from rents and shares was apportionable *de die in diem*, though they felt the force of the admission made by the parties before their Lordships that the law of apportionment applicable to India was the old law in England. They were also of opinion that the old English law of non-apportionment was not applicable to the case before them

which was not a case between persons standing in the relation of lessor and lessee or of persons who were bound by covenants relating to payment of rent at stated intervals.

In the case before us also it is hardly proper to describe, as already pointed out, the zamindar and the persons from whom the payments are due as persons standing in the position of lessor and lessee. Having regard to the special features of the case in the Privy Council we are not inclined to hold that the previous decisions of this Court which have been uniform should be considered to be overruled by that decision. Following those decisions and the decision in 61 Cal 711[7] and 3 Pat 367[6] we hold that the principle of S. 36, T. P. Act, will apply to the present case on grounds of justice, equity and good conscience and that the decision of the lower Court is right. The appeal is dismissed with costs of respondents 1, 2, 5 and 6.

C.R.K./K.B. *Appeal dismissed.*

A. I. R. 1937 Madras 222

HORWILL, J.

Modeboyina Raghavalu—Petitioner.

v.

Oduru Narasa Reddi and *others*—Opposite Parties.

Criminal Revn. Case No. 887 and Petn. No. 817 of 1935, Decided on 6th November 1936, from order of 2nd Class Magistrate, Gudur, D/- 24th September 1935.

Criminal P. C. (1898), S. 204 (3)—Summons case—Complainant failing to pay 'witness batta'—Complaint can be dismissed under S. 204 (3).

In a simple summons case, where process fees are payable at the very commencement, if the complainant does not pay witness batta, the case falls under S. 204 (3) and the Magistrate has power to dismiss complaint under it: *5 Mad 160* and *1933 M W N 1266, Disting.* [P 222 C 2]

K. Subramaniam—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner brought a summons case, and after the appearance of the accused he was given three days' time to pay witness batta in order that his witnesses might be summoned. As the batta was not paid the Magistrate dismissed the complaint, purporting to act under S. 204 (3), Criminal P. C. It is contended here that S. 204 (3) does not apply to non-payment of witness batta, and 5 Mad 160[1] has been cited to that effect. That was a case under the old Code when there was no section corresponding to S. 204 (3) of the present Code. The Magistrate purported to dismiss the complaint under S. 205 of that Code, which resembles S. 247 of the present Code. S. 247 provides for the acquittal of the accused in cases of non-appearance of the complainant. It was held in that case that S. 205 did not apply. There seems to be no reason to think that the power given to the Magistrate under S. 204 (3) does not apply to non-payment of witness batta. This sub-section gives the Magistrate power to dismiss the complaint when the complainant fails to pay any process fees or other fees. The section is therefore quite wide enough to include non-payment of witness batta. My attention has been drawn to the judgment of Burn, J. reported in 1933 M W N 1266.[2] There, in a warrant case, after the charge had been framed, the attendance of the witnesses for the complainant was necessary in order that they might be further cross-examined. It was held that in such a case the complainant should not be compelled to pay process fees. It followed that if he was not bound to pay process fees the complaint should not be dismissed for non-payment of those fees. Clearly that case has no application to the present case, which is a simple summons case, where process fees were payable at the very commencement of the proceedings. The learned discussion of Burn, J. in that case would have been unnecessary if the petition could have been dismissed on the simple ground alleged in this petition. I therefore find that the order of the Magistrate was correct and accordingly order that this petition be dismissed.

C.R.K./V.B.B. *Petition dismissed.*

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1. *In the matter of* Korapula v. Monappa, (1882) 5 Mad 160=2 Weir 305.
2. Amirthammal v. Ratnaswami Padayachi, (1933) M W N 1266=1933 M Cr C 339.

A. I. R. 1937 Madras 223

VARADACHARIAR AND MOCKETT, JJ.

Addepalli Lakshmanaswamy — Appellant.

v.

Gadireddi Narasimha Rao—Respondent.

Appeal No. 178 of 1934, Decided on 29th July 1936, against decree of Dist. Court, East Godavari, Rajahmundry, in O. S. No. 30 of 1933.

(a) Promissory Note — Consideration — *K* borrowing money from certain firm on security of his goods—Portion of goods found missing thereby diminishing security—Firm contemplating prosecution of *K* but abandoning the idea—*A* being interested in *K*'s business executing promissory note for loss of security—Consideration held not illegal.

In order to prove that the consideration of a pronote is illegal the Court must be satisfied that the pronote was given in pursuance of an agreement to stifle prosecution The mere possibility of a talk of criminal proceedings at some stage or another will not make the transaction illegal. Further it is not principle of law that whenever a third person undertakes the liability of another person in whom he is interested, the third person's promise is either without consideration or vitiated by illegality. [P 224 C 2 ; P 225 C 1]

K borrowed certain money from a Marwari firm on the security of his goods. He was allowed to take as much goods as he required on a proportionate payment of money. On a certain day it was found that a great quantity of goods was missing thereby diminishing the security. The Marwari firm contemplated to prosecute *K* but did not proceed further. The firm was not prepared to accept promissory note from *K* and so *A* who was interested in *K's* business executed the promissory note for the value of lost goods :

Held : that there was no agreement to stifle prosecution and the consideration of the note was not illegal : *Ward* v. *Lloyd*, *(1843) 7 Scott's N R 499*, *Rel. on.* [P 225 C 1]

(b) Promissory Note—Consideration—Onus —Executant admitting execution of pronote —Onus lies upon him to prove absence or illegality of consideration.

Where executant admits the execution of promissory note in suit, the onus prima facie lies upon him to prove absence of consideration or other circumstances exonerating him from liability. [P 226 C 1]

(c) Costs—Costs can be refused to successful plaintiff when guilty of improper conduct —Successful plaintiff cannot be directed to pay defendant's costs when defendant's conduct is no better than that of plaintiff.

In certain cases the Court might refuse to award costs even to a successful plaintiff, if he had been guilty of improper conduct in connection with the institution or trial of the case ; but there is little or no precedent for directing a successful plaintiff to pay the defendant's costs, when the conduct of the defendant in putting forward his pleas or in conducting his case has been no better than that of the plaintiff. [P 227 C 1]

V. S. Narasimhachar—for Appellant.

G. Lakshmanna and *G. Chandrasekara Sastry*—for Respondent.

Varadachariar, J.—This is an appeal by the defendant against a decree on a promissory note (Ex. A) admittedly executed by him in favour of a Marwari firm of Rajahmundry for Rs. 3,250. The defence on the merits is framed in very general terms in Issue 1, viz., "Was the pronote executed under the circumstances mentioned in the written statement and is it void?" The question has been argued before us under various aspects. One of the pleas put forward by the defendant was that the pronote was executed nominally. The learned Judge rightly observes that on the defendant's own showing it is difficult to understand this plea. The substance of the defence however is that the execution of this note is so connected with certain transactions between that Marwari firm and one G. Krishnamurthi, a merchant of Rajahmundry, that the defendant should be held to have incurred no liability whatever except to see that Krishnamurthi paid up his dues to the Marwari firm or that the transaction was illegal as being the result of an agreement to stifle a proposed criminal prosecution by the Marwari firm against Krishnamurthi. The plaintiff apparently wanted to avoid an investigation of some of these questions on the ground that he was a bona fide holder in due course having obtained an endorsement of the promissory note from the Marwari firm for consideration and without notice of any vitiating facts. The learned Subordinate Judge has rightly held that the plaintiff has not made out this ground of claim. There is sufficient justification for the learned Judge's opinion that it is the Marwari firm that is conducting the suit through the plaintiff and that the plaintiff must have been aware of the circumstances under which the promissory note came to be executed.

In dealing with what we have stated above to be the main defence in the case, it is necessary to examine what exactly happened on or about the date of the suit pronote, i. e. 26th September 1930. Krishnamurthi had borrowed moneys from the Marwari firm on the security of the stock of aluminium circles stored in rooms in

Krishnamurthi's house, the key of the rooms being in the possession of the Marwari firm. It was the practice for Krishnamurthi to remove from those rooms, with the consent of the Marwari firm, so much of the stock as he wished to utilise for his own purpose, on payment of a proportionate part of the debt calculated on the footing that 500 pound circles could be released on payment of Rs. 325. The books of the Marwari firm as well as Krishnamurthi's books show that on or about 26th September 1930 the firm credited Krishnamurthi with a sum of Rs. 3,276 out of which, deducting a sundry item of Rs. 26 separately entered, the sum of Rs. 3,250 is separately entered in Krishnamurthi's books as having come to him from the defendant and paid over by him to the Marwari firm. Krishnamurthi's book also shows this transaction under a column provided for adjustment entries as distinct from another column dealing with cash transactions. It is the defendant's case that on the 25th, when the stock in the rooms was weighed, it was found to be short by about 5,000 circles, that the Marwari firm through P. W. 1 threatened a prosecution against Krishnamurthi and that as part of an arrangement for the abandonment of the contemplated prosecution it was suggested to him by the Marwari himself that he might execute a promissory note for a sum of Rs. 3,250, because the Marwari was not prepared to accept the suggestion made by the defendant that a pronote for that amount might be taken from Krishnamurthi himself. The defendant would add that he was assured even at that time that this was merely done to bring a kind of pressure on Krishnamurthi to satisfy the debt in the ordinary course and the pronote was not intended to be enforced against himself. P. W. 1 attempts to dissociate the suit transaction from the transactions between the Marwari firm and Krishnamurthi. We are not satisfied that either party has stated the whole truth. After a careful examination of the evidence, we are of opinion that the learned Subordinate Judge has come to a correct conclusion on the facts in summarising the result of the evidence as follows :

> There can be no doubt that the Marwadi took the pronote as representing the loss sustained by him on the 5000 odd pounds of aluminium circles that were found missing on 25th September 1930.

The learned Judge rejected the story that there was any agreement to stifle a prosecution ; his view was that the Marwari probably threatened to make a report to the Police, because he would naturally have been anxious to trace the aluminium circles which were found short on weighment. There was no doubt some basis for a suspicion that that portion of the stock could not have disappeared without Krishnamurthi's knowledge, but on the other hand the evidence itself shows that Krishnamurthi turned round against the Marwari, because the keys of the rooms in which the stock had been stored were in the possession of the Marwari. The idea of a prosecution of Krishnamurthi seems to us an invention. What is most likely to have happened is that as the parties were not able to agree as to how the goods could have disappeared they were anxious to investigate the loss. Whether Krishnamurthi in his own mind was conscious of any worse conduct on his part is not a material point for the decision of this case. If the Marwari did not proceed further with the contemplated complaint, it is difficult in the circumstances to draw from it the inference that there was an agreement to stifle a prosecution. It is not as if the evidence clearly establishes conduct on Krishnamurthi's part which could have justified a prosecution or even led the Marwari to think that there was a reasonable chance of success in launching such a prosecution. This being the true position at the time when the promissory note was executed, we see no reason to differ from the view of the lower Court that the execution of the promissory note could not be said to be vitiated on the ground of illegality of consideration.

The authorities show that the mere possibility of a talk of criminal proceedings at some stage or another will not make the transaction illegal. The Court must be satisfied that the pronote was given in pursuance of an agreement to stifle a prosecution. It was pointed out as early as in 7 Scott's (N R) 499[1] at p. 506 that the mere fact that the plaintiff did not prosecute the defendant, as at one time he threatened, will not warrant the Court in coming to the conclusion that there was an agreement on his part to abstain from

1. Ward v. Lloyd, (1843) 7 Scott (N R) 499=6 Man & G 785=13 L J C P 5.

prosecuting. If the fact of the actual commission of the offence is beyond doubt and the plaintiff knew of it, his abstaining from prosecuting would afford some foundation for the argument that the non-prosecution must have been the result of an agreement not to prosecute. But as stated already there is very little basis in this case for finding that the Marwari could have ever seriously thought that Krishnamurthi had committed any offence. Further, this is certainly not the case of a person who wishes to gain some money not already due to him as a result of some arrangement entered into on the threat of criminal proceedings ; P. W. 1 has only taken steps to secure payment to himself of a portion of the money undoubtedly due to him from Krishnamurthi and in respect of which the security had admittedly become insufficient when on weighment on 25th September 1930 it was found that the stock was less than it should be.

Mr. Narasimhachar, the learned counsel for the appellant, recognized the distinction between cases in which there is a pre-existing civil liability and those in which there is no such pre-existing liability, but he pointed out that in many cases where this distinction is recognized the pre-existing liability is that of the very person who gave a subsequent note or security and the security or note is not given by a stranger. In that connexion he relied on the observations of Cotton, L. J. in 10 Q B D 572[2] at p. 576. But this circumstance is only a factor to be borne in mind in drawing the inference of fact as to whether the promissory note was given in pursuance of an agreement to stifle a prosecution. It is not a principle of law that wherever a third person undertakes the liability of another in circumstances similar to those in the present case, the third person's promise is either without consideration or vitiated by illegality. In 53 Cal 51,[3] 41 I C 812[4] and 70 I C 295,[5] we find that third persons had undertaken the liability either individually or jointly with the person originally liable, in circumstances similar to those in the present case; and in all of them the learned Judges held that the transaction was not vitiated on the ground of illegality. It may be that if Krishnamurthi's liability still continued or if the present defendant was such a stranger to Krishnamurthi in respect of their pecuniary transactions that the defendant could be held to have intervened in this matter only with a view to save Krishnamurthi from prosecution, the inference of an agreement to stifle a prosecution would easily follow ; but the evidence establishes that the defendant and Krishnamurthi were interested in each other's business and the defendant had advanced large amounts to Krishnamurthi.

There is even a suggestion in the defendant's cross-examination that he was a partner in this very aluminium business of Krishnamurthi, but that is nothing more than a suggestion. Anyhow, the defendant's admissions themselves are sufficient to show that it was not merely as a friend that he was interested in Krishnamurthi's affairs. What is more significant in this case is that on the date of Ex. A not merely had the Marwari firm treated Krishnamurthi's liability to them as reduced by this sum of Rs. 3,250, but there are corresponding entries in Krishnamurthi's books crediting the defendant with that sum and also crediting the Marwari with that sum. The subsequent settlement of accounts between Krishnamurthi and the Marwari firm has also proceeded on the footing that Krishnamurthi's liability to the firm had already been reduced by this sum of Rs. 3,250. It is thus clear that there was a perfectly intelligible reason for the Marwari and Krishnamurthi and the defendant entering into this transaction, viz., that to avoid all questions as to how the stock came to be reduced they arranged that it might be treated as a redemption of so much of the stock by Krishnamurthi on the usual terms, of payment of Rs. 325 for every 500 circles removed and the defendant was willing to find the money or undertake the liability to enable Krishnamurthi to do so. In this view there is no basis either for the suggestion that there could have been no consideration for Ex. A or that the agreement could only have been to stifle a criminal prosecution.

It was next argued by Mr. Narasimhachar that as the plaintiff came into Court with a case that consideration for Ex. A

2. Flower v. Sadler, (1856) 10 Q B D 572.
3. Dwijendra Nath Mullick v. Gopiram Gobindaram, A I R 1926 Cal 59=89 I C 200=53 Cal 51=29 C W N 855.
4. Sukhdeo Dass v. Mangal Chand, A I R 1917 Pat 454=41 I C 812=2 P L J 630.
5. Adhikanda Sahu v. Jogi Sahu, A I R 1922 Pat 502=70 I C 295=1 Pat 164.

passed in the form of a cash payment and that it had nothing to do with the transactions between Krishnamurthi and the Marwari firm, we should dismiss the suit when we hold that that case had not been made out. In support of this argument, he relied on the observations of Sundara Aiyar, J. in 21 M L J 1013[6] and the observations of a learned Judge of the Allahabad High Court in A I R 1934 All 1068.[7] We do not think that on a question of this kind it is possible or desirable to lay down any hard and fast rule. It is true that the decision of the Court must be based upon the evidence in the case and not upon any speculation as to the possibility of a case not found in the evidence. In the present case as the defendant admitted the execution of the suit promissory note, the onus prima facie lies upon him to prove absence of consideration or other circumstances exonerating him from liability.

We have held that he has not succeeded in proving either absence of consideration or illegality of consideration. If the matter stood there, undoubtedly the plaintiff's suit must have succeeded. Where a plaintiff who also leads evidence fails on the story that the consideration was paid in a particular form, it may sometimes happen that the Court may be unable to come to any conclusion as to what the consideration was. But in the present case, as we have already explained, that is not the position to which the Court is driven. Krishnamurthi's books have been exhibited as evidence on the defendant's side. They undoubtedly show the true nature of the transaction, and when the evidence is examined in the light of those books it is sufficient to establish that the defendant's story is false in so far as he brings in an element of illegality into the transaction and also in so far as he pleads that there was an understanding that Krishnamurthi alone should be held liable for the whole amount of his debt to the Marwari firm and that the defendant should not be liable to the Marwari firm even to the extent of the amount taken over under Ex. A. If in these circumstances the Court holds that the suit transaction is supported by consideration, we do not think this can be said to be a case in which the Court will be giving the plaintiff a decree on mere speculation. If portions of the plaintiff's case are false, that will be a matter to be taken into account in dealing with the question of costs. We do not think that any principle of law requires us to hold that the suit should necessarily be dismissed in such circumstances. If the defendant could plead that he had been taken by surprise on any particular point that would be another matter. But that is not the position here. We therefore agree with the learned Judge that the plaintiff was entitled to a decree on the suit promissory note in the terms given by him.

It was next contended on the authority of the cases in 1 All 487[8] and 20 M L J 144[9] that the suit note should be held to be one not supported by consideration. But the facts here are different. In 20 M L J 144[9] the learned Judges were dealing with the matter merely on the pleadings, before any evidence had been recorded and they only observe that there was no admission in the written statement that the promisee, at the request of the promisor, put himself to any loss. But here we have already pointed out that as the result of Ex. A the Marwari firm released Krishnamurthi *pro tanto* from his liability to the firm and except for the plea of illegality it cannot be said that it was not done at the defendant's instance and as a result of the promissory note. The case in 1 All 487[8] proceeded on a very different set of facts and it is not necessary to refer to them here in detail. It was lastly suggested that just as Krishnamurthi made some payments which have been endorsed on the suit note, Krishnamurthi has settled the whole account including the suit debt with the Marwari firm and that therefore there is no liability any longer outstanding under Ex. A. The endorsements on Ex. H however clearly establish that Krishnamurthi discharged the Marwari's debt only after excluding the amount due under Ex. A.

The respondent has filed a memorandum of objections objecting to the order of the lower Court in respect of costs. The learned Subordinate Judge took the view that as the plaintiff as P. W. 1 persisted in putting forward the case that Ex. A represented a cash transaction independent

6. Venkata Raghavalu Chetty v. Sabapathy Chetty, (1911) 21 M L J 1013=12 I C 250.
7. Ram Jash v. Markande Pathak, A I R 1934 All 1068=153 I C 611.
8. Nanak Ram v. Mehin Lal, (1875-77) 1 All 487.
9. Sesha Aiyar v. Mangal Doss Jee, (1910) 20 M L J 144=5 I C 757.

of the dealings between Krishnamurthi and the Marwari firm, the case is one in which the Court should exercise its discretion as to costs against the plaintiff, not only to the extent of depriving the plaintiff of his costs but even of directing the plaintiff to pay the defendant's costs. This seems to us wholly unwarranted.

In certain cases the Court might refuse to award costs even to a successful plaintiff, if he had been guilty of improper conduct in connexion with the institution or trial of the case; but there is little or no precedent for directing a successful plaintiff to pay the defendant's costs, when the learned Judge has himself held that the conduct of the defendant in putting forward his pleas or in conducting his case has been no better than that of the plaintiff. We were at one stage disposed to think that we might be doing justice between the parties by directing them to bear their respective costs in the lower Court, but Mr. Lakshmanna, the learned counsel for the respondent, rightly insisted that the defendant's reply notice left the plaintiff no alternative but to institute the suit because the defendant wholly declined to pay any portion of the suit claim. In these circumstances, we think the proper order as to costs in the lower Court will be that the defendant should pay to the plaintiff the institution fee, namely Rs. 322-7-0, but that in other respects the plaintiff and the defendant should bear their respective costs in the lower Court. In the result the appeal is dismissed with costs and the memorandum of objections is allowed to the extent above indicated. There will be no order as to costs in the memorandum of objections.

C.R.K./S.C. *Appeal dismissed.*

A. I. R. 1937 Madras 227

CORNISH, J.

Gopalakrishna Nayakar—Petitioner.

v.

Madhavanayaki Ammal and *others*—Opposite Parties.

Civil Revn. Petn. No. 679 of 1935, Decided on 2nd October 1936, from order of Dist. Court, West Tanjore, D/- 8th February 1935.

Provincial Small Cause Courts Act (1887), Ss. 16, 27, 33—Small Cause suit instituted as such does not lose its character as Small Cause suit by being mistakenly transferred to original side and tried as regular suit—S. 27 bars appeal from decree in such suit.

According to S. 16 read with S. 33 a Court which has Small Cause jurisdiction cannot try a suit of Small Cause nature otherwise than as a Small Cause suit. A Small Cause suit instituted as a Small Cause suit does not lose its character of a Small Cause suit by reason of its being mistakenly transferred to the original side of the Court and tried as a regular suit, and S. 27 bars any right of appeal from a decree in such a suit : *A I R 1935 Mad 919* ; *40 Cal 537* and *25 Bom 417, Rel. on* ; *A I R 1931 All 574, Expl.*

[P 228 C 1]

A. V. Viswanatha Sastry—for Petitioner.

R. Gopalaswamy Ayyangar—for Opposite Parties.

Order.—The petitioner in this Revision Petition was defendant in a suit on a promissory note. The District Munsif dismissed the suit. The plaintiff thereupon appealed to the District Court. The District Judge allowed the appeal and remanded the case for re-trial on a particular issue. The petitioner challenges the jurisdiction of the District Judge to entertain the appeal and consequently to make any order in it. It appears that the suit was instituted in the Court of the District Munsif as a Small Cause suit and that the District Munsif at the time had Small Cause jurisdiction up to the pecuniary value of the suit. But this District Munsif was transferred to another Court and his place was taken by a Munsif who had not the requisite Small Cause jurisdiction. To meet this emergency, recourse was had to S. 25, Provincial Small Cause Courts Act, and the suit was re-numbered and registered as a regular suit. Before the suit came on for trial the first Munsif returned to that Court. Consequently he was competent to try this suit as a Small Cause suit and, indeed, having regard to S. 16 of the Act, he had no jurisdiction to try it otherwise. But evidently, by some mistake, the suit retained its altered number and description as a regular suit and was tried as a regular suit. The question is whether the decree made in these circumstances is appealable. If the decree is to be deemed to have been passed in a regular suit, no doubt the general right of appeal given by S. 96, Civil P. C., applies.

On the other hand, if this decree is to be deemed to have been passed in a Small Cause suit, S. 27 of the Act bars any right of appeal from that decree. It has been argued by the learned advocate for the

respondent that S. 27 can only apply where a decree is made under the provisions of the S. C. Courts Act. His contention is that it is only when the Court is exercising Small Cause jurisdiction that the decree has a finality under S. 27. If the Court, though it has Small Cause jurisdiction, has in fact exercised its ordinary jurisdiction, S. 27 has no application. The question is undoubtedly a difficult one. But it is covered by authority. S. 16 read with S. 33 of the Act makes it clear that a Court which has Small Cause jurisdiction cannot try a suit of a Small Cause nature otherwise than as a Small Cause suit; and it has been held by a Bench in 40 Cal 537,[1] following a decision of the Bombay High Court in 25 Bom 417,[2] that a Small Cause suit instituted as a Small Cause suit does not lose its character of a Small Cause suit by reason of its having been mistakenly transferred to the Original Side of the Court and tried as a regular suit. A similar view was taken by Stone, J. in 69 M L J 443.[3] I think that the principle of those cases should govern this case. The learned advocate for respondent has cited a Full Bench ruling in 54 All 171.[4] But this ruling is not inconsistent with the authorities above referred to. All that was decided in the Allahabad case was that if a suit had been instituted as a Small Cause suit and then transferred to the Original Side because the Munsif has not got jurisdiction to try the suit as a Small Cause suit, and was tried by him as a regular suit, then the suit has no other character than that of a regular suit, and a decree passed in it is appealable under S. 96. For these reasons I think the petition must be allowed with costs throughout and the order of the lower appellate Court set aside.

C.R.K./R.M. *Petition allowed.*

1. Indra Chandra Mukerjee v. Srish Chandra Banerjee, (1913) 40 Cal 537=21 I C 120.
2. Shankarbhai v. Somabhai, (1901) 25 Bom 417 =3 Bom L R 129.
3. Ramaswami Muthiriyan v. Arunachalam Chettiar, A I R 1935 Mad 919=159 I C 958= 69 M L J 443.
4. Bhagavati Pande v. Badri Pande, A I R 1931 All 574=136 I C 357=1931 A L J 953=54 All 171 (F B).

A. I. R. 1937 Madras 228

CORNISH, J.

Rakka Kudumban—Appellant.

v.

Arulayi and *others*—Respondents.

Second Appeal No. 1284 of 1931, Decided on 3rd March 1936, against decree of Sub-Judge, Tuticorin, in A. S. No. 146 of 1929.

(a) Res judicata—Suit by *A* against *B* and *C* for title to and possession—Suit decreed in trial Court—Appeal by *B* claiming through *C* but omitting to make *C* respondents to appeal—Decision against *C* being final held operated as res judicata against *B's* attempt to re-open that decision in appeal.

A brought a suit against *B* and *C* for title to and for possession of suit land. His suit was decreed in the trial Court and *B* and *C* were restrained by injunction from interfering with enjoyment of the property by *A*. *B* who claimed title to the land by purchase from *C*, and who had no other basis of title appealed but failed to make *C* respondent to the appeal :

Held : the decision against *C* having become a final decision operated as res judicata to *B's* attempt to re-open that decision in appeal : *A I R 1927 P C 252, Foll.* [P 228 C 2; P 229 C 1]

(b) Practice — New plea — Point pleaded involving question of res judicata—Court is bound to entertain it even though parties had abandoned it.

A second appellate Court will be chary of allowing an appellant to take a point in second appeal which has not been raised, and which ought to have been raised at an earlier stage of the hearing. But where a particular point involves a question of res judicata the Court is bound to entertain it notwithstanding that the parties themselves may even have abandoned it. [P 229 C 1]

(c) Civil P. C. (1908), O. 41, R. 20 — Person 'interested in the result of appeal.'

A defendant against whom a right of appeal has become barred is not a person 'interested in the result of the appeal' within the meaning of O. 41, R. 20 : *A I R 1927 P C 252, Foll.* [P 229 C 1]

A. Swaminatha Iyer—for Appellant.

K. S. Desikan and *S. T. Adityan* — for Respondents.

Judgment.—I think that this appeal must be allowed, upon the additional ground of appeal which has been filed, namely that the decision of the trial Court upon the plaintiff's title to and possession of the property was res judicata and not open to revision or reversal by the appellate Court. The plaint makes it clear that the plaintiff claimed to have title to and to be in possession of the suit land. His suit was decreed in the trial Court, and defendants 1 and 2 were restrained by injunction from interfering with his enjoyment of the same. Defendant 1, who

claimed title to the land by purchase from defendant 2, and who had no other basis of title, appealed. Unfortunately, he neglected to make defendant 2 a respondent to the appeal. The result is, I think, that the decision against defendant 2 having become a final decision, operated as a bar to defendant 1's attempt to re-open that decision. This is the principle to be derived from the Privy Council ruling in 6 Rang 29[1] at p. 35. In other words, there being no appeal by defendant 2 against the trial Court's finding, that finding had become res judicata against defendant 1 who claimed through defendant 2. It has, however, been urged that this Court should not entertain this second appeal in the peculiar circumstances in which the additional grounds of appeal have come to be made. No doubt a second appellate Court will be chary of allowing an appellant to take a point in second appeal which has not been raised, and which ought to have been raised, at an earlier stage of the hearing. But this particular point involves a question of res judicata which a Court is bound to entertain notwithstanding that the parties themselves may even have abandoned it. Then it has been suggested that defendant-appellant 1 should be allowed to meet this belated objection to his appeal by remanding it for re-hearing on the merits after giving him the opportunity of adding defendant 2 as a respondent. But the time in which this might have been done has long expired, and their Lordships in 6 Rang 29,[1] *supra*, have ruled that it is impossible to regard a defendant against whom a right of appeal has become barred as a person 'interested in the result of the appeal' within the meaning of O. 41, R. 20. For these reasons I must allow this second appeal, and as it seems to me that defendant 1 ought to have been alive to the necessity of making defendant 2 a party to his appeal in the lower appellate Court, the appeal must be allowed with costs here and in the lower appellate Court.

C.R.K./S.C. *Appeal allowed.*

1. V. P. R. V. Chokkalingam Chetty v. Seethai Achi, A I R 1927 P C 252=107 I C 237=6 Rang 29 (P C).

* A. I. R. 1937 Madras 229

CORNISH, J.

Chaganti Veerasalingam—Appellant.

v.

Mallampalli Subbarayudu and *others*—Respondents.

Appeal No. 136 of 1931, Decided on 9th September 1936, against appellate order of Sub-Judge, Narsapur, in A. S. No. 109 of 1930.

*** (a) Restitution—Decree against *A* and *B* jointly and severally— *B* depositing decretal amount into Court on behalf of himself and *A* for payment to decree-holder — In appeal decree reversed as against *B* but confirmed against *A*—*B* claiming restoration of amount deposited and withdrawn by decree-holder—*B* held entitled to restitution.**

A party who has been ultimately successful as the final result of the litigation is to be restored to the same position which he would have occupied, had not the injury suffered by him in the litigation been done. The same principle applies even where one defendant had paid the money into Court on behalf of himself and other co-defendants who had succeeded in the appeal. [P 230 C 1, 2]

A decree was passed against *A* and *B* under which the liability against them was joint and several. *B* paid the decretal amount into Court on behalf of himself and *A* to be paid to the decree-holder. The decree-holder withdrew the amount so deposited. In appeal the decree was reversed as against *B* but was confirmed as against *A*. *B* applied for restitution of the amount withdrawn by decree-holder :

Held : that *B* was entitled to the restitution of the amount : *A I R 1933 Mad 33* and *A I R 1932 Cal 313*, *Rel. on*. [P 230 C 2]

(b) Deed — Construction — Surety bond—Surety agreeing to pay amount withdrawn by decree-holder personally or out of property secured on condition of defendants succeeding in appeal are not liable when only one defendant succeeds.

The terms of a surety bond are to be construed, where there is ambiguity in a way favourable to the surety. But if the words in a bond are not ambiguous, but make it clear that the liability is only to come into force upon the stated conditions, there is no reason for putting a construction upon the bond other than according to its clear and unambiguous language. [P 231 C 1]

A obtained decree against *B* and *C*. *B* and *C* appealed and *B* deposited the amount in the Court. *A* withdrew the amount after furnishing sureties *E* and *F* who executed a bond agreeing to pay the amount personally or out of the property secured on condition of defendants succeeding in appeal. Only *B* succeeded in appeal and decree against him was set aside. *B* applied for restitution under S. 144, Civil P. C.:

Held : that *E* and *F* could not be held liable as they had undertaken liability only on the condition of success of both the defendants. [P 231 C 1]

V. Suryanarayana—for Appellant.

Ch. Raghava Rao, *P. Somasundaram*, and *T. R. Tyagarajan*—for Respondents.

Judgment. — The appellant is defendant 2. With defendant 1, his mother-in-law, he was sued for the conversion of certain articles. A decree was made against them directing the return of the articles alleged to have been converted or to pay the value of them. The decree, in my opinion, fixed the defendants with a joint and several liability. The defendants appealed, and on an application for stay of execution pending the appeal the Court ordered that the decree amount, a sum of Rs. 1,275, should be paid into Court. This money was paid into Court by the appellant (defendant 2). It is so found as a fact by the first Court and upon the evidence given in the case I think there can be no doubt about it. The plaintiff, who is respondent 3 before me, applied to take the money out of Court, and an order was made to that effect on her furnishing security for the amount. Respondents 1 and 2 became sureties and executed a bond for the amount. In the appeal defendant 2 was successful and the decree against him was set aside, but the decree against defendant 1 was confirmed. Having succeeded in the appeal defendant 2 applied under S. 144 to the executing Court for restitution of the money which he paid into Court.

The first Court held that he was entitled to restitution against the plaintiff and the two sureties. On appeal the Subordinate Judge reversed this decision and held that the appellant was not entitled to restitution against the decree-holder or the sureties. The plaintiff had not appealed against that order of the first Court. The first question which is to be decided is whether defendant 2 is entitled to restitution against any of the parties. In my opinion he is certainly entitled to restitution against the plaintiff. The principle upon which restitution is granted has been stated by Anantakrishna Ayyar, J. in 55 Mad 1025[1] to be that a party who has been ultimately successful as the final result of the litigation is to be restored to the same position which he would have occupied had not the injury suffered by him in the litigation been done. In that case defendant 1, a successful appellant, had deposited half the decree amount into Court in order to have a stay of execution pending the appeal. The appeal was successful so far as he was concerned and also so far as certain other defendants-appellants were concerned. The other defendants had not appealed and the decree stood as against them. It was held that defendant 1 who had paid the money into Court was entitled to restitution from the plaintiff and to receive back that money. Another similar case is reported in A I R 1932 Cal 313[2] where it was held that the same principle applied even where one defendant had paid the money into Court on behalf of himself and other co-defendants who had succeeded in the appeal. Therefore, on principle and on authority, I think that the appellant (defendant 2) is entitled to restitution of this money from the plaintiff. The appeal therefore as regards the plaintiff-respondent 3 succeeds and is allowed with costs. The more difficult question however is whether restitution can be obtained against the sureties by enforcement of their bond against them. This must depend upon the construction of the bond. This bond states inter alia that "the defendants deposited the said amount in Court for the sake of the plaintiff" and it is conditioned that :

> If the defendants should succeed in the appeal preferred in the Sub-Court, we agree that the said amount may be recovered by means of the property given as security and also from us personally.

Under the bond the sureties have undertaken a personal liability. But it has to be seen whether this liability arises unless the conditions stated in the bond have been directly fulfilled. The learned advocate for the appellant has referred to the proposition stated in Vol. 10, Halsbury, p. 316, with regard to the construction of bonds where it is said :

> The Court leans against the separation between the nature of the covenant and the nature of the interest, and where the interest is joint the covenant will be joint if the words are capable of construction ; where the interests are several, the covenant will in the same manner be construed, if possible, as several. The express language must not be contradicted, but it will be moulded to suit the interests according as they are joint or several.

The bond in this particular case must, in my opinion, be construed as an undertaking by the obligors to the obligees

1. Shanmugasundara v. Ratnavelu, A I R 1933 Mad 33=139 I C 348=55 Mad 1025=63 M L J 383.

2. Rajendra Kumar v. Rajendra Nath, A I R 1932 Cal 313=137 I C 294=35 C W N 1305.

jointly. I think the covenant must be taken to have that meaning. Their liability was so conditioned that it was only if the "defendants" should succeed in the appeal they were to be liable. It is a well known principle of construction that the terms of a surety bond are to be construed, where there is ambiguity, in a way favourable to the surety. But if the words in a bond are not ambiguous, but make it clear that the liability is only to come into force upon the stated conditions, there is no reason for putting a construction upon the bond other than according to its clear and unambiguous language. I do not think that upon the language of this bond the sureties can be held to have undertaken a liability except upon the condition that the appeal of both the defendants succeeded. In these circumstances I think the lower appellate Court was right in holding that no restitution on the footing of the bond could be obtained by the appellant against respondents 1 and 4. The result is that so far as they are concerned, the appeal is dismissed with costs of respondent 1. I hold therefore that the appellant is entitled to restitution from the plaintiff with interest at six per cent per annum from 10th October 1927. (Leave to appeal to defendant-appellant 2. No leave to appeal to the plaintiff.)

C.R.K./K.B. *Appeal partly allowed.*

A. I. R. 1937 Madras 231

PANDRANG ROW, J.

In re *Abdulgani Sahib* — Accused—Appellant.

Criminal Appeal No. 352 of 1936, Decided on 20th August 1936, against order of Sessions Judge, South Arcot Division, in case No. 16 of 1936.

Criminal Trial—Sentence—Old offender—Previous convicts need not be more severely punished—Sentence should be adequate and not severe—Sentence of six years for theft of property worth Rs. 50 held too severe.

There seems to be an idea prevalent in the minds of some Judges that there is a rule that the sentence on an old offender should always be at least a little more severe than the sentence just previous. This so-called rule cannot be supported by any good reason. It may be an excellent rule of thumb, but in imposing sentences such a rule cannot be safely followed in the interests of the proper administration of criminal justice. While the sentences imposed on criminals should be adequate to the offence, there is every reason why they should not be excessive. Apart from the injustice to the offender which an excessive sentence entails, such a sentence tends to undermine public confidence in the administration of criminal justice. [P 232 C 1]

The sentence of six years' rigorous imprisonment for theft of a cow worth Rs. 50 on an accused person who was a previous convict having been in jail for five years held to be too severe in consideration of the value of the stolen property. [P 232 C 1]

Parakat Govinda Menon (for Public Prosecutor)—for the Crown.

Judgment. — This is a jail appeal in which notice has been ordered to issue by my brother Burn, J. on the ground that the sentence appeared to be excessive. The appellant was convicted as a result of the unanimous verdict of the jury to the effect that he was guilty of theft, after a trial conducted before the Sessions Judge of South Arcot. The charge to the jury is vitiated by a defect in the definition of the offence punishable under S. 411, I. P. C. The learned Sessions Judge omitted to tell the jury that it was only a dishonest retention or receipt of stolen property that constituted the offence. He charged the jury in the following terms :

If a person receives or retains stolen property knowing or having reason to believe the same to be stolen, then he is said to commit an offence punishable under S. 411, I. P. C. : *vide* Para. 2 of the charge.

In Para. 8, in dealing with the presumption arising from recent possession of stolen property not accounted for, the same omission to mention the all-important adjective "dishonest" occurs. A similar omission is found in Para. 13 of the charge. This is no doubt a serious defect, but it does not appear to have prejudiced the appellant who was found guilty not of an offence punishable under S. 411, but of theft itself. The case would have been different if the jury's verdict was that the accused was guilty of an offence under S. 411, I. P. C. In other respects, there has been no misdirection in the charge of a material nature, and I see no reason to suppose that the verdict of the jury was not a proper one on the evidence. As regards the question of sentence, the learned Judge does not give any particular reason for imposing a sentence of six years' rigorous imprisonment under S. 379 read with S. 75, I. P. C. The prosecution case is that the property stolen in this case was a cow worth about Rs. 50. For an offence of this nature, if committed by a casual offender for the first time, the ordinary sentence

would not certainly exceed six months' imprisonment. The question is whether an old offender, whose previous conviction was in 1929, and whose previous sentence was five years' rigorous imprisonment should now necessarily be given six years' imprisonment. There seems to be an idea prevalent in the minds of some Judges that there is a rule that the sentence on an old offender should always be at least a little more severe than the sentence just previous. This so-called rule cannot be supported by any good reason.

It may be an excellent rule of thumb, but I do not think, in imposing sentences, such a rule can be safely followed, in the interests of the proper administration of criminal justice. While the sentences imposed on criminals should be adequate to the offence, there is every reason why they should not be excessive. Apart from the injustice to the offender which an excessive sentence entails, such a sentence tends to undermine public confidence in the administration of criminal justice. In the absence of any reasons for imposing a sentence of six years' rigorous imprisonment in this case, and in view of the nature and value of the stolen property, I am of opinion that the sentence imposed by the learned Sessions Judge is far too severe. The sentence therefore, is reduced to three years' rigorous imprisonment. The order directing the appellant to give information of his residence and change of residence to the police for a period of three years after the expiration of the sentence will stand. The conviction is confirmed and the substantive sentence is reduced to three years' rigorous imprisonment.

C.R.K./B.D. *Order accordingly.*

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* A. I. R. 1937 Madras 232

FULL BENCH

VARADACHARIAR, BURN AND PANDRANG ROW, JJ.

Board of Commissioners for Hindu Religious Endowments, Madras—Petitioner.

v.

P. V. R. Ratnasami Pillai and *others*—Opposite Parties.

Civil Revn. No. 2001 of 1934, Decided on 17th November 1936, from order of Dist. Court, Tanjore, D/- 21st August 1934.

*** Madras Hindu Religious Endowments Act (2 of 1927 as amended in 1930), S. 84—Temple held to be "excepted temple" under Act of 1927 subsequently held to be not so, according to new definition under Amending Act of 1930—Matter does not involve question of interfering with vested rights accrued under old Act but simply grouping of temples in particular manner—Rule against retrospective operation of new Act hence is not applicable:** *40 M L W 288=A I R 1934 Mad 555=152 I C 86, Overruled.*

There is nothing like a recognized legal right or category of right known to general jurisprudence that is connoted by the expression "excepted temple." It was merely a grouping or classification adopted by the Legislature in 1925 as a convenient method of referring to a certain class of temples with a view to lay down certain rules in relation thereto in the body of the Act. No doubt, as long as the Act stood in that form, temples which fell in the category of excepted temples were intended to be dealt with in a particular way and temples comprised in the category of non-excepted temples were intended to be dealt with in another way. But it does not mean that there was a kind of guarantee that, once the legislature has thought fit to say that a particular temple will be dealt with in a particular manner it should never afterwards be dealt with in a different manner. [P 233 C 2]

So where a temple held to be an "excepted temple" under the Act of 1927 is subsequently held by the Board to be not so according to its new definition under the Amending Act of 1930, the decision in such case does not involve the question of interference with vested rights accrued under the old Act but simply the grouping of temples in one manner at a particular stage of legislation and in a different manner at a later stage of legislation. This being so there is no scope for the application of the rule against retrospective operation of the new Act: *Lemon v. Mitchell, (1912) A C 400; A I R 1927 P C 242; A I R 1916 Mad 607* **and** *A I R 1918 Mad 353, Disting.; 40 M L W 288=A I R 1934 Mad 555=152 I C 86,* **Overruled.** [P 233 C 1, 2; P 234 C 1]

P. V. Rajamannar, K. Subba Rao and *C. A. Vaidyalingam*—for Petitioner.

K. V. Srinivasa Ayyar—for Opposite Parties.

Varadachariar, J.—This is a Revision Petition asking this Court to revise the order passed by the District Judge of West Tanjore on an application presented to him under S. 84, Madras Hindu Religious Endowments Act. The point raised in the case has been decided by Cornish, J., adversely to the Board, in another case 40 M L W 288[1]; as the correctness of that decision was challenged on behalf of the petitioner, this case has been directed to be posted before this Bench for determination of the question. The Hindu

1. Rajagopala Chettiar v. Hindu Religious Endowment Board, A I R 1934 Mad 555=152 I C 386=40 M L W 288.

Religious Endowments Act of 1927 defined an "excepted temple" in certain terms in Cl. 5 of S. 9. By an Amending Act of 1930 a new definition has been substituted. Some time in 1927, the temple, to which this application relates, was held by the Board to be an "excepted temple" within the meaning of the definition as it stood in the Act of 1927. After the Amending Act of 1930 had been passed, the Board has held that according to the new definition this temple is not an excepted temple. Against this latter decision of the Board the trustees of the temple filed the application out of which the present revision petition arises. The learned District Judge set aside the order of the Endowments Board on the grounds: (1) that the former decision of the Board has become final and (2) that the Amending Act 4 of 1930 cannot take away the right acquired by the trustees under that decision as there are no words expressly declaring the Act retrospective.

The argument that the former decision has become final could not be and was not seriously pressed. In the nature of things, the Board could have given a decision in 1927 only with reference to the definition as it then stood and the finality attached by S. 84 to such a decision can also have relation only to that definition. Properly understood, the decision merely means that the institution was an excepted temple within the meaning of Act 2 of 1927. It cannot be suggested that it is not open to the Legislature to vary that definition. On such variation, the question for determination will be whether the institution is an excepted temple within the meaning of the new definition. A decision that an institution satisfies a particular definition cannot certainly mean a decision that it must satisfy the new definition. On behalf of the respondents more serious reliance has therefore been placed upon the argument that by reason of the former decision the trustees had acquired a vested right which could not be affected by the amendment of the law, in the absence of words in the Amending Act making the amendment retrospective in its operation. It is this contention that receives support from the decision of our learned brother Cornish, J. in 40 M L W 288.[1] The matter has been argued at some length on behalf of the respondents and we have carefully considered the decision of the learned Judge. We have come to the conclusion that there is no scope here for the application of the rule against retrospective operation, because there is really no question of any interference with a vested right or impairing obligations which have come into existence under a previous state of the law.

There is nothing like a recognized legal right or category of right known to general jurisprudence that is connoted by the expression "excepted temple." It was merely a grouping or classification adopted by the Legislature in 1925 as a convenient method of referring to a certain class of temples with a view to lay down certain rules in relation thereto in the body of the Act. No doubt, as long as the Act stood in that form, temples which fell in the category of excepted temples were intended to be dealt with in a particular way and temples comprised in the category of non-excepted temples were intended to be dealt with in another way. But it does not seem to us reasonable to suggest that there was a kind of guarantee that, once the legislature has thought fit to say that a particular temple will be dealt with in a particular manner, it should never afterwards be dealt with in a different manner. There is no question in the present case calling for the determination of the rights and liabilities of parties in respect of any acts done already, i.e., during the time the old Act was in force. The question is merely what is to be the method of supervision over the particular temple after the amendment has come into force and what are its liabilities in the future in the matter of contribution and so on. The cases referred to in the judgment of Cornish, J., namely, (1912) A C 400[2]; 54 I A 421,[3] as well as the decisions in 38 Mad 101[4] and 40 Mad 1009,[5] which were cited in the course of the arguments before us, are not in our opinion applicable here. They clearly relate to rights which had accrued to parties under the previous state of the law and we have no doubt that the general

2. Lemon v. Mitchell, (1912) A C 400=81 L J P C 173=106 L T 359=28 T L R 282.
3. Delhi Cloth and General Mills v. Income-tax Commissioner, Delhi, A I R 1927 P C 242=106 I C 156=54 I A 421 (P C).
4. Ramakrishna Chetty v. Subbaraya Aiyar, A I R 1916 Mad 607=18 I C 64=38 Mad 101 24 M L J 54.
5. Thirumalaisami Naidu v. Subramanian Chettiar, A I R 1918 Mad 353=45 I C 109=40 Mad 1009.

principle of construction in such cases is that a vested or accrued right is not prima facie affected by a change of the law in the absence of express words or necessary implication to the contrary. But, as we have endeavoured to show, there is really no question of vested right in any sense known to the general law here but only a grouping of temples in one manner at a particular stage of legislation and in a different manner at a later stage of legislation.

We are accordingly unable to follow the decision in 40 M L W 288.[1] We are of opinion that the learned District Judge was in error in thinking that the order of the Board was erroneous on the grounds given by him in para. 5 of his judgment. The order is accordingly set aside and the case remanded to the District Court to be dealt with on the merits. The costs of this revision petition will be costs in the cause.

C.R.K./P.R. *Case remanded.*

A. I. R. 1937 Madras 234

CORNISH, J.

Allavarapu Subbayya—Appellant.

v.

Jakka Peddayya and *another*—Respondents.

Appeal No. 91 of 1934, Decided on 23rd September 1936, against appellate order of Sub-Judge, Cocanada, D/- 7th February 1934.

Penalty—Compromise decree is subject to S. 74, Contract Act—Debtor agreeing to pay certain amount less than suit amount to creditor within stipulated time—Creditor agreeing on his part to give up his claim for costs and remaining amount on payment by debtor as agreed to—Debtor agreeing to pay whole suit amount on his committing default—Provision as to payment of whole amount does not amount to penalty — Time held to be essence of contract as concession was granted only on condition of payment at stipulated time.

A compromise being an agreement is subject to S. 74, Contract Act and to the equitable relief which the Court can give under that provision, notwithstanding that the compromise is embodied in a decree : *A I R 1933 All 252 (F B), Foll.* [P 235 C 1]

If there is an agreement to pay a sum of money by a particular date with a condition that if the money is not paid on that date a larger sum shall be paid, that condition is in the nature of a penalty against which a Court of equity can grant relief and award to the party seeking payment only such damage as he has suffered by the non-performance of the contract. But if, on the other hand, there is an agreement to pay a particular sum followed by a condition allowing to the debtor a concession, for example, the payment of a lesser sum, or payment by instalments by a particular date or dates, then the party seeking to take advantage of that concession must carry out strictly the conditions on which it was granted, and there is no power in the Court to relieve him from the obligation of so doing. The test of penalty is whether the liability is imposed on the debtor to pay the decree-holder something more than he is entitled to recover under the decree. [P 235 C 1, 2]

An agreement was entered into between debtor and creditor that debtor should pay certain amount less than suit amount to the creditor within a stipulated time and on debtor's failure he agreed to pay the whole of suit amount. A compromise decree was in terms passed :

Held : that the stipulation did not amount to a penalty: *A I R 1934 Bom 370* and *A I R 1926 All 278, Applied.* [P 235 C 2]

Held also : that time was essence of contract inasmuch as concession to pay lesser amount was given only on condition of payment by debtor within stipulated time. [P 235 C 2]

Ch. Raghava Rao and *M. Sri Ramamurti*—for Appellant.

C. Rama Rao—for Respondents.

Judgment. — The decree-holder is the appellant. He brought a suit on a promissory note executed by defendant 1, he being the younger brother of defendant 2. The suit was alone contested by defendant 2, but it ended in a compromise. This compromise was embodied in a decree and runs as follows :

That if, out of the suit amount of Rupees 1,383-12-4, the sum of Rs. 800 is paid in two months from this date by the defendants to the plaintiff, that is, on 24th April 1933, in cash, the plaintiff shall give up the remaining suit amount and costs of the suit ; that, in case the defendants fail to so pay the sum of Rs. 800 to the plaintiff on 24th April 1933, the plaintiff shall recover the suit amount of Rs. 1,383-12-4 only from the defendants from their moveable and immoveable properties in execution proceedings with execution costs and that as regards the costs in this suit, the plaintiff shall give up his costs and the defendants shall give up their costs.

The sum of Rs. 800 was not paid on 24th April 1933 ; but on that day defendant 1 was allowed by the Court to pay Rs. 500 and was given time up to 3rd May 1933 to pay the balance of Rs. 300. As a matter of fact, he paid the balance on 29th April 1933. The defendant then applied to the Court to record full satisfaction of the decree. This was resisted by the decree-holder. The District Munsif dismissed the application, but it has been

allowed by the Subordinate Judge on appeal. The Subordinate Judge was of opinion that the stipulation regarding payment of the full suit amount on failure of payment of Rs. 800 on the fixed date amounted to a penalty against which the Court was entitled to give the judgment-debtor relief. The decree-holder has appealed. There is no doubt that a compromise being an agreement is subject to S. 74, Contract Act, and to the equitable relief which the Court can give under that provision, notwithstanding that the compromise is embodied in a decree. It has been so held by a Full Bench of the Allahabad High Court in 55 All 334.[1] The question here is, whether the recovery of the suit amount of Rs. 1,300 odd on non-payment of the sum of Rs. 800 on the stipulated date was recoverable by way of penalty. This must depend upon the terms of the agreement under which this sum was made payable. The law on the subject has been stated by Sir John Beaumont, C. J. in 58 Bom 610[2] at p. 617, in these words :

> If there is an agreement to pay a sum of money by a particular date with a condition that if the money is not paid on that date a larger sum shall be paid, that condition is in the nature of a penalty against which a Court of equity can grant relief and award to the party seeking payment only such damage as he has suffered by the non-performance of the contract . . . . But if, on the other hand, there is an agreement to pay a particular sum followed by a condition allowing to the debtor a concession, for example, the payment of a lesser sum, or payment by instalments, by a particular date or dates, then the party seeking to take advantage of that concession must carry out strictly the conditions on which it was granted, and there is no power in the Court to relieve him from the obligation of so doing.

It has been contended that the present case is distinguishable from the Bombay case because the larger amount there had been decreed. It is true that in the present case the sum of Rs. 1,383 has not in terms been decreed as payable ; but I think it is clear from the language of the decree that the defendants had both agreed to pay the full amount of the plaintiff's claim if they did not fulfil the condition on which the concession of a reduced sum had been made to them. Defendant 2 by virtue of the compromise had submitted to a liability for this sum if the stipulation of the payment of a lesser sum was not fulfilled, and it is not correct in my view to describe this agreement as one for the payment only of Rs. 800 under the terms of the compromise decree. The agreement was that the plaintiff should only enforce his claim to the full amount if Rs. 800 was not paid on the stipulated date. The test of a penalty would be that it was a liability imposed on the defendants to pay the decree-holder something more than he was entitled to under the decree : 24 A L J 210.[3] In the present case the decree-holder was entitled to the full amount of his claim provided that the stipulation regarding the concession was not carried out. This did not amount to a penalty.

The only other question is whether the time stipulated in the compromise for payment was of the essence of the contract. I am clearly of opinion that it was. The only reason for the concession was that the payment should be made on the stipulated date. For these reasons therefore I think that the appeal succeeds and must be allowed with costs throughout. (Leave to appeal refused.)

C.R.K./M.D. *Appeal allowed.*

1. Mohiuddin v. Kashmiro Bibi, A I R 1933 All 252=142 I C 419=55 All 334 = 1933 A L J 132 (F B).
2. Burjori Shapurji v. Madhavlal Jesingbhai, A I R 1934 Bom 370=152 I C 574=58 Bom 610=36 Bom L R 798.
3. Kishen Prasad v. Kunj Behari Lal, A I R 1926 All 278=91 I C 790=24 A L J 210.

A. I. R. 1937 Madras 235

VARADACHARIAR, J.

Payidimarri Madhava Sarma and *another*—Plaintiffs—Petitioners.

v.

Valuri Seshagirirayudu and *others*—Defendants—Opposite Parties.

Civil Revn. No. 1807 of 1934, Decided on 28th October 1935, from order of Sub-Judge, Narasapur, D/- 27th October 1934.

(a) Court-fees Act (1870), Ss. 7 (i) and 11—Suit for accounts—Plaint containing certain claim for specific amount misappropriated by defendant—Claim does not fall outside claim for accounts—No court-fee is payable under S. 7 (i) — If amount is not accounted for and if decreed, court-fee will have to be paid under S. 11.

In a suit for accounts the plaint contained certain specific amount misappropriated by the defendant and which, the plaint stated, defendant while rendering the account was bound to pay with interest :

Held: that the claim was not independent of the accounting and did not fall outside the claim for accounts and therefore no court-fee was payable under S. 7 (i). And if on the taking of accounts the amount was not accounted for and had been decreed ultimately, the court-fee would be payable under S. 11. [P 236 C 2 ; P 237 C 1]

(b) Court-fees Act (1870), S. 7 (v)—Suit for accounts—Claim for specific amount misappropriated or alternatively for possession and mesne profits of property purchased with money misappropriated—For latter prayer court-fee is payable under S. 7 (v).

A person may hold property in trust for another but if the latter sues for possession of that property he is bound to pay court-fee thereon. This cannot be said to be included in the suit for accounts. It may be that in taking of the accounts the defendant will be entitled to credit for the price of this property because the plaintiffs take the property as their own, but that is different from saying that the prayer for possession of the property is also comprised in the claim for accounts. [P 237 C 1]

In a suit for accounts, the plaint contained a claim for specific amount misappropriated or alternatively prayer for possession and mesne profits of the property purchased with amount alleged to be misappropriated:

Held: that the prayer for possession and mesne profits could not be said to be included in the suit for accounts. The court-fee was payable under S. 7 (v) in respect of the prayer for possession. [P 237 C 1]

P. Satyanarayana Rao — for Petitioners.

Order. — This is a Revision Petition against the order of the lower Court calling upon the plaintiffs to pay court-fee upon a sum of Rs. 3,612 in the following circumstances: Defendant 1 is the maternal uncle of the plaintiffs and was in management of their property for a number of years. The suit is substantially one calling upon him to render an account of his management. It has been valued as a suit for accounts and court-fee paid on that basis. The question now for consideration arises with reference to certain allegations made in para. 5 and an alternative prayer (d) in para. 17 of that plaint. Para. 5 of the plaint relates in particular to one item of mismanagement or improper conduct on the part of defendant 1, namely, in respect of a pronote for Rs. 2,100 said to have been executed by defendant 5 in favour of the plaintiffs. It is alleged that defendant 1 practically misappropriated this amount by destroying the genuine note and having another note for Rs. 2,000 executed in his own favour for the said amount and a note for Rs. 500 in favour of Viyyankundu. It is accordingly stated that "defendant 1 is while rendering accounts bound to pay the said amount of Rs. 2,100 with interest." The paragraph next refers to the fact that defendant 1 had taken a sale deed of certain lands from defendant 5 in satisfaction of this pronote claim. With reference to this land, the plaint claims that defendant 5 should be held to have made the purchase as a trustee for the plaintiffs and that the plaintiffs are accordingly entitled to possession and mesne profits. Hence the prayer (d). The learned Subordinate Judge says that though the suit is one for accounts and the relations between the parties are such as to make defendant 1 liable to render accounts to the plaintiffs, still, the specific claim for recovery of a definite amount on a definite allegation appears to me to fall under S. 7 (i) and cannot be disguised under the cloak of relief of accounting. The plaint para. 5 expressly asks for a decree for the said amount.

He calculated the principal and interest due on the pronote at Rs. 3,612 and accordingly ordered court-fee to be paid thereon. I am unable to agree that this is the correct view of the plaint claim. If the sum of Rs. 2,100 due under the alleged pronote had been received by defendant 1 in the form of a note executed in his own favour by defendant 5, it will still be money received by him as an accounting party; but as the plaintiffs are alleging that in that connection defendant 1 had acted fraudulently by making it appear that the renewed debt was in respect of an amount due to himself and by suppressing the genuine note in favour of the plaintiffs, details relating to this transaction had to be stated in the plaint to bring out how and why the plaintiffs claimed to hold defendant 1 accountable in respect of a sum realised by him on a promissory note which stands in his own favour. The sentence in para. 5 to the effect that "defendant 1 is while rendering accounts bound to pay the said sum of Rs. 2,100 with interest" does not mean that it is a claim independent of the accounting, but that in the accounting plaintiffs should be allowed credit even for the sum of the note which has been fraudulently taken by defendant 1 in his own name from defendant 5. I am unable to agree with the learned Judge that this is a claim for recovery of a definite amount falling outside the claim for accounts. If, for instance, the defendant satisfies that even this amount has been spent on behalf of the

plaintiffs, there will be an end of the defendant's liability under this head. This will not be the case in an ordinary suit for money under S. 7 (i). That is why a suit for accounts is allowed by law to be valued in a particular way. After all, the plaintiffs will not in such a case ultimately evade payment of the stamp duty; because, if on the taking of accounts the amount is not accounted for and is ultimately decreed in favour of the plaintiffs, the time for payment of court-fee on such amount is fixed by law under S. 11, Court-fees Act.

While I disagree with the view taken by the lower Court for the reasons above indicated, I must, nevertheless, hold that the plaintiffs are liable to pay court-fee in respect of the prayer for possession under S. 7 (v) of the Act. In para. 16 of the plaint it is suggested that no court-fee is payable in respect of the claim for the Sch. (d) property because it is an alternative prayer. This does not seem to be a valid reason. A person may hold property in trust for another, but if the latter sues for possession of that property he is bound to pay court-fee thereon. This cannot be said to be included in the suit for accounts. It may be that in the taking of the accounts the defendant will be entitled to credit for the price of this property because the plaintiffs take the property as their own, but that is different from saying that the prayer for possession of the property is also comprised in the claim for accounts. In modification of the lower Court's order, therefore, I direct that the plaintiffs shall pay court-fee under S. 7 (v) in respect of the prayer for possession of Sch. (d) property. The lower Court shall fix the proper court-fee payable and take it out of the amount which I am told the plaintiffs have already paid into the lower Court under the order now revised. The plaintiffs will be entitled to a refund of the surplus amount unless they allow it to remain in the Court to be utilised under S. 11, Court-fees Act, in due time. There will be no order as to the costs of this revision petition.

C.R.K./S.C. *Order accordingly.*

A. I. R. 1937 Madras 237

PANDRANG ROW, J.

V. Lakshminarayanan Chettiar — Appellant.

v.

A. Rangayya Chettiar—Respondent.

Second Appeal No. 1157 of 1932, Decided on 6th October 1936, against decree of Sub-Judge, Dindigul, in A. S. No. 72 of 1931.

Hindu Law—Joint family—Right of co-parceners — Release for consideration of specific property in favour of one co-parcener by other—Deed stating that there was only blood relationship and no monetary one between them thenceforth—Statement does not amount to release of all joint property.

When a release is executed for valuable consideration by a co-parcener, it is obvious that the consideration must depend on the value of the interest or right which is relinquished thereunder. It is therefore necessary to indicate exactly in respect of what property the release was given. [P 238 C 2]

A co parcener released for valuable consideration the specific property mentioned in the deed with a statement: "Hereafter there is only blood relationship between you and me and there is no monetary relationship ":

Held : that the statement did not operate as a release of the rights of the executant relating to all joint property; the property specifically mentioned in the deed only was released. [P 238 C 2]

Judgment.—This is an appeal from the decree of the Subordinate Judge of Dindigul dated 12th July 1932 reversing on appeal the decree of the District Munsif of Dindigul dated 30th June 1931 in O. S. No. 166 of 1930, a suit for partition and recovery of possession of a fourth share in the plaint site. The entire extent of the site in question is only 22 ft x 32 ft and though the site is said to be situated in Dindigul town, the tenacity with which this litigation has been fought is out of all proportion to the intrinsic value of its subject matter. The plaintiff claimed his one-fourth share on the ground that the entire site originally belonged to one Muthukrishna Achari and that after his death Muthukrishna Achari's surviving four brothers became entitled to the site and that one of such brothers, viz. Subbayya Achari sold his share to him in September 1925 (Ex. A). The defendant contended that the site was purchased by Muthukrishna Achari with joint family funds of himself and his brothers and that

after his death one of his brothers, Ponnuswami Achari, as manager of the joint family, sold the entire site to one Subramania Chetti in 1920 (Ex. 1), and that Subramania Chetti sold the same to the defendant in 1922 under Ex. 2. The defendant's main contention thus was that the plaintiff's vendor Subbayya Achari had no right at all to the property which he purported to sell to the plaintiff under Ex. A.

The trial Court found that the plaint site was not the joint family property of Muthukrishna Achari and his brothers and that the plaintiff's vendor had title to convey his share in the plaint site. A preliminary decree for partition was therefore passed in favour of the plaintiff. On appeal however the Subordinate Judge differed from the District Munsif on the question as to whether the plaint site was joint family property or not, mainly relying on a certain document (Ex. 17) which was admitted in appeal. The trial Court's finding was that Muthukrishna Achari was the sole owner of the site. The Subordinate Judge held that it was joint family property and he further held—disagreeing with the trial Court—that by virtue of the two release deeds Exs. 7 and 8, executed by Subbayya Achari in 1920, he had ceased to have any interest in the joint family properties. As a result of these findings the lower appellate Court allowed the appeal and dismissed the suit with costs. The present second appeal is by the plaintiff.

Some complaint was made about the admission of Ex. 17 by the lower appellate Court, but I do not think there is much substance in this complaint. Ex. 17 had been tendered in the trial Court itself but was rejected on the ground that it had been produced late and was also inadmissible for want of registration. Both these objections were overruled by the Subordinate Judge in appeal and I am unable to say that he was wrong in admitting the document as evidence in appeal. Though it would appear that the learned Subordinate Judge relied almost entirely on the recitals found in Ex. 1 about family necessity or benefit, I am unable to say that there is no evidence sufficient to support his finding that the property was joint family property. It is a question of fact and there is no sufficient reason to interfere with the finding on that question in second appeal.

Assuming, therefore, that the property has been rightly found to be joint family property the question remains whether the plaintiffs' vendor Subbayya Achari, who is admittedly a member of the family and entitled as such to a fourth share in it, lost or relinquished his right thereto by reason of the two release deeds Exs. 7 and 8 executed by him. On this point I am unable to concur in the opinion of the learned Subordinate Judge. A perusal of these documents shows that the releases were meant to operate only in respect of the properties specifically described in the schedules appended to those documents. The operative words which affect the releases are as follows. In Ex. 7 the words are :

> As I have received the said sum of Rs. 2,000, and separated myself by executing this release deed, hereafter neither myself nor my heirs that may come into existence shall, at any time, for any reason, have any manner of right or interest against yourself or your heirs in respect of the moveable or immoveable properties described in the A schedule, the outstandings due or the amounts to be paid and described in B schedule.

In Ex. 8 the words are :

> I have therefore executed this supplemental release deed out of my free will and consciousness to the effect that all the undermentioned properties are also covered by the said release deed and that I have no right or subsequent lien whatever in respect of them.

It is clear that the consideration for the release was the payment of Rs. 2,000 in cash and when a release is executed for valuable consideration by a co-parcener it is obvious that the consideration must depend on the value of the interest or right which is relinquished thereunder. It is therefore necessary to indicate exactly in respect of what property the release was given. Exs. 7 and 8 clearly show that the release was in respect of only the properties mentioned therein. The general statement which is found in Ex. 7 to the effect that "hereafter there is only blood relationship between you and me and there is no monetary relationship" does not operate as a release of the rights of the executant relating to all joint property. The trial Court was in my opinion right in coming to the conclusion that the express recitals in Exs. 7 and 8 do not support the contention of the defendant that the executant thereof had relinquished all his interest in all the joint family properties. The execution of a

supplemental deed like Ex. 8 appears to show that the previous release deed was not intended to effect an extinction of all rights in all the joint family properties. On this point therefore I am of opinion that the trial Court's view as to the legal effect of the release deeds Exs. 7 and 8 was right and that the learned Subordinate Judge went wrong in taking a contrary view. It follows from this that the second appeal must be allowed and the decree of the trial Court restored.

It has been urged on the side of the defendant-respondent that he is entitled to some equities by reason of the alleged discharge of the mortgage binding on the plaint site by one of his vendors, viz. Sabapathi Achari. This claim to equity was not put forward in the written statement nor is it referred to in the judgments of the two Courts below. I do not think it is open to the defendant to raise such a contention for the first time in second appeal especially when the claim requires for its determination, the determination of a question of fact. No issue has been framed about the alleged discharge though something has been said in the judgment of the trial Court. I am unable therefore to accede to the request of the defendants-respondents' advocate to remand the entire suit for fresh disposal so as to enable him to raise this new claim. It must not be taken that there has been any decision adverse to this claim in this litigation, and if it is open to the defendant to agitate this claim in a separate suit, nothing that has been said by me on this point must be deemed to stand in his way. I am not prepared to allow this claim to be raised for the first time in the stage of second appeal.

The result is the decree of the lower appellate Court is set aside and the decree of the trial Court is restored. The appellant is entitled to his costs in this Court and the Court below.

Leave to appeal is refused.

C.R.K./S.C. *Appeal allowed.*

A. I. R. 1937 Madras 239

BURN AND MENON, JJ.

Nandamani Anangabhima and *another* —Appellants.

v.

Modono Mohono Deo — Defendant — Respondent.

Letters Patent Appeals Nos. 62, 63 and 64 of 1935, Decided on 7th August 1936, against judgment of King, J., D/- 18th March 1935, reported in *A I R 1935 Mad 786.*

Execution — Application filed by pleader having no written authority— Pleader has no power or capacity to act—Application has no legal effect as not being in accordance with law.

If a pleader purports to do something which he has no power or capacity to do, what he purports to do can have no legal effect. [P 240 C 2]

Where therefore an execution application is presented by a pleader without any documentary authority in his favour from the decree-holder, it is not a question of a defect in the pleader's authority ; nor is it a question of an irregularity, nor even of an illegality, in anything that he does but it is simply a question of want of power or capacity on his part to act. The pleader having no capacity or power to act, the application has no legal effect as not having been made in accordance with law. [P 240 C 2]

B. Jagannadha Das—for Appellants.

B. V. Ramanarasu—for Respondent.

Judgment.—These appeals are from the judgment of our learned brother, King, J., in C. M. S. A. Nos. 12, 13 and 14 of 1929.* The facts have been set out in the judgment of our learned brother and need not be repeated here. We do not find that there is any very great difficulty in this case. The only point that arises for decision is whether the decree-holder, the appellant herein, "applied in accordance with law" for execution when his petition, E. P. No. 1414 of 1923 and the connected petitions were presented to the District Munsif on 20th November 1923. The last execution petition before that had been presented in 1920, and the execution petition now under consideration was presented in 1925, and therefore it is clear that unless the application of 1923 was one made in accordance with the law, Art. 179 (as it then was) of the Limitation Act will bar execution.

Now, to begin with, E. P. No. 1414 of 1923 and the connected execution petitions are not apparently in themselves defective in any way. They

*Reported in A I R 1935 Mad 786.

are signed by the decree-holder and no criticism of their contents has been offered. The objection on behalf of the judgment-debtors is that they were presented by the decree-holder's vakil Mr. A. Thumbanadham, who had no vakalat authorizing him to present them. It is clear that there was no vakalat, and we must assume that as a point of fact. The learned District Munsif says that there is no doubt that Mr. A. Thumbanadham had authority to file the execution petitions. It is not known upon what evidence the learned District Munsif made this statement, but if it is true it must refer to some oral authority because no written authority has been produced, and there is in fact no allegation anywhere that vakalats had in fact been executed in favour of Mr. Thumbanadham by the decree-holder. The question then is whether the decree-holder in 1923 "applied in accordance with law to the proper Court for execution": *vide* Art. 179, Lim. Act, as it stood in 1923 and 1925. The question, we think, admits of a very simple answer. Under O. 21, R. 10, Civil P. C., the decree-holder "shall apply for execution . . ." By O. 3, R. 1 (we quote the relevant portions) :

> Any application to any Court, required or authorized by law to be made by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made by the party in person, or by his recognized agent or by a pleader appearing, applying or acting on his behalf.

It is not alleged in this case that the party made these applications to the Court in person. It is not alleged that he made them by a recognized agent. The only case is that he made them by his pleader, Mr. Thumbanadham. O. 3, R. 4, says :

> No pleader shall act for any person in any Court unless he has been appointed for the purpose of such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power of attorney to make such appointment.

This means according to the contentions of the judgment-debtor that the act of the pleader in presenting these execution petitions was a mere nullity. According to the contentions of the learned advocate for the appellants, Mr. Jagannadha Das, the want of a vakalat was a mere irregularity which may be cured or condoned. We have had large number of cases cited, but none of them is exactly applicable : many, we think, are quite irrelevant. It is not to the point to discuss cases in which there have been defects, whether grave or trivial, in the applications, plaints or petitions, nor cases in which there have been defects or omissions in vakalats filed in Court. This is not a case of any defects in particulars in any document. It is a case simply of want of authority on the part of the pleader to act. O. 3, R. 4, says that no pleader shall act unless he has been appointed by a document in writing. This means in our opinion that if the pleader has not been appointed by a document in writing, he is wanting in capacity or competence to act. It is not a question of a defect in the pleader's authority ; it is not a question of an irregularity or even of an illegality in anything that he does ; it is simply a question of want of capacity to act. If a pleader purports to do something which he has no power or capacity to do, we think, it must be clear that what he purports to do can have no legal effect.

Mr. Jagannadha Das has contended that since upon the applications of 1923 the executing Court took action, issuing notices to the judgment-debtors, posting the case for various dates of hearing, on some dates ordering costs to be paid and the like, therefore, the execution petitions cannot, after all that has been done, be treated as mere waste paper or as if they had not been presented at all. This argument we think would have great force if anything had really been done upon those execution petitions, but the end of them was that they were withdrawn and were accordingly dismissed without any execution having really taken place. It is, we think, unfortunate perhaps that the decree-holder should be met with a plea of an apparently technical kind like this when he seeks to execute his decrees. But there is no doubt that a technical point, if it is a good one, is the best of all points ; and in the present case, as we are satisfied that the presentation of these execution petitions by the decree-holder's pleader was a mere nullity, we hold that our learned brother's judgment was correct and that these appeals must be dismissed. But in view of the fact that the appellant was successful in both the Courts below, we make no order as to costs in these Letters Patent appeals.

W.D./A.L. *Appeals dismissed.*

* * A. I. R. 1937 Madras 241

VARADACHARIAR AND STODART, JJ.

Secretary of State—Appellant.

v.

V. M. Meyyappa Chettiar — Respondent.

Appeal No. 99 of 1934, Decided on 1st May 1936, against order of Sub-Judge, Devakottah, D/- 25th January 1934.

*** * (a) Income-tax Act (1922), S. 67 — Statutory tribunal with power to decide existence of certain facts before further action acts within jurisdiction in making that decision — Civil Court has no jurisdiction to question his decision of fact — Income-tax Officer assessing person on deciding, after proper inquiries, that he is resident of British India — Assessee alleging himself to be foreign resident, moving civil Court against assessment on ground that officer's decision about his residence was wrong — Civil Court has no jurisdiction to entertain suit.**

A statutory tribunal or authority which has to arrive at a decision as to the existence or non-existence of certain facts before proceeding to take further action under the statute, is acting within the jurisdiction in making that decision even though wrongly and is immune from civil proceedings to quash that decision except such as are prescribed by the statute. [P 250 C 2]

An Income-tax Officer assessed a certain person on deciding, after proper inquiries, that he was a resident of British India. The assessee alleged that he was a foreign resident and hence was not assessable as such. The Income-tax Officer found against him and required him under S. 22 to submit return of his income. He did not do this and was assessed under S. 23 ; and under S. 30 became barred from the remedies provided by the Act. The assessee therefore filed a suit in civil Court against the taxation on the ground that he was a foreign resident and that the assessing officer wrongly assumed jurisdiction in deciding that he was a resident of British India :

Held : that the Income-tax Officer having authority to decide the fact of his residence acted within his jurisdiction in deciding that he was resident of British India. Civil Court therefore had no jurisdiction to entertain the suit : *Case law discussed.* [P 250 C 1, 2 ; P 253 C 1]

*** (b) Income-tax Act (1922), S. 67—Remedies under Act against assessment barred to assessee — Fact that assessee has no other remedy is no answer to objection that no action lies in civil Court to challenge act of assessing officer acting within authority.**

The fact that a person has no other remedy is no answer to the objection that no action lies in the ordinary civil Courts to challenge the act of a statutory authority so long as the latter acted within his authority. [P 252 C 1]

The assessee after being required by the Income-tax Officer to submit return of his income under S. 22 was assessed under S. 23 (4) after his refusal to do so and under S. 30 became debarred from remedies provided by the Act :

Held : that the absence of the remedies could not be considered as an answer to the objection that the civil Court had no jurisdiction to entertain suit against the assessment made by the officer. [P 252 C 1]

K. S. Krishnaswamy Ayyengar and *N. Srinivasa Aiyengar*—for Appellant.

K. Rajah Aiyar and *K. S. Ramamurthy* for *V. Ramaswamy Iyer* — for Respondent.

Varadachariar, J.—This appeal arises out of a suit for a declaration that the plaintiff is not liable to be assessed to income-tax on the income received by him from his business in Saigon and for recovery of tax levied from him for the years 1929-30 and 1930-31. Issue 1 in the case raised the question whether the suit was not barred by S. 67, Income-tax Act 11 of 1922. Dealing with this point as a preliminary issue, the District Munsif dismissed the suit as barred by that section. The lower appellate Court was of opinion that the suit would be maintainable if the assessment was ultra vires or had been made without jurisdiction. In view of the allegations in the plaint, it held that the Court must decide on evidence whether the plaintiff was permanently residing in French territory, as, in that case, any income there received by the plaintiff from the Saigon business would not be income assessable under the Act. It recorded as concession by the plaintiff's vakil that issue 6 in the case, viz. :

> Whether the assessment was made without proper inquiry and without giving the plaintiff an opportunity to prove his contentions

could not be tried by the civil Court. Issue 5 (a) raised the question of fact:

> Whether the plaintiff had ceased to reside in British India, and whether he had no assessable income in British India.

The other issues were consequential. The lower appellate Court accordingly remanded the suit for trial of issue 5 (a) and for findings on the other issues in the light of the finding that may be come to on issue 5 (a). Against that order of remand, this appeal has been preferred by the Secretary of State. In view of the arguments urged before us, it is necessary to refer to a few facts appearing from the documents put in evidence as bearing on the preliminary issue. The plaintiff was at one time admittedly a resident of Palavangudi in the Chettinad (Ramnad District), but his case was that from 1926 he had been permanently residing at Pondicherry in French Territory and that

after a partition in his family in 1928, he had no proprietary interests, business or assets anywhere in British India. In October 1929 the plaintiff's agent appeared before the Income-tax Officer and put forward this contention. For reasons recorded in Ex. 1, that officer declined to accept that plea. He was of opinion that the plaintiff's residence out of British India was only temporary, that his wife was living in Chettinad and that he had a right to a share in the family house in Chettinad after his father's death. An appeal against Ex. 1 proved infructuous; and as the plaintiff did not make any return in respect of his income or produce his accounts in spite of several adjournments, he was assessed under S. 23 (4) of the Act on a sum of Rs. 8,100, being the amount disclosed by the accounts of the partnership to have been remitted to him (*vide* Ex. 2). For the next assessment, there was no appearance by or on behalf of the plaintiff before the Income-tax Officer. The steps taken to serve notices on the assessee are detailed in Ex. 3. On default of appearance in spite of these steps, the assessment had again to be made under S. 23 (4). But as, in the meanwhile, the assessee had sent a notice of suit to the Commissioner of Income-tax on 26th November 1930, the Income-tax Officer referred in his order (Ex. 3) dated 4th March 1931 to the materials on which he came to the conclusion that the plaintiff must be regarded as residing in Palavangudi. In addition to the circumstances stated in Ex. 1, he referred to the fact that the plaintiff's wife was living in Palavangudi in a house which he believed was purchased by the plaintiff in her name and that from an affidavit filed by that wife it appeared that plaintiff celebrated his daughter's marriage in that house in the year Sukla (1929-30) and that the plaintiff occasionally used to come and stay with her in that house.

In the circumstances above stated, two contentions have been urged before us in support of the Government's appeal; (1) that the bar enacted by the first part of S. 67, Income-tax Act of 1922 is absolute and unqualified, and (2) that the legislature has left it to the income-tax authorities to decide both questions of fact and of law, that appropriate remedies by way of appeal and reference (including a reference to the High Court on points of law) have been provided in the Act and that it could not therefore be the intention of the Legislature that civil Courts should in a separate suit be at liberty to examine the correctness of the conclusions arrived at by the income-tax authorities. Before dealing with the decisions cited before us, it is necessary to emphasize the fact that, in some of them, the question of exclusion of the civil Court's jurisdiction had to be dealt with merely on general principles and in the absence of a statutory prohibition, while in others the decision turned upon the scope of the prohibition enacted by statute. In the former class of cases, reliance has naturally to be placed on the general scheme of the law creating or empowering the authority whose acts are sought to be challenged. The observations of the Judicial Committee in (1874) 5 P C 417[1] are frequently referred to, as defining the limits of the civil Court's powers of intervention. But even in applying these observations, it seems to me unwarranted to assume that in all cases in which a prerogative writ can, according to those observations, issue from a superior Court, there must also exist a right of civil suit in the ordinary Courts of the land.

Whenever the right sought to be vindicated is not a creature of the statute itself but a common law right relating to the person or property of the subject, Courts start with the presumption that there must be a remedy in the ordinary Courts and insist on very clear and unmistakable indications of an intention to curtail or exclude the same; and in this connexion a distinction has been formulated between questions affecting the jurisdiction of the statutory authority and matters affecting the correctness of its decision. Even under the head of jurisdiction, a further refinement has been recognized, as indicated in the judgment of Lord Esher in (1888) 21 Q B D 313[2] at p. 319, according as the statute in question does or does not entrust to the statutory authority itself jurisdiction to determine whether or not the preliminary state of facts essential to give it jurisdiction to act under the statute

1. Colonial Bank of Australia v. Willan, (1874) 5 P C 417=43 L J P C 39=30 L T 237=22 W R 516.
2. Queen v. Commissioners for Special Purposes of the Income-tax, (1888) 21 Q B D 313=57 L J Q B 513=59 L T 455=36 W R 776=53 J P 84.

exists. In (1841) 1 Q B 66,[3] which is referred to with approval in (1874) 5 P C 417[1] at p. 443 and numerous later decisions, it was observed that the test of jurisdiction (for this purpose) was whether or not the authority in question "had power to enter upon the enquiry, not whether its conclusions in the course of it were true or false." The Court explained the principle by adding that it might be shown that the tribunal had no authority to commence the enquiry inasmuch as the question brought before them was not one to which their jurisdiction extended; and this, although by misstatements they have made the proceedings on the face of them regular.

In cases where the relevant statute contains a specific provision limiting or excluding the jurisdiction of civil Courts, the determination of the ambit of the civil Court's jurisdiction must prima facie rest upon the language used in the excluding provision. Even here, when the language is not sufficiently definite or comprehensive, its interpretation is naturally influenced by the presumption against the intention to oust the jurisdiction of civil Courts, especially when personal liberty and rights of property are concerned. One well known class of cases where the statute law has advisedly enacted only a a restricted exclusion of civil jurisdiction is that relating to taxation by Local or Municipal bodies. (*cf.* S. 354, Madras District Municipalities Act of 1920 and S. 228, Madras Local Boards Act of 1920, which preclude the challenge in a civil Court of any assessment, etc., provided that the provisions of the Act have been in substance and effect complied with.) The result of such language is practically to assimilate this class of cases to those where the statute contains no express words of exclusion of civil Courts' jurisdiction. (*cf.* 3 C W N 73[4] and 35 Cal 859,[5] which turned on S. 116, Bengal Municipal Act, which merely said that no objection shall be taken to any assessment or rating in any other manner than in this Act provided.)

Even where the words of exclusion in the statute are positive enough to exclude a writ of certiorari, the Judicial Committee made a reservation in (1874) 5 P C 417,[1] in respect of manifest defect of jurisdiction or fraud of the party. Whatever may be the disinclination of the Legislature in England against enacting a total exclusion of the civil Courts' authority or of English Courts in inferring it, such exclusion is not unknown in this country. The decision in 4 M I A 353,[6] is an instance in point. *See also* 50 Mad 449.[7] The point for decision in 4 M I A 353[6] related to the immunity of officers acting in excess of their powers in the administration of revenue law (similar to that provided for in the second part of S. 57, Income-tax Act) but their Lordships' observations, it was said, are equally apposite to the question arising under the first part of the section. The case is of special significance in view of the strong opinion expressed by Sir Erskine Perry (in the Supreme Court) in favour of the maintainability of the action. The learned Chief Justice referred to the interpretation placed by the Judicial Committee in 2 M I A 293[8] on 21 Geo. III, Ch. 70, S. 24 and added: 'If jurisdiction does not exist in the Supreme Court to correct wrongs of this kind, it exists nowhere' : *see* footnote on page 361 of 4 M I A in Mr. Sanjeeva Row's Edition of the Indian Reports. And yet their Lordships held against the jurisdiction of the Supreme Court, adding :

> Whether the plaintiff might have redress before any other tribunal can only be material in a doubtful construction of the statutes.

If the jurisdiction of the Court is clearly taken away "our decision," they said, "could not be influenced by consideration that the plaintiff is left without remedy." In 53 Mad 979[9] the exclusion of jurisdiction by S. 110, Government of India Act, 1915, has been held to exclude even the jurisdiction to issue a writ of certiorari. Whether the High Court can issue a writ of certiorari on an Income-tax officer in the mofussil, is a question beset with even greater difficulty : *see* 36 Mad 72[10] and

3. Reg v. Bolton, (1841) 1 Q B 66=4 P & D 679 =5 Jur 1154.
4. Navadwip Chandra Pal v. Purnanda Saha, (1898) 3 C W N 73.
5. Chairman, Giridih Municipality v. Sirish Chandra Muzumdar, (1908) 35 Cal 859=12 C W N 709=7 C L J 631.
6. Spooner v. Juddow, (1846-51) 4 M I A 353=6 Moo P C 257=1 Sar 363 (P C).
7. Govindarajulu Naidu v. Secy. of State, A I R 1927 Mad 689=105 I C 576=50 Mad 449=53 M L J 355.
8. Calder v. Halket, (1837-41) 2 M I A 293 (P C).
9. Venkataratnam v. Secy. of State, A I R 1930 Mad 896=128 I C 851=53 Mad 979=60 M L J 25.
10. *In re* Nataraja Ayyar, (1913) 36 Mad 72=16 I C 755=13 Cr L J 723=23 M L J 393.

C. M. P. No. 2544 of 1935;[11] but one cannot on that account recognize a right of suit in contravention of the declared policy of the legislature. In the interpretation and application of taxing statutes, the distinction between liability to assessment and the method or quantum of assessment has long been recognized in the Land Revenue Law of this country. After a review of the relevant statutory provisions, it was pointed out by a Full Bench in 14 Cal 67[12] at p. 84, that the former question had always been treated as and declared to be a matter for Courts of justice. The same distinction was recognized in S. 58, Madras Revenue Recovery Act, which excludes from the cognizance of civil Courts only questions as to "rate of land revenue or as to the amount of assessment." In 14 Cal 67,[12] the question was raised whether any and what departure had been made from this underlying principle by Act 9 of 1847, either by reason of its general scheme or by the specific provision in S. 9 which enacted that:

> No suit or action in any Courts of justice shall lie against the Government or any of its officers on account of anything done in good faith in the exercise of the powers conferred by this Act.

The majority approached this question from the point of view that because of the declared policy of the Indian Legislature for at least 50 years, they should not adopt a construction involving a departure from it unless the Legislature had expressed such intention in clear and unmistakable language. As regards S. 9, they held that it only referred to suits for damages. This method of approach was approved by the Judicial Committee on appeal, 17 Cal 590,[13] and with reference to S. 9, their Lordships observed:

> Full effect can be given to this section without holding that it deprives the owner of a permanently settled estate of that right of appeal which is given to him in order that he may have determined in a civil Court the justness of the demand of the Revenue authorities.

The language of S. 9 was in effect limited by their Lordships in view of the previous state of the law and they added (on p. 605):

> If it had been intended to take away from the proprietors of estates the power by application to the Courts to obtain immediate redress in any case in which the revenue authorities shall violate or encroach on the rights secured to them by the Permanent Settlement, it would have been done in express terms and not by such enactments as are contained in the Act of 1847.

Pausing for a moment, to compare S. 9 of Act 9 of 1847 with S. 67, Income-tax Act, 1922, I may point out that the exclusion in the Income-tax Act cannot be explained away as relating only to the suits for damages, because the section consists of two parts, of which the latter alone may be said to correspond to S. 9 of Act 9 of 1847. The first part in terms provides that:

> No suit shall be brought in any civil Court to set aside or modify any assessment made under this Act.

Subject to the controlling effect of the words 'made under this Act,' there can be little doubt that the exclusion of the jurisdiction of the civil Court is almost absolute. Can it be suggested that there is anything in the history of this branch of the law which, as in the case of land revenue law, would justify the Court in limiting the scope of this exclusion? I am not aware of any such considerations. On the other hand, in the English system from which the Income-tax law has been borrowed, it was settled as early as in (1848) 2 Ex 352,[14] that legislative policy as well as considerations of expediency pointed to the propriety of treating the assessment by the assessing authorities as final and conclusive unless appealed from in the manner pointed out by the statute. It is true that in (1916) 1 A C 215[15] [affirming the decision in (1914) 3 K B 429[16] at page 447] it was decided that 'prohibition' will lie and is an appropriate remedy if the commissioners acted without jurisdiction. The case there was clearly within the principle of *Reg.* v. *Bolton*[3]; because, according to the then state of the law, only certain specified commissioners could assess a person to income-tax in respect of profits derived from foreign possessions. Even on the fact found or assumed to exist, the Court held that the particular commissioner whose proceedings were sought to be restrained, had no jurisdiction to proceed with the assess-

11. Thyagaraju Chettiar v. Collector of Madura, reported in A I R 1936 Mad 398=163 I C 60=70 M L J 343=59 Mad 702.
12. Fahamidannissa Begum v. Secy. of State, (1887) 14 Cal 67 (F B).
13. Secy. of State v. Fahamidannissa Begum, (1890) 17 Cal 590=17 I A 40 (P C).
14. Allen v. Sharp, (1848) 2 Ex 352=17 L J Ex 209.
15. Kensington Income-tax Commissioners v. Aramayo, (1916) 1 A C 215=84 L J K B 2169=113 L T 1083=31 T L R 606=59 S J 715.
16. Rex v. Kensington Income-tax Commissioners, (1914) 3 K B 429=83 L J K B 1439=111 L T 993=30 T L R 574.

ment, as he admittedly was not one of those specified in the Act as competent to deal with such profits. The sense in which that decision must be understood was explained in (1915) 3 K B 768.[17] When it was argued that the commissioners had no jurisdiction to make or proceed upon the assessment because, according to the petitioner's contention, he was not chargeable to income-tax, and it was further contended that the commissioners could not give themselves that jurisdiction to assess a person by determining in the first instance that he was chargeable when in fact he was not, Lord Reading, L. C. J. reviewed the history of the Income-tax law and after referring to (1888) 21 Q B D 313[2] held that:

> The scheme of the legislature is to entrust the decision of the facts to a tribunal of persons specially selected for the locality . . . reserving always to the individual the right to have the commissioner's decisions on points of law reviewed by the Courts. The obligation is placed for reasons of expediency upon the person assessed to appeal to the commissioners if he wishes to rid himself of an assessment which is, in his view, based upon wrong conclusions of fact.

The only qualification added is that the assessing authorities should have materials before them on which they could honestly come to a conclusion against the assessee:

> Once that conclusion is reached, it follows that they had jurisdiction to decide all questions of fact.

Avery, J. observed that:

> In such a case, it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts including the existence of the preliminary facts on which the further exercise of their jurisdiction depends.

Both Avery, J. and Lush, J. make it clear that a writ of prohibition may issue if the assessing authority had never satisfied itself that a person was chargeable or had acted without any enquiry or if its belief was founded on an obvious and manifest mistake in law. Mr. Rajah Iyer referred to an observation of Bhearman, J. in (1925) 2 K B 250,[18] at p. 260, to the effect that:

> There may be cases in which prohibition may be obtained where the applicant shows that he is not liable to the jurisdiction of the commissioner at all.

Read in the light of other decisions and of the remarks of the other learned Judges who took part in that very case, this observation can only refer to cases like (1916) 1 A C 215,[15] where even on undisputed facts or facts assumed by the commissioner, they would have no jurisdiction. Whatever might be said of the Income-tax Act of 1886, there can be little doubt that the Indian Acts of 1918 and 1922 must, in view of their elaborate provisions and safeguards, be interpreted in the light of the principles above set forth as underlying the English Income-tax law. As I have already indicated, it may be open to doubt whether an ordinary civil action will lie in all cases in which and in all circumstances under which a writ of certiorari or prohibition may issue from a superior Court. But it certainly cannot be said that an assessment may be challenged by a civil suit even in circumstances in which a writ of certiorari or of prohibition will not be available. According to the facts which have been set out at the commencement of this judgment, the present case is one in which the assessing officer, did make an enquiry as to the facts relating to the plaintiff's residence in British India and there is no reason to think that he did not or could not honestly come to the conclusion that the plaintiff was a resident of British India: *cf.* 1 Tax Cas 225[19] and received in British India the income remitted from Saigon. In this view the plaintiff's suit must fail.

Mr. Rajah Iyer contended that according to the scheme of the Income-tax Act, it must not be held applicable to a non-resident assessee who disputed his liability to be assessed and that it did not entrust to the revenue authorities the right to decide the question of his liability and much less the right to decide it finally. I am not able to accept these contentions. In (1915) 3 K B 768[17] already referred to, it was laid down, on the authority in 2 Ex 352[14] that the procedure under the Act applied as much to a person who contended that he was not chargeable as to one who admitted that he was chargeable but complained of the manner or extent of assessment. The provisions of Ss. 42 and 44-A of the Indian Act clearly contemplate assessment being imposed on

17. The King v. Bloosmbury Income-tax Commissioners, (1915) 3 K B 768=85 L J K B 129=113 L T 1015=31 T L R 565.
18. Rex. v. Swansea Income-tax Commissioners, (1925) 2 K B 250=94 L J K B 718=133 L T 143=41 T L R 505=69 S J 606=9 Tax Cas 437.
19. Rogers v. Inland Revenue, (1881) 1 Tax Cas 225.

income accruing to non-resident foreigners and there is no reason why the assessing authority should not have the power to decide a disputed question of residence or receipt in British India for the purpose of Cls. 1 and 4 of S. 4, if it could and must decide disputed questions under Ss. 42 and 44-A. The notice under S. 22, Cl. (2) of the Act must be issued to all persons who, in the opinion of the Income-tax Officer, are in receipt of an income liable to tax and if a person thus served disputes his liability, I think it is his duty to put forth his objection before the assessing authorities. S. 30 makes it clear that one of the grounds of appeal contemplated by the Act is the assessee's denial of liability to be assessed under the Act. I see no reason to limit the scope of the denial there contemplated to the exceptions enumerated in Cl. (3), S. 4. That a denial of liability on the ground of non-residence may be raised in the course of assessment proceedings is shown by (1928) A C 234[20] on appeal from (1927) 2 K B 55: *see also* 13 Tax Cas 746;[21] (1928) A C 234[20] also shows that in certain circumstances and subject to certain limitations the question of residence may be a question of law fit to be referred to the High Court for its opinion: *see also* (1928) A C 217.[22] Mr. Rajah Iyer also contended that as the plaintiff did not appear before the Income-tax Officer he could not have appealed to the Assistant Commissioner under S. 30; but I fail to see how that circumstance can affect the construction of the Act as to the scope of the matters to be decided by the assessing authorities.

It is not necessary for the purposes of this case to decide whether the language of S. 67 of the Act of 1922 is clear or comprehensive enough to exclude a suit even in cases like these instanced by Avery, J. and Lush, J. in (1915) 3 K B 768[17] as fit cases for the Court's interference by writs of certiorari or prohibition. The answer to that question will in some measure depend upon the construction to be placed on the expression "made under this Act" occurring in the section. As observed by Muthuswami Ayyar, J., in 12 Mad 168[23] at p. 175 (with reference to similar language in S. 59, Madras Revenue Recovery Act):

> The section presupposes that certain proceedings were professedly taken under the Act and that there might be a valid claim to redress on the ground that they were not in accordance with the provisions of the Act.

The question (which was left open in that case) is whether the proceedings contemplated are those which are vitiated by mere errors of procedure or include those taken without jurisdiction. Later decisions relating to sales for arrears of public charges have proceeded not so much on the construction of this or like expressions but on the broad ground that sales not warranted by the statute are void and do not therefore require to be set aside within the shorter period of limitation: *cf.* 25 Cal 833;[24] 55 Mad 876.[25] In 21 Mad 367[26] at p. 368, a case under the District Municipalities Act it was observed that:

> An imposition which is expressly prohibited by the Act cannot be deemed to be made under the provisions of the Act.

The principle thus stated may perhaps be unexceptionable but its application will not always be easy. Take for instance, the first exception provided for in Cl. (3), S. 4, Income-tax Act of 1922, i.e., that in the case of property held in part in trust for religious or charitable purposes, the income applied thereto shall not be taxed. Suppose the income-tax authorities on the materials before them held that only a certain amount has been so applied but the assessee contends that a larger portion of the income has been applied for the purposes of the trust, could it have been intended that such a dispute might be agitated in a regular suit? Turning for a moment to the language of S. 67, Income-tax Act of 1922, it is obvious that the second part of the section, relating to the immunity of Government and its officers must cover not merely acts authorized by the statute but also acts done without jurisdiction but in the bona fide belief that they were authorized (*cf.* the fuller language employed in S. 1 of Act 18 of

20. Commissioners of Inland Revenue v. Lysaght, (1928) A C 234=97 L J K B 385=139 L T 6 =44 T L R 374=13 Tax Cas 511=72 S J 270, on appeal from (1927) 2 K B 55=96 L J K B 462.
21. Rex. v. Marylebone Income tax Commissioners, (1929) 13 Tax Cas 746.
22. Levene v. Commissioners of Inland Revenue, (1928) AC 217=97 L J K B 377=139 L T 1= 44 T L R 374=13 Tax Cas 486=72 S J 270.
23. Venkata v. Chengadu, (1889) 12 Mad 168.
24. Balakrisban Das v. Simpson, (1898) 25 Cal 833 =25 IA 151=2 C W N 513 (P C).
25. Marukkolundayammal v. Secy. of State, A I R 1932 Mad 664=139 I C 426=55 Mad 876=63 M L J 249.
26. Fischer v. Twigg, (1898) 21 Mad 367.

1850). Mr. Rajah Iyer suggests that this wider import is to be derived from the expression 'intended to be done' in that part of the section, but it seems possible that the word 'intended' was used only to signify 'futurity' so as to preclude suits for injunction in respect of proceedings 'intended' to be taken by the income-tax authorities. Amongst the reported cases under the Income-tax Acts brought to our notice, the only instance in which the assessee's suit succeeded is the decision of the Bombay High Court in 92 I C 351.[27] The decision turned on S. 39 of Act 2 of 1886 which was substantially in the same terms as the first part of S. 67 of the Act of 1922 and the learned Judges categorically laid down that:

> If the assessment is clearly ultra vires we do not think the provisions of that Act will apply.

There was no further discussion of the question of jurisdiction and the rest of the judgment deals only with the propriety of the assessment. The ground of denial of liability in that case no doubt was that the profits did not arise or accrue in British India but the rival contentions would seem to have turned on a point of law, the facts not being in dispute; and the learned Judges held that on the facts stated 'the profits accrued in the Baroda State.' The case is accordingly of no help to the present plaintiff, though it is an authority against a total denial of a right of suit. The Act of 1886 contained no provisions corresponding to the second part of S. 67 of the present Act which I have referred to above as throwing some light on the construction of the first part; nor did it contain the safeguards enacted in the present Act, by way of a right of appeal under S. 30, reference to a Board of Referees under S. 33-A and reference to the High Court with a right of appeal to the Privy Council under Ss. 66 and 66-A. I am not prepared to assume that the existence of these provisions indicating an elaborate special procedure would have made no difference in the opinion of those learned Judges. In 62 Cal 1011,[28] the discussion related to writ of certiorari and prohibition. The decision emphasizes the significance of the fact that in the Act itself :

> There is machinery by which the assessee may bring the matter before the Court and he can no longer contend that he has no specific or adequate remedy.

It is true that on p. 1093 the learned Judge observes that it is not for the Income-tax Officer to decide whether the state of facts contemplated by S. 34 exists and "if he re-opens the assessment without their existence he is acting without jurisdiction." But the context suggests that the learned Judge made that observation with reference to the nature of the special provisions in S. 34; otherwise, he would not have left unanswered the argument based on 21 Q B D 313[2] and (1901) 2 K B 879.[29] The remark that English decisions are not authoritative on the construction of the Income-tax Act was directed to the argument that the assessing officer's functions are only 'administrative' and not 'judicial.'

In A I R 1922 Pat 361,[30] the actual decision was in favour of the Government, but the learned Judge affirmed the principle that if a statutory authority purports to exercise its powers on what is not according to law (the subject matter of those powers) the Court will interfere 'because the authority is not acting under the statute and is not protected thereby.' The reference to 12 C W N 709=35 Cal 859[5] and the question made from that judgment suggest that the learned Judge did not in the circumstances find it necessary to keep apart the two classes of cases in one of which the exclusion of the civil Court's jurisdiction is enacted in much more restricted terms than in the other. In 52 Mad 12[31] at pp. 17 and 18, it was no doubt stated that :

> Where a certain income is outside the scope of the Act, such as agricultural income or income not earned in or brought into British India, any assessment in respect of such income would be outside the scope of the Act and a civil suit to recover it would not be barred ;

but the observation was obiter and it became unnecessary to pursue the matter as the assessee's suit failed on another ground. Further, no reference was made to the possible distinction between cases in which the item of income was even on the admitted facts outside the scope of the

27. Haji Rahmatullah Haji Pir Mahomed v. Secy. of State, A I R 1926 Bom 50=92 I C 351=27 Bom L R 1507.
28. *In re* Ramjidas Mahalisam, (1935) 62 Cal 1011.
29. King v. General Commissioners for Taxes for the District of Clerkenwell, (1901) 2 K B 879.
30. Secretary of State v. A. H. Forbes, A I R 1922 Pat 361=62 I C 394=3 P L T 125.
31. Rajah of Ramnad v. Secretary of State, A I R 1929 Mad 179=114 I C 829=52 Mad 12=55 M L J 770.

Act and these in which the assessing authorities had to decide on evidence whether it was within the Act or not. A I R 1925 Sind 130[32] likewise contains only dictum that if the income-tax authorities had assessed anything but 'income' or had levied assessment on the classes of income exempted by the Act, they would have overstepped the limits of their jurisdiction and the assessment would not have been under the Act. 5 Rang 825[33] adds very little beyond referring to the distinction between 'erroneous' assessment and 'ultra vires' assessment.

In 42 Cal 151[34] there appears a concession by counsel in the course of the argument (*see* p. 153) that if the Collector assesses anything but income, he acts beyond his jurisdiction ; but on the next page he is reported to have maintained that it is for the Collector to determine who is chargeable and that the civil Courts have no jurisdiction to determine that question. The judgment reflects this line of argument ; it is, however, noteworthy that when counsel was referred to 27 Cal 849,[35] he pointed out what I have already indicated that the provisions of the Income-tax Act are different from those of the Municipal Act. The learned Government Pleader claimed that 42 Cal 151[34] was a direct authority in his favour even for the purposes of the present case, because, he said, in both cases the question must be held to relate to the person chargeable ; but this ignores the fact that in the Calcutta case the income was admittedly assessable whereas in the present case the income will not be within the Act at all if the plaintiff's contention as to his residence is true. The learned Judges, however, recognized the principle that in respect of matters which the Act has left to be determined by the assessing authorities, their decision cannot be questioned by a separate suit. As I have held that in the present case also the assessing authority had power to determine the question of the plaintiff's residence in British India and the consequent receipt of the profits here, the plaintiff's suit must fail even according to the principle of the Calcutta decision. The appeal is allowed and the plaintiff's suit is dismissed with costs throughout.

Stodart, J.—This appeal arises out of a suit filed by the respondent Meyyappa Chetty in the Court of the District Munsif, Devakottai. The plaintiff is a merchant having a business in Saigon. He was assessed to income-tax in British India on profits of this business brought into British India in the years 1929-1930 and 1930-1931. Such profits are chargeable only if they are received by or brought into British India by a resident in British India : *see* S. 4, sub-section 2 of the Act. Plaintiff by his local agent contended before the Income-tax Officer that he did not reside in British India but the Income-tax Officer found against him and required him under S. 22 to submit a return of his income. He did not do this and was assessed under S. 23, sub-s. 4, and under S. 30 became debarred from the remedies provided by the Act, namely from the right of appeal to the Assistant Commissioner and second appeal to the Commissioner ; and from the right conferred by S. 66 of having a reference made to the High Court. Incidentally it may be observed that plaintiff contended also that he had no property in British India, but he must have had some property which could be proceeded against for the realization of the tax ; for he paid the tax.

Plaintiff then filed this suit for a declaration that he was not liable to be assessed and to recover the tax paid by him. He contended that he was not a resident of British India, but of Pondicherry, in French India. He contended firstly that the Income-tax Officer had not conducted a proper inquiry into the question of his residence and that he had had no proper opportunity of stating his case on this point and secondly, that the Income-tax Officer was wrong in holding that he was a resident of British India. The first of these grounds is now given up. There is no doubt that the Income-tax Officer did hold an inquiry as to the question of plaintiff's residence and decided that question to the best of his ability on the materials available. The learned District Munsif held that plaintiff's suit was not maintainable being barred by S. 67 of the Act, the first part of which is :

> No suit shall be brought in any civil Court to set aside or modify any assessment made under this Act.

32. Dayaram Ramadas v. Secretary of State, A I R 1925 Sind 130=78 I C 940=18 S L R 68.
33. Dr. R. N. Singha v. Secretary of State, A I R 1928 Rang 70=109 I C 180=5 Rang 825.
34. Forbes v. Secretary of State, A I R 1915 Cal 621=26 I C 893=42 Cal 151=19 C W N 138.
35. Kameswar Pershad v. The Chairman, Bhabur Municipality, (1900) 27 Cal 849.

Plaintiff appealed to the learned Subordinate Judge of Devakottai who held on the contrary that if it was true that the plaintiff was not a resident of British India then the Income-tax Officer's decision on that point was wrong and the assessment based on that decision was not made "under the Act" and so a suit to set aside that assessment lay; and in the result remanded the suit for trial of the issue:

Whether the plaintiff had ceased to reside in British India and whether he had no assessable income in British India.

Against that order of remand this appeal is preferred by the Secretary of State. The learned Government Pleader for the appellant contends that the question of respondent's residence was one which the Income-tax Officer had jurisdiction to decide; that his decision on the point was thus made under the Act; and that it cannot be challenged by a suit in the ordinary civil Courts but only in the manner provided by the Act. Learned Counsel for the respondent argues on the other hand that in deciding the point wrongly, the Income-tax Officer wrongly assumed jurisdiction and the assessment which followed on that decision was without jurisdiction. My finding is that the appellant's case is supported by ample authority and that the appeal must succeed.

The respondent does not dispute the general principle that when the legislature sets up authorities and tribunals to deal with a certain limited subject matter then a person aggrieved by an act done or decision made by such tribunal must have recourse to the remedies provided by the statute unless the act or decision complained of is done or made without jurisdiction or is in excess of jurisdiction. In the latter case he has recourse to the civil Courts; his remedy in India being by way of suit, in England by one of the prerogative writs such as prohibition or certiorari: *see* Robertson's Civil Proceedings by and against the Crown, and Halsbury's Laws of England under the title Crown Practice, Chs. II to V and the judgments of Bankes, L. J. and Atkin, L. J., in (1924) 1 K B 171[36] and more particularly the general observations of Atkin, L. J. at p. 204:

Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their authority they are subject to the controlling jurisdiction of the King's Bench exercised in those writs: p. 205.

The point which we have to decide in this appeal is whether the decision which the Income-tax Officer made as to the residence of the respondent was made in excess of his authority. A question of that kind must obviously arise in all cases in which under the Income-tax Act the taxing officer has to decide whether any particular item of income is or is not chargeable. I may observe also that the exempting clause in the Income-tax Act, namely S. 67 and similar clauses in other Acts which protect acts done and decisions made by statutory authority, do nothing more than enunciate the general principle. For instance S. 67 protects assessment made "under the Act." It does not protect assessments made in excess of jurisdiction. This general principle is well established in decisions of Indian Courts. *See* the judgment of Mukerji, J., in 35 Cal 859,[15] where the question for decision was the validity of a tax levied on the property:

A corporation which is invested with authority to assess taxes, is really invested with the quasi judicial power, and though its action when taken in conformity with the provisions of the law which created the authority, may not be liable to challenge in the civil Courts, it does not enjoy a similar immunity when that action can be challenged on the ground that it has been taken either in excess of or in contravention of the powers conferred upon by it by the statutes (p. 865).

The Bengal Municipal Act which was then under consideration contained an excluding clause (S. 116) to the effect that no objection could be taken to any assessment or rate in any other manner than in the Act provided, and this clause was strongly relied on by the Municipality on whose behalf it was contended that a regular suit for cancellation of the assessment was not contemplated by the legislature. On this point Mukerji, J. said:

In my opinion this contention is not well founded upon principle, and is not supported by any authority. The effect of . . . S. 116 was considered in the cases reported at (1898) 3 C W N 734 and 27 Cal 849.[35] In these cases it was pointed out that S. 116 does not take away the jurisdiction of the civil Court in a case in which it is alleged and established that the assessment is open to objection on the ground that it is ultra vires; in other words it is only when the action of the Municipality has been exercised in conformity with the powers conferred upon it by the Act that the civil Court has no power to interfere.

36. Rex v. Electricity Commissioners, (1924) 1 K B 171=93 L J K B 390=130 L T 164=68 J P 13=21 L G R 719=68 S J 188=39 T L R 715.

Again, in a case (24 Mad 205[37]) in which the Standard Life Assurance Company sued the Municipal Council, Cocanada to recover a sum levied on it as profession tax it was held, (1) that the suit lay because the Council had no authority to tax an Insurance Company, life insurance not being one of the businesses or trades in respect of which a tax might be levied and (2) that the suit was not barred by the excluding clauses, namely, S. 101, District Municipalities Act, 1884 :

> The assessment or demand of any tax, when no appeal is made as hereinafter provided, and the adjudication of an appeal by the Municipal Council shall be final;

and S. 162 (2):

> No suit should be brought in any Court to recover any sum of money collected under the authority of this Act . . . . provided that the provisions of this Act have been in substance and effect complied with.

Their Lordships say :

> The question really is whether when a company . . . . which is not taxable under the Act, is nevertheless taxed, it can be said that the provisions of the Act have been in substance and effect complied with. In other words the immunity conferred on statutory authorities by the provision which shuts out the jurisdiction of the civil Court does not extend to cases where their decisions are *ultra vires*.

The respondent here, as I have said, does not quarrel with the general proposition of law that the statutory authority is immune from suits so long as it acts in conformity with the statute and does not exceed its powers. What then is his position ? It is this. Before proceeding to make the assessment the Income-tax Officer had to decide whether or not the assessee resided in British India. Having wrongly decided this in the affirmative he wrongly assumed jurisdiction. Therefore the assessment was made without jurisdiction and is not protected by the general principle and is not protected by S. 67 either, since it was not made "under the Act." The question for decision therefore in this appeal is simply this : Had the Income-tax Officer jurisdiction to decide the point of the respondent's residence ? Then, if he did so after proper enquiry—for absence of proper enquiry has always been held to impair jurisdiction—his action in making the assessment in pursuance of that decision was not wrong. I must observe again that though the respondent raised the plea of absence of proper enquiry in the trial Court, he abandoned it on appeal. The whole case of the respondent therefore is that before proceeding to make the assessment, the Income-tax Officer had to find that the respondent was a resident of British India and having wrongly found that as a fact, he wrongly assumed jurisdiction to assess this particular item of income and thus acted without jurisdiction in assessing it.

Another point which arose in the course of the argument is this: Being a subject of a foreign State respondent claims to have been within his rights in ignoring the requisitions of the Income-tax officer that he should make a return of his income. S. 30 of the Act debars him from the remedies provided by the Act. Is he therefore to have no redress in the Courts of British India? As will be seen hereafter there is ample authority for the position that the absence of any other remedy is not to be taken into consideration in deciding the question whether the decisions of a statutory tribunal are or are not final. That a statutory tribunal or authority which has to arrive at a decision as to the existence or non-existence of certain facts before proceeding to take further action under the statute is acting within the jurisdiction in making that decision and is immune from civil proceedings to quash that decision except such as are prescribed by the statute, is established beyond all controversy. In 21 Q B D 313,[2] the question arose on the interpretation of the words "at the end of the year." The Commissioners for General Purposes were empowered to grant certificate for refund of income-tax overpaid, on application made "at the end of the year." Having done so in certain cases in which the applications were made long after the end of the year, the Commissioner for Special Purposes refused to honour the certificate on the ground that they were granted without jurisdiction. It was held that the Commissioners for General Purposes had jurisdiction to decide whether in the circumstances the applications were made in time. Lord Esher (Master of the Rolls) dealing with this point observed :

> When a tribunal or body which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not other-

37. Standard Life Assurance Co. v. Municipal Council, Cocanada, (1901) 24 Mad 205=10 M L J 401.

wise. There it is not for them conclusively to decide whether that state of facts exists, and if they exercise the jurisdiction without its existence what they do may be questioned. But there is another state of things . . . The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more . . . It is an erroneous application of the formula, to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts, because the legislature gave them jurisdiction to determine all the facts, including the preliminary facts on which the further exercise of their jurisdiction depends.

In a recent case (1915) 3 K B 768,[17] where the question at issue was the legality of a surcharge made by the Commissioner on the report of a surveyor of taxes, it was contended on behalf of the applicant that the Commissioners could not give themselves jurisdiction by wrongly deciding that the applicant was chargeable. Lord Esher's finding in the case just cited was emphatically affirmed. Lord Reading, C. J. said :

In my judgment this dictum states accurately the principle applicable to such cases ;

and again :

In my view an examination of the Income-tax Acts shows that the scheme of the legislature is to entrust the decision of the facts to a tribunal of persons specially selected for the locality, and who are often in a better position than the Courts to determine the questions of fact . . . The exigencies of the State require that there should be a tribunal to deal . . . with all such questions and to decide them finally . . . The obligation is placed for reasons of expediency, upon the person assessed to appeal to the Commissioners if he wishes to rid himself of an assessment which is in his view based on wrong conclusions of fact, and this obligation rests equally upon a person who contends that he is not chargeable as upon a person who admits that he is chargeable but not to the extent of the assessment made upon him.

(1901) 2 K B 879[29] was an application to prohibit the Commissioners from assessing certain profits to income-tax on the ground that by an erroneous decision on the facts they were seeking to give themselves a jurisdiction which they did not possess. It was held that they were merely deciding facts going to the quantum of taxable liability and that the proper remedy was by appeal upon a case stated ; that is to say, the remedy provided by the statute. The Commissioners, having jurisdiction under the Income-tax Act (1842), to assess a certain company to income-tax in respect of profits of a business carried on either wholly, or in part only, in Great Britain, they had for the purposes of that assessment jurisdiction to decide all questions of fact necessary for ascertaining the amount of these profits and therefore prohibition would not lie. What the Commissioners had decided was that the profits of the Eastman Kodak Company carrying on business in the United States were technically the profits of the Kodak Company which carried on business in London. The Court refused to enter into the merits of this decision. (1874) 5 P C 417[1] is an interesting and authoritative case which is relevant here on two grounds. The appeal was brought from a judgment of the Supreme Court of Victoria which quashed an order made by a Court of Mines established under a statute called the Mining Statute. The order of the Court of Mines was that a certain company should be wound up forthwith under the provisions of the Mining Companies Limited Liability Act ; and was made at the instance of the Colonial Bank on the ground that the company owed it a large amount of money. The Supreme Court having been moved by writ of certiorari rescinded the order on the ground that it was made without jurisdiction as the company was not indebted to the bank, which again depended on the question whether the debt was incurred with the authority of duly constituted officers of the company. The Judicial Committee held that the question of the existence of the debt was a question which the Judge of the Court of Mines was competent, in fact, bound to decide ; that the Supreme Court could only come to the opposite conclusion upon a re-trial of the question (which of course was inadmissible) ; and that the winding up order could not therefore be quashed on the ground that it was made without jurisdiction (*see* p. 443) :

An objection that the Judge has erroneously found a fact, which though essential to the validity of his order, he was competent to try, assumes that having general jurisdiction over the subject matter, he properly entered upon the inquiry but miscarried in the course of it. The Supreme Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide.

The second point on which this decision is relevant to the present case arises from the fact that the Mining Statute contained a clause providing that no proceedings under the Act should be removed or removeable to the Supreme Court save as provided in the Act. The Judicial Committee held that this privative clause did not operate to deprive the Supreme Court

absolutely of its power to issue a writ of certiorari, but merely controlled and limited its action on such writ; and expressed its opinion that in such cases the Court would interfere to quash an order only upon the ground of manifest defect of jurisdiction in the tribunal making it, or of manifest fraud in the party procuring it: *see* Halsbury, Vol. 9, p. 862, para. 1458 in the title Crown Practice:

> Although certiorari is taken away (by the statute) it may be granted when the inferior Court has acted without or in excess of jurisdiction for in such a case the Court has not brought itself within the terms of the Statute taking away certiorari.

This is the exact position contended for by the respondent here. S. 67 does not bar a suit to set aside an assessment made without jurisdiction for the reason that such an assessment is not made under the Act. The second main contention of the respondent is that being a foreign national he was entitled to ignore the requisitions made by the Income-tax Officer calling upon him to make a return of his income under S. 30 of the Act. Having thus become debarred from the remedies provided by the Act by way of appeal and second appeal, etc., he is left without remedy unless he can file a suit against the Government to establish that he is not assessable to income-tax. The fact that a person has no other remedy has however been held by the highest authority to be no answer to the objection that no action lies in the ordinary civil Courts to challenge the act of a statutory authority so long as the latter acted within his authority. In 4 M I A 353[6] which was an appeal by a Collector of Revenue against a decision of the Supreme Court of Bombay mulcting him in damages in an action for trespass, it was held by the Judicial Committee that the action was barred by 21 Geo. III, Ch. 70, S. 8:

> That the said Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue, etc.

It was also held, on the argument that the respondent had no other remedy as follows:

> Whether the plaintiff might have redress before any other tribunal can only be material in a doubtful construction of the Statutes and Charters establishing the Court in which the action was brought. If by these Statutes and Charters its jurisdiction is clearly taken away, our decision could not be influenced by the consideration that the plaintiff is left without remedy.

There is always a remedy of course for acts done or decisions made under colour of any particular statute when these acts are done or decisions are made without jurisdiction or in excess of jurisdiction. Mukerji, J. in 35 Cal 859,[5] cited above, indicates the particulars in which the jurisdiction of the quasi judicial tribunal may be defective or when it may be exercised in excess: *see* p. 866 of 35 Cal. There may be a manifest defect of jurisdiction in the tribunal that made order such as in the case reported in (1916) 1 A C 215[15] where an income-tax assessee was assessed by the Commissioners for Kensington when on the facts stated he should have been assessed by the Commissioners for the City of London. There may be manifest fraud in the party obtaining the order. There may be something defective in the character or constitution of the Court. Again the subject matter of the enquiry on which the decision was made may be outside the scope of the Act as in 24 Mad 205,[37] cited above. There may be the absence of some preliminary proceeding which was necessary to give jurisdiction to the tribunal. For example, take these cases where revision of property tax in a Municipality is challenged on the ground that the prescribed formalities of publication, etc. were not observed. The cases cited by the learned counsel for the respondent are examples of these principles and are no exceptions to the general rule. In 92 I C 351[27] the assessee had been assessed on profits which accrued in the Native State of Baroda and were received by him in the Native State of Gondal. Such profits are clearly outside the scope of the present Income-tax Act as they were outside the scope of the then existing Act (2 of 1886). On the facts of the case the Income-tax Officer had no jurisdiction and his fallacious reasoning that the profits were taxable because they accrued on the sale of grain which was grown in British India and exported into Baroda was rejected: *See also* the observations of the learned Judges in 52 Mad 12[31]:

> If the tax was levied under the Act no doubt a suit would be barred, but if the assessment was made in respect of an item of income which is not assessable under the Act, a civil suit would lie to recover it inasmuch as the officer making the assessment had no jurisdiction to make it. In cases in which the Income-tax Officer has to decide whether a certain item of income is assessable or not, his decision cannot be said to be ultra vires even if it is illegal. But where a certain income is outside the scope of the Act, such as agricultural income or income not earned in or brought into British India, any assessment made

in respect of such income would be outside the scope of the Act, and a civil suit to recover it would not be barred by reason of S. 52.

For the converse proposition that no suit will lie when the Income-tax Officer is acting within his powers in making the assessment, *see* 42 Cal 151.[34] That was a case where the plaintiff Forbes contended that he was not liable to be assessed on profits received by him as an executor. Jenkins, C. J. said :

The Collector has come to the conclusion that the subject matter with which he was dealing was income, as admittedly it was, and so was subject to tax. He further determined that the plaintiff being the person to whom the income accrued was the person chargeable. In so determining he was exercising a jurisdiction that was clearly vested in him by the Act, and I cannot see how it can be said that he purported to exercise a jurisdiction which he did not possess and so did not make an assessment under the Act. This is income which is liable to be taxed within the meaning of the Act. The Collector has determined that the plaintiff is a person chargeable and in so doing has acted within the limit of his jurisdiction. That being so it appears to be a case where, according to S. 39 (which is in terms the same as S. 67 of the present Act) it is right to say that the suit does not lie.

I agree therefore with my learned brother in holding that respondent's suit was not maintainable. This appeal is allowed with costs. The order of the lower appellate Court is set aside and the decree of the trial Court restored.

C.R.K./P.R. *Appeal allowed.*

A. I. R. 1937 Madras 253

HORWILL, J.

Muthu Kr. Ar. Pl. Arunachellam Chettiar—Petitioner.

v.

Kalayappa Chettiar and *another*—Opposite Parties.

Civil Revn No. 1343 of 1934, Decided on 28th September 1936, from order of Sub-Judge, Dindigul, D/- 23rd April 1934.

Rateable Distribution—Decree by *X* against father and son—Joint family property sold in execution by *X*—Father subsequently becoming insolvent and his share in sale proceeds delivered to Official Receiver—*Y* having decree against father alone applied for rateable distribution in son's share of sale proceeds—*Y* neither proving debt binding on son nor making him party to execution proceedings—Decree of *Y* cannot be held to be decree against son also—*Y* is therefore not entitled to rateable distribution.

X obtained a decree against the father and son and in execution sold their property. Father having been adjudicated insolvent his share in the sale proceeds went to Official Receiver. *Y* who had obtained his decree against the father alone filed an execution petition and claimed rateable distribution with *X* in the share of sale proceeds of the son, on the ground that the son was liable for the debts of his father :

Held : that there was no evidence to show that decree obtained by *Y* was binding on the son nor was the son made party to execution proceedings by *Y*, as being liable for his father's debt; decree of *Y* cannot be said to be a decree against the son also, and he cannot therefore claim rateable distribution with *X* : *A I R 1936 Mad 40, Disting.* [P 254 C 1]

C. S. Venkatachariar and *P. S. Sarangapani Iyengar*—for Petitioner.

S. Ramaswami Iyer and *T. P. Gopalakrishna Iyer*—for Opposite Parties.

Order.—The respondents in this petition attached the whole family property of the father and the son before judgment. A decree was obtained and the property was subsequently brought to sale and the purchase money deposited in Court. The father became insolvent and the father's share of the proceeds was handed over to the Official Receiver. Because the son's share had already been attached the father had no power over the son's share of the property and so the Official Receiver was allowed to take only the father's share of the proceeds. The petitioner, who obtained a decree against the father on a promissory note debt, has filed a petition for rateable distribution. The Subordinate Judge of Dindigul held that the petitioner could not be granted this relief. The argument of the learned advocate for the petitioner is that as the son is liable for his father's debt, it is not necessary for him to add the son as a party to execution proceedings against the family property and that his decree against the father must be considered to be a decree against the son also, and that he can therefore execute his decree against the son's share of the family property. S. 73 applies only to the execution of the decrees against the same judgment-debtor ; but I have been referred to a Full Bench decision in 69 M L J 711,[1] to the effect that the words 'same judgment-debtor' must not be construed too strictly. There, one creditor obtained a decree against the father and then after his death added his two sons as his legal representatives, and a second creditor obtained a decree

1. Ramkrishnan Chettiar v. Viswanathan Chettiar, A I R 1936 Mad 40=159 I C 501=59 Mad 93=69 M L J 711 (F B).

against the sons of the father after the father's death. It was held that in fact the decrees were against the estate of the deceased father and that it made no difference that in one case the name of the father was given and in the other the names of the sons. In the case under consideration the respondent has a decree against the son as well as the father, whereas the petitioner has a decree against the father only. In his execution petition, the petitioner did not even make the son a party on the ground that he was liable for his father's debts, and we do not even know that the decree was obtained against the father for a debt binding on the son. In these circumstances, I am not satisfied that the decree of the petitioner can be considered to be a decree against the son also, which alone would entitle him to rateable distribution. The petition is therefore dismissed with costs.

C.R.K./B.D. *Petition dismissed.*

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* A. I. R. 1937 Madras 254

FULL BENCH

BEASLEY, C. J., RAMESAM AND KING, JJ.

S. M. Narayana Ayyangar—Appellant.

v.

S. P. R. M. Subramanian Chettiar and *others*—Respondents.

Second Appeals Nos. 1148 to 1151 and 1181 of 1932, Decided on 8th February 1935, against decree of Dist. Court, Madura, in A. S. No. 501 to 504 of 1929 and 350 of 1921.

(a) Madras Estates Land Act (1 of 1908), S. 3 (4) (f)—Improvement—Fruit tree—Cocoanut plantation is fruit garden and is improvement : *50 Mad 482=A I R 1927 Mad 137=99 I C 559, Overruled.*

Cocoanut is a fruit and cocoanut trees are fruit trees and as such cocoanut plantation is a fruit garden within the meaning of S. 3 (4) (f) of the Act. Plantation of cocoanut tree is an improvement within the meaning of the section : *A I R 1932 Mad 343, Rel. on; 50 Mad 482=A I R 1927 Mad 137=99 I C 559, Explained* and **Overruled.** [P 256 C 1]

*** (b) Res judicata—Rent suit—Principle of res judicata is confined to matters existing at date of former decision — Decision of law even if erroneous as to particular year for which suit is brought is res judicata in subsequent suit for later years as to those matters—Principle applies if general principle is decided in former suit.**

The principle of res judicata is to be confined only to matters which actually existed at the time of former decision. The decision therefore as to matters existing at the date of former suit for rent for a particular year, even though erroneous, is res judicata in respect of those matters in a suit for rent for subsequent years. But this rule does not apply to suit for rent as to certain areas in respect of which no claim was and could be made in former suit. [P 257 C 2]

There can be no res judicata laying down a wrong rule of law between parties for future guidance also. The decision must be confined to the matter to which it has been applied at the time of former decision : *A I R 1914 Mad 399 (F B); A I R 1918 Mad 1309; A I R 1933 Mad 925; Hoystead* **v.** *Commissioner of Taxation, 1926 A C 155: A I R 1930 Mad 209; A I R 1926 Cal 650; A I R 1928 Cal 717* **and** *A I R 1928 Cal 777, Rel. on.* [P 257 C 2]

K. Rajah Iyer and *A. Srinivasa Ayyangar* — for Appellant.

S. R. Muthuswamy Iyer — for Respondents.

Order of Reference.

Varadachariar, J.—This batch of second appeals arise out of suits for rent in respect of two sets of holdings covered by patta Nos. 38 and 54. Two of the second appeals arise out of suits of 1923 and two more out of suits of 1926 and the fifth arises out of a suit instituted in 1920 and is the result of an intermediate remand by this Court. One of the main questions in these cases turns on the effect of the definition of 'improvements' in S. 3, Cl. 4, Estates Land Act, the point for decision being whether a cocoanut plantation comes within that definition or not. One Bench of this Court in a suit between these very parties, reported in 50 Mad 482,[1] has dissented from that decision and held that it does not. Another Bench in a case reported in 62 M L J 511[2] held that it is an 'improvement.' It is by reason of the decision in 50 Mad 482,[1] that the lower Courts have held that that matter is res judicata between the parties even though the present suits relate to subsequent faslis. One of Mr. Rajah Iyer's contentions on behalf of the appellant is that the point being merely one of law, turning on the definition in the Act, the rule of res judicata should not be applied and he next contends that it cannot be applied to some at least of these suits, where even according

1. Vellayappa Chetti v. Subramanian Chettiar, A I R 1927 Mad 137=99 I C 559=50 Mad 482=51 M L J 880.
2. Sri Rajah Bommadevara Chayadevamma v. Venkataswami, A I R 1932 Mad 343=138 I C 40=62 M L J 511.

to the present plaints, the claim is not on the same basis as in the old suits but on a different basis by reason of changed facts. He also contends that in the application of the rule of res judicata, the present case is governed by the analogy of the decision in (1926) A C 94,[3] and not of that in (1909) A C 615.[4] With reference to the decision in 65 M L J 684[5] he takes exception to some observations in that judgment and relies on certain other portions of that judgment and he further contends that the decision in 56 Cal 723,[6] is, if anything, in his favour, rather than against him.

I must say that the question of res judicata is by no means free from difficulty and the decisions on the point are by no means uniform. It has to be remembered that the policy of S. 13, Estates Land Act, was a statutory declaration that even if a practice had heretobefore existed of paying for improvements effected by the tenant, it should no longer be capable of being enforced. It will be a matter for consideration how far that policy can be controlled by the application of the rule of res judicata, merely on the ground that in a litigation relating to prior faslis, the Court has interpreted S. 3, Cl. 4, Estates Land Act, in a particular manner. I am not, as at present advised, quite satisfied that the decision is one on a mixed question of law and fact. I do not say more on that matter, as I am suggesting that the case may be placed before his Lordship the Chief Justice for his consideration whether it may be posted before a Bench of two Judges or before a Full Bench, to deal with the question of res judicata on the point of law and also to consider the conflict between the judgments in 50 Mad 482[1] and 62 M L J 511.[2]

On hearing the case opened by Mr. Rajah Iyer, I felt that even if I should uphold the plea of res judicata, to some extent, it might still become necessary to deal with the conflict between 50 Mad 482[1] and 62 M L J 511,[2] and that if I should accept his contention that it is not res judicata this conflict will necessarily have to be considered. As will appear from the judgments in those two cases, the practice of rearing cocoanut and palm trees in extensive areas of land classified as 'dry' is quite common in the Southern Districts and it seems to me desirable that there should be an authoritative pronouncement as to whether such plantations are or are not "improvements" within the meaning of the definition in the Estates Land Act. The matter will be placed before his Lordship the Chief Justice.

3. Broken Hill Proprietary & Co., Ltd., v. Broken Hill Municipal Council, (1926) A C 94=95 L J P C 33=134 L T 335.
4. Badar Bee v. Habib Merican Noordin, (1909) A C 615=78 L J P C 161=101 L T 161.
5. Maharajah of Jeypore v. Ramamurthi, A I R 1933 Mad 925=148 I C 221=57 Mad 73=65 M L J 684.
6. Tarini Charan Batacharya v. Kedar Nath Kaldar, A I R 1928 Cal 777=115 I C 593=56 Cal 723=33 C W N 126 (F B).

OPINION.

Ramesam, J. — This batch of second appeals arises out of a number of suits for rent for different faslis under S. 77, Estates Land Act. There are two holdings under the tenant: one holding under patta No. 38 and another holding under patta No. 54. Rent is claimed for portions of the suit holdings at a rate higher than the dry rate on the ground that there are cocoanut gardens in these holdings. In a former litigation between the same parties which culminated in S. A. 433, etc. of 1924 the same claim was made. The defendant ryot resisted the claim at the higher rate on the ground that a cocoanut plantation was an improvement within the meaning of S. 3 (4) (f), Estates Land Act, and that he is not liable to pay the higher rate and is liable to pay only the dry rate. It was held by Devadoss and Wallace, JJ. [in 50 Mad 482[1]] that the planting of a cocoanut garden was not an improvement under the Act and that the plaintiff was entitled to the enhanced rate. The same holdings are the subject matter of the present suits. It is conceded by the appellant that so far as patta No. 38 is concerned, the cocoanut plantation now existing is merely the old plantation, but as to patta No. 54 it is said that at the time of the former litigation only a portion, viz. 7 karukams, was planted with cocoanut plants but now a larger area is sought to be charged at the higher rate. I will refer to this question of additional area later on. Leaving this aside, two questions arise in the present second appeals. The first is whether cocoanuts are fruits and a cocoanut plantation can be regarded as a fruit garden within the meaning of S. 3 (4) (f), Estates Land Act. So stated, this question is undoubtedly a question of law, viz. the construction of

an Act, the question being whether a particular term in the Act can be so interpreted or defined as to cover a particular class of trees.

Now it may be said that the fruit of the cocoanut tree is not a fruit in one sense of the term but is a nut and apparently this was the view that prevailed with Devadoss and Wallace, JJ. in 50 Mad 482.[1] But this case was considered in 62 M L J 511[2] by another Bench of this Court (Reilly and Ananthakrishna Ayyar, JJ.) and was dissented from. Both the learned Judges have dealt with the matter at some length and have given good reasons for differing from the former decision and for holding that cocoanut trees are fruit trees. Even Devadoss, J., from whose judgment the latter case came up in Letters Patent appeal, held that cocoanut trees are fruit trees but he does not refer to the judgment in the other case reported in 50 Mad 482.[1] It is unnecessary to repeat the reasons given by Reilly and Ananthakrishna Ayyar, JJ. I will only add the following considerations. In the Century Dictionary under "cocoanut" we have "the nut or fruit of the cocoanut tree." And then under "double cocoanut" we have "the fruit of a remarkable palm . . . . . the fruit often weighs 40 or 50 lbs. . . . . ." Under "sea cocoanut" we have "the fruit of a species of palm." In Murray's English Dictionary under "double cocoanut" we have got practically the same sentence repeated. In common parlance the cocoanut is always referred to as a fruit before the fibre is removed.

I therefore hold that cocoanuts are fruits and that cocoanut trees are fruit trees and a cocoanut plantation is a fruit garden within the meaning of S. 3 (4) (f), Estates Land Act. It follows that the tenant who has effected improvements in these cases ought not to be liable for any additional rent beyond the dry rate. The next question is how far the defendant-appellant is affected by the rule of res judicata. As already mentioned, the former decision, which, in the light of our present decision, must be held to be erroneous, was between the same parties and in respect of the same holdings. Mr. Raja Iyer, the learned advocate for the appellant, contends that an erroneous decision of law should not be held to be res judicata in a later litigation between the same parties relating to a different year and that the former decision should be confined to the year in respect of which the former litigation arose. The question how far an erroneous decision on a matter of law or on the terms of a tenancy would be res judicata has been considered in three decisions of this Court. The first one is 37 Mad 70[7] at p. 73. It was there held that a former decision as to the extent of a holding in a suit between a landlord and tenant relating to the validity of patta under the Rent Recovery Act would be res judicata in respect of later years on the ground that it decides a general question not peculiar or special for that particular year. So far as this matter is concerned, the Estates Land Act is similar to the Rent Recovery Act, and if any question of general principle is settled in one litigation in respect of one year as regards the terms of patta, that would bind the parties for the future years also until new circumstances intervene. The next decision of this Court that I would refer to is 32 M L J 63.[8] There the suits related to the recovery of a cess claimed by a zamindar from inamdars. The cess was payable annually. It was held that in cases where in a prior litigation the cess was held to be payable, that decision constitutes res judicata in litigation with respect to later years. The conclusion of the learned Judges is thus expressed :

> Where a decision on a point of law, whether it be on the construction of a document or of a statute or on common law or on customary law settles a question that arises directly out of conflicting views as to the rights of the parties, it is res judicata.

The reason of the judgment may be expressed thus, viz., that the former litigation settles the terms on which the two parties are related to each other in the matter of the holdings provided the decision and the terms are confined to the actual subject matter of the suit. The earlier decisions of this High Court in 5 Mad 304,[9] 30 Mad 461[10] and 33 Mad 102,[11] were dissented from. In 65 M L J 684[5] the same view was followed. An attempt to reopen the decision in 32 M L J 63[8]

7. Bayyan Naidu v. Suryanarayana, A I R 1914 Mad 399=17 I C 445=37 Mad 70=23 M L J 593 (F B).
8. Venkatanarasimhalu Naidu v. Venkataratnam, A I R 1918 Mad 1309=37 I C 857=32 M L J 63.
9. Parthasarathi v. Chinna Krishnan, (1882) 5 Mad 304.
10. Mangalathammal v. Narayanaswami Iyer, (1907) 30 Mad 461=17 M L J 250.
11. Natesa Chetti v. Vengu Nachiar, (1910) 33 Mad 102=3 I C 701=20 M L J 20.

based on the decision of the Privy Council in (1926) A C 94,[3] was made but failed. That attempt is again repeated before us. Mr. Rajah Iyer contending that the decision in 32 M L J 63[8] and 65 M L J 684[5] should be re-considered in the light of the Privy Council decision just mentioned. In the same volume we have got (1926) A C 155,[12] another decision of the Privy Council. The earlier decision relates to the valuation of land for rating purposes. The second decision relates to land tax assessment and it was held that an admission on a fundamental matter in a prior case—and a decision stands on the same footing—estops a different contention in a later case. At first sight it looks as if these two decisions are in conflict. Possibly the earlier decision may be explained on the footing that the valuation of land for purposes of rating for each year is so peculiar to that year and has to be made on considerations confined to that year and should be so uninfluenced by considerations that prevailed in prior years that no question should be considered as a general principle and what happened in one year—whether a matter of principle or a matter of detail—should not be used in another year and therefore the decision of one year is not res judicata for another year. If that decision is not to be explained in that way and should not be regarded as inconsistent with the decision in (1926) A C 155,[12] I prefer to follow the latter decision. This is practically the view accepted in 65 M L J 684[5] as to these two cases. These cases have also been considered in 58 M L J 260[13] and a similar view was taken there of the first case.

It is said that in cases under the Bengal Tenancy Act, it has been held that a decision between landlord and tenant as to the rate of rent in a prior year does not constitute res judicata in later years when the question comes up. But even there it has been held that where the earlier decision decides a matter of general principle, it would be res judicata in later years: *vide* 43 C L J 146[14] and 48 C L J 184.[15] It is true that in Calcutta a view prevailed at one time similar to the decision in 30 Mad 461[10] (32 Cal 749[16]), but this decision has since been overruled by that Court in 56 Cal 723.[6] It is then argued by Mr. Rajah Iyer relying on a passage in this last judgment that some exception should be made to the principle of res judicata in matters of jurisdiction, limitation or procedure on grounds of public policy. It is difficult to conceive how the question of res judicata can arise for the same subject matter in later years with reference to questions of jurisdiction, limitation or procedure. But here we are not concerned with any such question. It is suggested that the rules of the Estates Land Act are based on public policy and some exception should be made in such matters. We are not referred to any principle or authority to support such a proposition and I am unable to accept this contention. But as already observed, the principle of res judicata should be confined only to matters which actually existed at the time of the former decision. If there are new areas in patta No. 54 which were not planted with cocoanut at the time of the former suit and in respect of which no claim for enhanced rate of rent was or could be made in the former suit, the matter is not res judicata in the present suit in respect of such areas. The respondent contended that even in respect of such areas the question of general principle is settled between the parties. There can be no res judicata laying down a wrong rule of law between parties for future guidance also. The decision must be confined to the matter to which it has been applied at the time of the former decision. Areas and trees to which it was not applied then will be governed by the correct principle of law. It is said by the respondent that this matter was not raised earlier. The appellant claims that he did raise it. However the consideration of this question and how far the matter may be allowed to be raised are points which we leave to the learned Judge who would dispose of the second appeal in the light of the above observations, and if in his discretion, he thinks fit, he can allow

12. Hoystead v. Commissioner of Taxation, (1926) A C 155=95 L J P C 79=134 L T 354=42 T L R 207.
13. Sankaralinga Nadar & Brothers v. Commissioner of Income-tax, Madras, A I R 1930 Mad 209=126 I C 273=53 Mad 420=58 M L J 260 (F B).
14. Gnanada Govindo v. Nalini Bala, A I R 1926 Cal 650=94 I C 837=30 C W N 593=43 C L J 146.
15. Ayetonnissa Bibi v. Amjad Ali, A I R 1928 Cal 717=115 I C 588=32 C W N 828=48 C L J 184.
16. Alimunnissa Chowdhurani v. Shama Charan Roy, (1905) 32 Cal 749=9 C W N 466=1 C L J 176.

those points to be raised in second appeal. It is for him and not for the Full Bench to consider this question. With these observations these cases are remitted to the learned Judge for disposal.

Beasley, C. J.—I agree.

King, J.—I agree.

(After the opinion of the Full Bench, the case was again put before Varadachariar, J.)

Varadachariar, J.—Now that the Full Bench have held that the decision in 50 Mad 482[1] will operate as res judicata in respect of the areas then in question, it follows that S. A. Nos. 1148, 1150 and 1181 of 1932 fail and must be dismissed with costs in S. A. No. 1148 of 1932 only. S. A. Nos. 1149 and 1151 arising respectively from S. S. Nos. 2627 of 1923 and 3861 of 1926 relate to lands covered by patta No. 54. Even in respect of these lands, the former judgment will operate as res judicata except to the extent to which it can be said that in these second appeals which relate to later faslis the claim for rent is made in respect of lands brought under cocoanut cultivation after the date of the previous suits relating to these pattas. Mr. Rajah Iyer states that in the former suits the claim at Rs. 2 per karukam was made only in respect of 7 karukams, whereas in the present suits that rate is claimed in respect of 9 karukams and likewise the Rs. 5 rate in respect of the later faslis. A distinction is sought to be suggested between the claim at Rs. 2 rate and the claim at Rs. 5 rate, and it is argued that the rule of res judicata ought not to be applied at any rate to the extent of upholding the Rs. 5 rate claim. I am not able to agree with this contention. The decision of the Full Bench implies that the allowance of Rs. 2 claim was on the footing that the contention that the tenant was not liable to pay in respect of improvements effected by him was not available to him by reason of the rule of res judicata. Once that contention is put aside, the contract alleged by the landlord is that up to a particular stage he is entitled to rent at Rs. 2 per karukam and at later stages he is entitled to rent at Rs. 5 per karukam. I therefore do not see any justification for saying that though on the basis of Rs. 2 it is res judicata, the claim for the same land at later stages at the rate of Rs. 5 will not be res judicata.

Mr. Rajah Iyer further suggests that the written statement in S. S. Nos. 2627 of 1923 and 3861 of 1926 raised a question of fact that the trees have not in fact reached the stage when even on the basis of the agreement, as alleged by the plaintiff, the rent at Rs. 2 or Rs. 5 could be claimed at all. I see nothing of this contention put forward either before the Deputy Collector or before the lower appellate Court. I am not satisfied that any evidence which the defendant wanted to offer to substantiate this contention was shut out. I am therefore unable to allow that point to be raised at this stage. A further point was sought to be raised by Mr. Rajah Iyer on the construction of the contract relied on by the plaintiff, namely that the mere fact that one tree or some trees begin to put forth spathe will not justify the landlord in claiming the higher rate of rent in respect of the whole area under cocoanut cultivation. This point too does not appear to have been raised in any of the Courts below. It cannot be said to be really a matter of law or construction which can be dealt with in second appeal. It will really have to be considered in the light of the course of conduct of the parties or usage in the neighbourhood, and I must therefore disallow it also as a point not raised up to this stage and which cannot be disposed of without further evidence.

Mr. Muthuswami Iyer on behalf of the respondents is unable to state definitely whether Mr. Rajah Iyer's contention that in the old suits the claim was made and decreed only in respect of 7 karukams, whereas in the present suit the claim was made in respect of 9 karukams, is borne out by the record or not. But having regard to the fact that the rule of res judicata has got to be applied practically against the spirit of the provision made in the statute and seeing that the rule of decision in a matter of this kind has been the subject of so many conflicting pronouncements, I am not prepared to disallow the point raised by Mr. Rajah Iyer, which, after all, can be determined from the records of the Court or at any rate from the relevant pattas. The District Judge is accordingly requested to make a report, after giving an opportunity to both the parties to place all relevant materials before him, whether the claim in S. S. Nos. 2627 of 1923 and 3861 of 1926, in so far as it relates to cocoanut

plantation, is in respect of any area in excess of that which formed the subject matter of S. S. Nos. 2582 of 1918 and 1638 of 1920, and if so, what is the extent of the excess area. The report to be sent before 15th April 1935.

C.R.K./K.B. *Case remanded.*

*** A. I. R. 1937 Madras 259**
FULL BENCH
VARADACHARIAR, BURN AND PANDRANG ROW, JJ.

Secretary, Board of Revenue, Tripli-cane, Madras—Petitioner.

v.

Madura Mills Co., Ltd. — Opposite Party.

Referred case No. 6 of 1935, Decided on 19th November 1936.

*** Stamp Act (1899), S. 2 (10)—Oral agreement between two companies *M* and *H* for allotment of their respective shares to each other otherwise than in cash—Substance of agreement embodied in resolutions of companies— Company is not owner of its shares —Issue of shares by company does not amount to transfer of property possessed by company—Particulars of agreement filed by *M* with Registrar according to S. 104, Companies Act—Transaction amounts to "agreement" and not to "conveyance" as defined by S. 2 (10), Stamp Act.**

A share is property in the hands of a shareholder, but when the company is for the first time issuing shares, there is no transfer to the allottee of any property already possessed by the company as the company cannot be regarded as owner of its shares. [P 260 C 2]

Where two companies *M* and *H* orally agreed to allot some of their shares, fully paid up, to each other otherwise than in cash, as per certain agreement between them and the substance of the agreement was embodied in resolutions recorded in the books of both the companies and a statement embodying the particulars of the above agreement was filed in the form presented before the Registrar under S. 104, Companies Act, along with an agreement bearing a twelve anna stamp:

Held: the contract of which the particulars were recorded in the prescribed form filed with the Registrar did not amount to a "conveyance" within the meaning of S. 2 (10), Stamp Act and was a mere "agreement": *A I R 1934 Lah 530* and *Coats v. Inland Revenue Commissions, (1897) 2 Q B 423, Rel. on; A I R 1932 All 291, Ref.* [P 261 C 1]

K. S. Champakesa Ayyangar and *Govt. Pleader*—for Petitioner.

S. Duraiswami Ayyar — for Opposite Party.

Varadachariar, J.—The question arising for decision in this reference relates to the stamp duty payable on a certain form filed with the Registrar, under S. 104, Companies Act. By an arrangement between the Madura Mills Ltd., Madura and Harveys Ltd., Tuticorin, it was agreed that 20,000 fully paid up shares in the Madura Mills should be allotted to the Harveys in consideration of an allotment by the latter to the former of 1,000 fully paid up shares of Harveys as well as of an agreement to do ginning for the Madura Company at a specified rate for a period of ten years. It is stated that the original arrangement was only oral, but its substance has been embodied in resolutions recorded in the books of both the Companies. Under S. 104, Companies Act, it is required that where a contract relating to the issue of shares fully paid up otherwise than in cash has not been reduced to writing, the Company shall, within one month after the allotment, file with the Registrar the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing. A statement embodying the above particulars was accordingly filed by the Madura Mills before the Registrar on 29th August 1933. There was also produced an agreement dated 26th August 1933 bearing a twelve annas stamp.

The language of the agreement dated 26th August 1933 is calculated to suggest that the allotment had not yet been made, but was intended to be made *in futuro*. Similar language appears in some of the other papers also before us. This is scarcely reconcilable with the scheme of S. 104, Companies Act, nor with the records in the case of what actually happened. The Collector's letter to the Board of Revenue shows that Harvey's shares were allotted on or before 1st August 1933, and Madura Mills' shares were allotted on 2nd August 1933. Mr. Duraiswami Ayyer therefore agreed that we might deal with the case on the footing that an allotment had in fact been made when the statements were filed before the Registrar. He nevertheless maintained that this makes no difference so far as the present question is concerned, because he contended that the allotment of shares will not amount to a "conveyance" within the meaning of the definition in S. 2, Cl. (10), Stamp Act. There are other provisions made in the Stamp Act with reference to letters to allotment as

well as share certificates. The question in the present case arises not with reference to the letter of allotment itself, but as to the consideration for such allotment, when the allotment has been made as of shares fully paid up otherwise than in cash. S. 104 contemplates that the consideration for such allotment may be either a contract of sale or a contract for services or the consideration may be in other forms. The stamp duty payable will therefore vary according as the consideration consists of a sale of property or of an agreement of any other kind.

The collector who referred the matter to the Board for opinion was apparently inclined to think that the reciprocal allotment must be regarded as amounting to a sale and therefore the transaction was liable to stamp duty as a conveyance. Before the Collector as well as before the Board, reliance seems to have been placed on the decision of the Lahore High Court in 15 Lah 501,[1] in support of the argument that where a transaction does not amount to a conveyance but is merely an agreement to convey, the document does not require to be stamped as a conveyance. The facts in that case are not quite analogous to those of the present, but there can be very little doubt as to the correctness of the general principle therein recognised : *see also* (1932) 30 A L J 394.[2] The Board's reference incidentally mentions another argument advanced before it on behalf of the party, namely that there was no question of conveyance here, because the transaction did not relate to immoveable property. There is no substance in that argument, as the Board themselves observe, because the definition of conveyance in the Stamp Act will apply as much to the transfer of moveable as to the transfer of immoveable property.

Before us Mr. Duraiswami Ayyer put his argument on two grounds. He contended that though the allotment was complete it did not by its very nature amount to a 'transfer of property' within the meaning of the definition of conveyance, because the company cannot be regarded in any sense as the owner of its own shares, so that when it issues or allots shares it cannot be said to be transferring property. It is one thing to say that shares are property in the hands of a shareholder (e. g., S. 28, Companies Act), but it is a wholly different position, when the shares are being for the first time issued by the company itself. Alternatively, he contended that even if there should be any possibility of regarding this transaction as in the nature of a 'sale' of shares, it would not amount to a "conveyance" unless property has passed thereunder, that according to the definition of "goods" in the Sale of Goods Act, shares are "goods", that under S. 4, Sale of Goods Act a 'contract of sale' is nothing more than an 'agreement to sell' until the property in the goods to be sold passes, and that under S. 18, where there is a contract of sale of 'unascertained' goods, no property is transferred to the buyer unless and until the goods are ascertained. In the present case, at the time of the oral arrangement the particulars of which were filed before the Registrar, there had been no appropriation of any specified shares in either company to the other company in pursuance of the allotment and he accordingly maintained that the transaction could not amount to anything more than a mere "agreement to sell" within the meaning of S. 4, Sale of Goods Act. Reliance was placed in this connection on the observation of the Judicial Committee in 50 Bom 360.[3] In the view that we take on the first question, it does not seem to us necessary to express any opinion on the second. On the first question, the learned Government pleader did not dispute the proposition that a Company cannot be regarded as holding its own shares. But he nevertheless suggested that there is nothing wrong in regarding the company as owning the shares which it issues and in that sense it may be possible to bring the case within the definition of "conveyance" in the Stamp Act. We find it difficult to follow this distinction. As we have already observed, it is no doubt true that in the hands of a shareholder, a share is property, and when a shareholder exchanges his shares with another it may be possible to regard the transaction as amounting to a transfer whether by way of exchange or convey-

1. Bhola Ram & Sons, Ltd. v. Emperor, A I R 1934 Lah 530=1934 Cr C 835=150 I C 781=36 P L R 9=15 Lah 501 (S B).
2. *In re* Swadhesi Cotton Mills Co., Ltd., A I R 1932 All 291=137 I C 337=1932 A L J 394 (S B).
3. Maneckji Pestonji v. Wadilal Sarabhai & Co., A I R 1926 P C 38=94 I C 824=53 I A 92=50 Bom 360 (P C).

ance : *cf.* (1897) 2 Q B 423.[4] But when the company is for the first time issuing shares, it seems to us that there is no question of property already possessed by the company being thereby transferred to the allottee. Whatever may be the exact nature of the right which the allottee acquires between the date of allotment and the date of the entry of his name in the register, it is difficult to regard the issue of the shares to him by allotment as amounting to a 'transfer of property' by the company to him. On this ground, we must hold that the contract of which the particulars were recorded in Form 7 did not amount to a "conveyance" and that Form 7 was properly treated by the parties as an "agreement."

C.R.K./W.D. *Reference answered.*

4. Coats v. Inland Revenue Commissions, (1897) 2 Q B 423=66 L J Q B 732=77 L T 270=46 W R 1=61 J P 693.

A. I. R. 1937 Madras 261

VARADACHARIAR AND HORWILL, JJ.

V. Krishnaswami Rao—Petitioner.

v.

R. Srinivasa Desikan—Opposite Party.

Civil Revn. No. 1527 of 1935, Decided on 7th October 1936, from order of Sub-Judge, Tiruvarur, D/- 11th November 1935.

Evidence Act (1872), S. 92—Suit by mortgagee for sale of mortgaged property—Oral agreement between mortgagor and mortgagee that mortgage amount should be settled at certain amount and mortgagee would accept certain property in full discharge of his mortgage debt—Evidence to prove oral agreement is admissible.

Where in a suit by mortgagee for sale of the mortgaged property, mortgagor pleaded that there was an oral agreement between him and the mortgagee that the mortgage amount should be settled at certain amount and certain property should be sold to the mortgagee in full discharge of the mortgage debt:

Held: that the mortgagor was entitled to adduce evidence to prove the oral agreement. *Case law discussed.* [P 261 C 1, 2; P 264 C 2]

B. Sitarama Rao, C. R. Krishna Rao and *P. G. Raghavendra Rao*—for Petitioner.

K. Bhashyam Ayyangar for *R. Tirumalaitatachariar*—for Opposite Party.

Varadachariar, J.—In this petition, we are asked to revise an order holding that the petitioner cannot be permitted to prove an oral agreement which he pleaded in defence to a mortgagee's suit for sale. The petitioner admitted the mortgage sued on, but pleaded that under an agreement brought about by persons interested in the plaintiff and accepted by the plaintiff, it had been agreed that the mortgage amount should be settled at Rs. 9,000 and in full discharge of the claim under the mortgage deed a certain portion of the hypotheca should be sold to the plaintiff. The truth and validity of this agreement formed the subject matter of the first issue in the case; and the second issue raised the question, whether even if the first issue should be found in the defendant's favour, the agreement precluded the plaintiff from maintaining this suit, when admittedly the agreement remained executory. It was further contended on behalf of the plaintiff that, in view of S. 92, Evidence Act, it was not open to the defendant to adduce evidence relating to the alleged oral agreement; this contention was embodied in the third issue. The learned Judge heard arguments on the third issue (as a preliminary issue) and held that no oral evidence was admissible to prove the agreement set up in the written statement.

Before referring to the decisions relied on by the one side or the other, it is desirable to note the terms in which the exclusion of oral evidence is laid down in S. 92. The main clause excludes evidence of "any oral agreement for the purpose of contradicting, varying, adding to or subtracting" from the terms of a contract, etc., proved in the manner provided for by S. 91. The provisos introduce certain exceptions (or apparent exceptions) and to prov. 4 there is an exception. The language of the exception in the proviso does not of itself prohibit or exclude any kind of evidence; it merely excludes the benefit of the proviso in the excepted cases; with the result that in these cases the prohibition contained in the main part of the section will apply. We have accordingly to consider whether the oral agreement alleged in the written statement "contradicts, varies, adds to or subtracts" from the mortgage document.

It is settled by a long line of authority —and Mr. Bhashyam does not deny—that a debtor may plead and prove an actual discharge in a manner or on terms different from those contemplated by or provided for in the document evidencing the debt. But relying on the distinction drawn in the cases between a 'discharge' and an

agreement to give a discharge in future, he maintains that in the present case the alleged contract to take a sale of a portion of the hypotheca in satisfaction of the debt amounts to nothing more than an agreement to give a discharge if and when the sale is completed and is therefore within the prohibition contained in S. 92. This argument seems to us to rest on a misapprehension of the legal effect of the contract of sale in such cases.

We must observe at the outset that we have found it somewhat embarrassing to deal with the question of admissibility of evidence at this stage, because some of the steps in the argument relevant to that point will also bear on the question raised by the second issue in this case, viz., whether and how far the alleged agreement, if true, affords a defence to the present action. We have endeavoured, as far as possible, to avoid expressing any definite opinion on this aspect of the matter; and we wish to make it clear that when deciding the second issue, the lower Court need not feel hampered by any observations made in the course of this judgment. It only remains to add that we are assuming for the present purpose that if permitted the defendant will be able to prove a valid and enforceable contract as alleged in the written statement. The decision in 56 Mad 198[1] shows that the mere fact of an arrangement being 'executory' does not preclude the possibility of its operating as a satisfaction of a pre-existing obligation. We are not in this case concerned with the question whether in view of the scheme of the Civil Procedure Code, an arrangement of that kind can be pleaded in an 'executing' Court as amounting to satisfaction of a decree, a point on which divergent views have been expressed. A contract between a debtor and his creditor that the former should sell and the latter should accept any property in satisfaction of the debt may, it seems to us, operate in one of three ways; and on none of these hypotheses will proof of such contract be precluded by S. 92, Evidence Act.

In one view the contract itself may operate as a final or absolute discharge of the debt, substituting the relationship of a 'vendor and vendee' for that of 'debtor and creditor' and giving the creditor thereafter only the remedy by way of specific performance of the contract to sell. If this is the correct view the debtor is entitled to contend that the case is within the line of authority relating to proof of 'discharge.' It will be a mere play upon words to say that because there is only an agreement to sell it must be treated as on the same footing as an agreement to give a discharge. This view of the legal effect of a contract to sell would seem to derive support from the decision of the Judicial Committee in 11 All 47.[2] In more than one place, their Lordships speak of the debt as having been wiped out by the contract; and even on failure of the contract of sale, they held that the remedy of the creditor was no longer a suit for the recovery of the pre-existing debt but one founded on failure of consideration or on S. 65, Contract Act. Mr. Bhashyam suggests that their Lordships' observations should be understood as made in the light of the fact that at one stage the Court had decreed specific performance of the contract but this argument ignores their remark (on p. 55):

> Up to the stage of the Subordinate Judge's decree in 1881, Dhum Singh retained the amount of his debt as of right and in accordance with the contract alleged by him.

The judgment seems to proceed on the basis that from the date of the contract, the sum theretofore representing the debt must be regarded as "purchase money" in the hands of the debtor vendor which he is entitled to retain. The contract dealt with in 11 All 47[2] was anterior to the Transfer of Property Act; and it may be a matter for argument whether and how far the provisions of Ss. 54 and 55, T. P. Act, affect availability of the above reasoning at the present day. It may however be pointed out that as observed by Abdur Rahim J. in 40 Mad 338,[3] and by Devadoss, J. in 50 M L J 228,[4] S. 55, T. P. Act, may well be read as using the terms 'buyer' and 'seller' even when referring to the position of the parties prior to the execution of the deed of sale. A second possible view is that the contract to sell

1. Ramanarasu v. Venkata Reddi, A I R 1933 Mad 28=141 I C 429=56 Mad 198=63 M L J 598.

2. Bassu Kuar v. Dhum Singh, (1889) 11 All 47 =15 I A 211=5 Sar 260 (P C).
3. Adikesavalu Naidu v. Gurunatha Chettiar, A I R 1918 Mad 1315=39 I C 358=40 Mad 338=32 M L J 180 (F B).
4. Kathamuthu Pillai v. Subramania Chettiar, A I R 1926 Mad 569=94 I C 561=50 M L J 228.

operates only as a 'conditional' discharge of the debt whether as a matter of law or on the basis of the presumed intention of the parties. Such a legal implication may be compared to the principle well known in cases where a person executes a promissory note in payment of the price of goods purchased. As a presumption of fact, it may be rested on the ground suggested in 39 All 178,[5] and by Miller, J. in 37 Mad 423[6] at p. 425. The difference between this hypothesis and the previous one will be that on the failure of the debtor to carry out the contract by the execution of the sale deed, the creditor will not be restricted to the remedy by specific performance but may sue for the debt itself. It might also follow that the debtor is not bound to sue for specific performance and will be completely dischraged if he is ready and willing to carry out his contract by the execution of a sale deed or at any rate if he tenders a duly executed sale deed. Whatever may be the bearing of these considerations on the question raised by the second issue, no prohibition under S. 92, Evidence Act, can arise even on this hypothesis, because the plea is in substance one of discharge and not of an agreement to give a discharge in future.

A third possible view is that the contract to sell is an independent matter : *cf.* 50 Bom 566,[7] and till the sale is completed the contract does not affect the rights of the creditor or the obligations of the debtor as creditor and debtor. 51 All 799[8] and A I R 1936 Lah 476,[9] may be referred to in this connection ; but as they do not discuss the question of the admissibility of evidence, they do not call for further notice here. On this footing, there is no scope at all for the application of S. 92, Evidence Act, for *ex hypothesi* the later contract does not as a contract affect the rights and liabilities of the parties under the original contract. Such a case cannot be assimilated to one in which the creditor agrees to receive a smaller sum than is actually due because in the latter case the creditors' rights under the first document are undoubtedly affected. In this connection Mr. Bhashyam sought to make some point of the fact that according to the written statement, the amount due to the mortgagee is said to have been settled at Rs. 9,000, whereas on a proper calculation the amount actually due as per terms of the document will be found to be something more. This seems to us immaterial, because the defendant's allegation is that in full satisfaction of the claim under the mortgage document, the plaintiff agreed to take certain properties. The reference to Rs. 9,000 is only a step in determining the extent of properties to be conveyed : *cf.* 34 M L W 921.[10] Among the authorities cited, the strongest in favour of the respondent is the decision of a single Judge of the Rangoon High Court in A I R 1934 Rang 228.[11] With due respect we have felt some difficulty in following the reasoning in that judgment. The learned Judge is reported to have observed that :

> An agreement to transfer land in satisfaction of the claims due on these two documents is *nudum pactum* and consequently it cannot be proved.

It is well settled that in the case of a contract to sell, the obligation to sell and the obligation to buy are respectively the 'consideration' for the reciprocal promises and it does not seem to us correct to speak of such an agreement as a *nudum pactum*. Nor can it make any difference for this purpose that the price is not to be paid in the future but consists of money already due by the vendor to the vendee. It will be too much, for instance, to suggest that in such a case a suit for specific performance will not lie. Again, we are unable to see how the fact of its being a *nudum pactum* stands in the way of its being proved. The learned Judge then observes :

> The agreement in itself is not satisfaction and it can only be considered as an agreement modifying the terms of the contract

This is practically begging the question; none of the considerations we have above set out has been adverted to. The assumption that an arrangement for payment by way of transfer of land must always be a variation of the original contract in all

5. Har Chandi Lal v. Sheoraj Singh, A I R 1916 P C 68=39 I C 343=44 I A 60=39 All 178 (P C).
6. Aryaputhira v. Muthu Kumaraswami, A I R 1914 Mad 489=15 I C 343=37 Mad 423=23 M L J 339.
7. Harkisan Das Bhagwan Das v. Bai Dhanu, A I R 1926 Bom 497=98 I C 634=50 Bom 566.
8. Angan Lal v. Saran Bihari, A I R 1929 All 503=121 I C 221=1929 A L J 526=51 All 799.
9. Guranditta Mal v. Labhu Ram, A I R 1936 Lah 476=163 I C 123=38 P L R 155.
10. Suppan Chetty v. Yegnanarayana Ayyar, A I R 1932 Mad 141=136 I C 317=34 M L W 921.
11. Nachiappa Chettiar v. Theivani, A I R 1934 Rang 228=151 I C 398.

cases of loans is perhaps too wide: *cf.* 11 C L J 39;[12] 14 C L J 507,[13] at p. 510; 53 M L J 863[14] and 1936 M W N 205.[15] The learned Judge purports to follow the decision in 44 Bom 55;[16] but that decision, though purporting to be based on 42 Mad 41,[17] is opposed to the trend of the Madras decisions (*cf.* 53 Mad 127[18] and 54 Mad 889[19]) because the learned Judges of the Bombay High Court declined to permit proof even of a plea of completed discharge by payment of a smaller sum than was actually due. The next case relied on by Mr. Bhashyam is A I R 1929 All 615.[20] The agreement pleaded by the defendant was there found against on the evidence; the observation of the point of law is therefore only obiter. Even that observation consists only of a single sentence (without any discussion) that the 'oral agreement amounted to a modification of the original contract.' By way of distinction on the facts, we may point out that the alleged second agreement in that case comprised not merely a sale of some lands for part of the original debt but also a payment of a further sum of Rs. 7,000 in cash. We are not in a position to say how far this circumstance influenced the opinion of the learned Judges. They purport to follow the decision in 42 Mad 41,[17] but that related to the ordinary case of a creditor agreeing to receive less than what was due under the document. In 28 All 508,[21] at p. 514, reference has been made to the objection under S. 92 to a plea which in some respects resembles the present, but as will be seen from the summary on p. 512, the plea involved certain other matters which are clearly within the prohibition of S. 92, and the observations on p. 514 put together so many objections to the plea that it is not possible to gather the extent which in the opinion of the learned Judges the objection under S. 92 was available. Allowing the revision petition, we hold that the defendant is entitled to adduce evidence in respect of the oral agreement alleged in the written statement. The costs of this revision petition will be costs in the cause and be provided for in the decree of the lower Court.

C.R.K./S.C. *Petition allowed.*

12. Kamala Sahai v. Babu Nundan Mian, (1910) 11 C L J 39=2 I C 13.
13. Ramavatar v. Tulsi Prasad Singh, (1911) 14 C L J 507=11 I C 713=16 C W N 137.
14. Nokamma v. Dharmayya, A I R 1928 Mad 233=107 I C 417=53 M L J 863.
15. Lakshminarasimha Rao v Raghavamma, A I R 1936 Mad 380=162 I C 52=36 M W N 205.
16. Jagannath v. Shankar, A I R 1920 Bom 115=54 I C 689=22 Bom L R 39=44 Bom 55.
17. Mallappa v. Natum Nagu Chetty, A I R 1919 Mad 833=48 I C 158=42 Mad 41=35 M L J 555.
18. Balasundara v. Ranganatha Ayyar, A I R 1929 Mad 794=122 I C 641=58 M L J 503=53 Mad 127.
19. Vaidhyanatha Rao v. Kandappa Chetti, A I R 1931 Mad 636=132 I C 292=61 M L J 556=54 Mad 889.
20. Md. Niaz v. Nanhe Mal, A I R 1929 All 615=119 I C 107=1929 A L J 924.
21. Maharaj Singh v. Balwant Singh, (1906) 28 All 508=3 A L J 274=1906 A W N 117.

A. I. R. 1937 Madras 264

BURN, J.

K. Sivasankara Mudaliar and *others*—Appellants.

v.

R. Krishnaswami Mudaliar—Respondent.

Second Appeal No. 772 of 1933, Decided on 29th October 1936, against decree of Dist. Court, Salem, in A. S. No. 174 of 1932.

Madras Estates Land Act (1 of 1908), S. 3 (5)—Landholder—Joint family of brothers as landholder — Managing member not recognized as landholder—Tender of patta by him alone is invalid.

Where a joint family consists of three brothers, who are all landholders and the managing member is not registered or recognized as a single landholder by the Collector, tender of patta by him alone is invalid as all the brothers are co-equal landholders: *12 I C 715, Rel. on*; *15 Mad 484* and *A I R 1918 Mad 1128, Disting.*

[P 264 C 2; P 265 C 1]

K. S. Sundaram—for Appellants.

D. Ramaswamy Ayyengar—for Respondent.

Judgment.—The decision of the learned District Judge is supported by the case reported in 10 M L T 450[1] to which he refers. The cases reported in 15 Mad 484[2] and 4 M L W 654[3] are cases in which a single landholder had been recognized by the Collector as landholder, and, therefore, they do not apply to this case. Here it is clear that all the three brothers are landholders and though the appellant

1. Venugopala Rao v. Venkatrayudu, (1911) 10 M L T 450=12 I C 715.
2. Ayyappa v. Venkatakrishnama Razu, (1892) 15 Mad 484=2 M L J 219.
3. Parthasarathy Aiyengar v. Rangaswami Aiyengar, A I R 1918 Mad 1128=38 I C 645=4 M L W 654.

is the eldest brother and the managing member of the joint family of which all three are members, he has not been recognized or registered by the Collector under S. 3 (5), Estates Land Act, simply because there has been no dispute between himself and his brothers. We have there three co-equal "landholders" of whom only one tendered the patta in this case. Such a tender, I agree with the learned District Judge, is invalid. This appeal is dismissed with costs.

C.R.K./B.D. *Appeal dismissed.*

A. I. R. 1937 Madras 265

VARADACHARIAR AND HORWILL, JJ.

Chinnasami Chetty and *others*—Appellants.

v.

Manickammal and *another*—Respondents.

Letters Patent Appeal No. 109 of 1935, Decided on 13th October 1936, against judgment of Wadsworth, J., D/- 4th September 1935.

Sale — Consideration less than Rs. 100— Non-registration of document does not invalidate sale if prior oral sale and delivery of possession are established.

Where the sale is only for amount less than Rs. 100, the non-registration of the document is not fatal to the validity of the transfer if the transferee is able to establish a prior oral sale and delivery of possession in pursuance thereof, i. e., an oral sale sufficiently dissociated from the unregistered sale deed, that the one can be regarded as independent of the other : *A I R 1928 Mad 546, Expl.* [P 265 C 1, 2]

V. T. Rangaswami Ayyangar — for Appellants.

M. S. Venkatarama Aiyer—for Respondents.

Varadachariar, J.—This Letters Patent appeal arises out of a suit in ejectment. The plaintiff claims the suit property as one of the items which he purchased in execution of a decree passed on a mortgage given by one Dharma Goundan in the year 1913. Defendant 1 is a widow of the mortgagor's brother. She claims that three years before the mortgage, the suit property had been sold to her husband by Dharma Goundan. The only question for our decision is whether by this sale which is said to have taken place in 1910, defendant 1's husband became in law the owner of the property. The document produced in evidence of the sale is admittedly unregistered, but as the sale was only for Rs. 75, the non-registration of the document is not fatal to the validity of the transfer if defendant 1 is able to establish a prior oral sale and delivery of possession in pursuance thereof, i. e., an oral sale sufficiently dissociated from the unregistered sale deed, that the one can be regarded as independent of the other. Both the lower Courts found that the consideration for the transfer by Dharma Goundan to his brother must have been paid a month or two and possession must also have been taken by the vendee a month or two before the unregistered sale deed. The appellants' learned counsel is no doubt justified in the comments that he made upon the way in which defendant 1's pleas are put forward in the written statement. But having regard to the line taken by the plaintiff who altogether denied the reality of the transaction, no issue was specifically framed on the question when and how the title passed to defendant 1's husband and when possession was taken by him. It may perhaps be conceded that the necessity for dissociating the oral sale from the unregistered document was not sufficiently realised in the early stages of the litigation either by the plaintiff's advisers or by defendant 1's advisers. But we do not think that at this stage we will be justified on that ground in ignoring the concurrent findings of both the Courts that the consideration had been paid and possession had been taken by defendant 1's husband at least a month before the date of the unregistered sale deed. If this be the conclusion on the facts, it will be a very artificial application of S. 91, Evidence Act, to say that the contract between the parties is contained only in the unregistered sale deed and that there could be no other proof of the sale.

In addition to the authorities referred to in the judgment of the learned Judge of this Court who heard the second appeal, our attention was also drawn to the decision in A I R 1928 Mad 546.[1] We do not wish to throw any doubt upon the legal principles laid down there, but from the dates given in that judgment it will be clear that on the findings, there was no possibility of inferring an oral contract and delivery of possession anterior to the unregistered sale deed and much less an

1. Kuppuswami v. Chinnaswami, A I R 1928 Mad 546=111 I C 677.

oral contract dissociated from it. We accordingly hold that there is no reason for interfering with the decision of Wadsworth, J. in the second appeal. The Letters Patent appeal is dismissed with costs.

C.R.K./B.D. *Appeal dismissed.*

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* A. I. R. 1937 Madras 266

VENKATARAMANA RAO, J.

Kotamreddi Subba Reddi—Appellant.

v.

Perumareddi Venkatanarasimha Reddi and *others*—Respondents.

Appeal No. 165 and Civil Revn. Petn. No. 500 of 1934, Decided on 31st August 1936, against order of Dist. Court, Nellore, D/- 24th February 1934.

*** (a) Civil P. C. (1908), O. 7, R. 11 (c)—Court has no jurisdiction to return plaint presented with insufficient stamp—It must fix time for making up deficiency and can reject plaint if deficiency is not made within time fixed.**

A Court has no jurisdiction to return a plaint presented with an insufficient stamp. It is incumbent upon the Court to receive it, fix a time within which the deficiency should be made up and if it is not complied with within the time allowed, to reject it: *A I R 1926 Mad 676* and *1932 M W N 104*, *Rel. on.* [P 266 C 2; P 267 C 1]

*** (b) Civil P. C. (1908), O. 7, R. 11 (c)—Requisite stamps not available—Court can permit plaintiff to file plaint with stamps of smaller denomination — Order declining to receive plaint with stamps of smaller denomination is unjust.**

There is nothing illegal in permitting a plaintiff to file a plaint with stamps of a denomination smaller than the one required under the rules, if the requisite stamps are not available. [P 267 C 1]

There is nothing in the rule framed and published by the Notification No. 76 dated 19th May 1883 as amended by Notification dated 25th February 1924, which prohibits the receipt by the Court of a plaint with court-fee stamps of a denomination less than the one required under that rule. On the other hand the rule provides that court-fee stamps of a lesser denomination can be affixed if the stamps of the required value are not available. [P 267 C 1,2]

Where, therefore, the plaintiff filing a plaint begs permission of the Court to affix court-fee stamps of a smaller denomination, as the stamps of the required value are not available to him on that day before he can file the plaint in the Court, the Court ought to permit the plaintiff to affix the necessary stamps in accordance with the request made by him and receive the plaint and the act of the Court in declining to receive the plaint is highly unjust. [P 267 C 2]

B. Somayya—for Appellant.

K. Kuppuswamy, and *A. Viswanatha Dhikshithar* (Court guardian)— for Respondents.

Judgment.—This is a Civil Miscellaneous Appeal against the Order of the District Judge of Nellore refusing to receive a plaint. A preliminary objection has been taken that no appeal lies and it is conceded that no appeal lies. A revision petition has been filed and I therefore propose to deal with the said petition. The suit was to recover a sum of Rs. 8,131-13-0 upon a promissory note executed by defendants 1, 5 and 8 in favour of the plaintiff and also for a declaration that a certain mortgage executed by defendant 8 in favour of defendant 9 is void and not binding upon the creditors of the family of defendants 1 to 8.

On the last date of limitation, that is, on 24th February 1934, the plaintiff appeared to have gone to the office of his pleader and asked him to prepare a plaint and file the same in Court that day. It was about 12 noon when he saw his pleader. The court-fee leviable on the plaint is a sum of Rs. 710-12-0. It seems that the court-fee stamps of the denomination required under the rules could only be obtained from the Taluk Office and for that purpose the money had to be paid into the Taluk Office before 11-30 a. m. So the necessary stamps could not be available to the plaintiff. It took nearly 4 p. m. to have the plaint prepared and the plaint was thereupon presented with a court-fee stamp of twelve annas affixed thereon. The Sheristadar declined to receive the plaint and the matter was brought to the notice of the learned District Judge who also declined to receive the plaint and passed the following order: "This plaint not being properly stamped will not be received." Within a few minutes after the said order having been passed the pleader for the plaintiff interviewed the learned District Judge in his chambers and made a request to him to grant time till 12 noon the next day for supplying the deficient stamp or permit him to affix court-fee stamps of a smaller denomination and present the plaint within 15 minutes. But the learned District Judge refused to accede to either request. It seems to me that the learned Judge acted illegally in declining to receive the plaint.

In more than one decision of this Court it has been pointed out that the Court has

no jurisdiction to return the plaint presented with an insufficient stamp. It is incumbent upon the Court to receive it, fix a time within which the deficiency should be made up and if it is not complied with within the time allowed, to reject it : *vide* A I R 1926 Mad 676[1] and 1932 M W N 104,[2] where Jackson, J. followed 38 Bom 41.[3] It is rather surprising that the office of the District Court should have ignored this procedure which has been pointed out by the High Court. Further, I do not see that there is anything illegal in permitting a plaintiff to file a plaint with stamps of denomination smaller than the one required under the rules, if the requisite stamps are not available : Ss. 25 to 27, Court-fees Act, specify the mode of levying fees. S. 25 says : "All fees referred to in sections or chargeable under this Act shall be collected by stamps." S. 26 says :

> The stamps used to denote any fees chargeable under this Act shall be impressed or adhesive, or partly impressed or partly adhesive, as the Local Government may, by notification in the Local Official Gazette, from time to time direct ;

and S. 27 gives power to the Local Government to frame rules for regulating the supply of stamps or the number of stamps to be used for denoting any fee chargeable under this Act. The only rule in this behalf which has seen brought to my notice is the rule framed and published by the Notification No. 76, dated 19th May 1883, as amended by Notification dated 25th February 1924. The said rule provides as follows :

> When, in the case of fees amounting to or exceeding Rs. 25, the amount can be denoted by a single impressed stamp, the fee shall be denoted by a single impressed stamp of the required value. But if the amount cannot be denoted by a single impressed stamp or if a single impressed stamp of the required value is not available, an impressed stamp of the next lower value available shall be used, and the deficiency shall be made up by the use of one or more additional impressed stamps of the next lower values available which may be required to make up the exact amount of the fee in combination with adhesive stamps to make up fractions of less than Rs. 25.

There is nothing in this rule which prohibits the receipt by the Court of a plaint with court-fee stamps of a denomination lesser than the one required under that rule. On the other hand, the rule provides that court-fee stamps of a lesser denomination can be affixed, if the stamp of the required value is not available. From the affidavits of both the pleader and the plaintiff filed in this case, it is quite clear that stamps of the required value were not available to the plaintiff on that day before he could present the plaint in Court. In such circumstances the Court ought to permit the pleader of the plaintiff to affix the necessary stamps in accordance with the request made by him and receive the plaint. The act of the Court in declining to receive the plaint is highly unjust and I therefore set aside the order of the learned Judge and direct him to receive the plaint and give leave to the plaintiff to furnish the deficient stamp within one week after the receipt of the order by the lower Court from this Court. I however direct the plaintiff to pay a sum of Rs. 75 as and for the advocate's fee to the defendants who are represented by an advocate in this Court and also any other costs incurred by them in connection with this civil revision petition and the appeal. I understand that the Court guardian has already been paid the fee that has been fixed by the Registrar and I do not propose to make any separate order for him.

C.R.K./R.M. *Order accordingly.*

1. Basavayya v. Venkatappayya, A I R 1926 Mad 676=95 I C 439=51 M L J 90.
2. Narasimha Rao v. Venkata Krishna Rao, 1932 M W N 104.
3. Achut Ramachandra v. Nagappa Bab Bagaya, A I R 1914 Bom 249=21 I C 337=38 Bom 41 =15 Bom L R 902.

A. I. R. 1937 Madras 267

PANDRANG ROW, J.

Secretary of State — Petitioner.

v.

Thayammal and *another* — Opposite Parties.

Civil Misc. Petn. No. 2754 of 1936, Decided on 20th October 1936, against decree of Sub-Judge, Madura, in Appeal No. 146 of 1934.

(a) Pauper — Appeal — Effect of admitting appeal — Government cannot intervene in matter of court-fee after appeal in forma pauperis has been admitted.

After the application has been allowed and the appeal in forma pauperis has been admitted and only awaiting hearing, there is no scope for any intervention by the Government in the matter of court-fee. [P 268 C 1]

*** (b) Civil P. C. (1908), O. 41, R. 10—Object and scope—Court-fee due to Government is not costs incurred by Government.**

Order 41, Rule 10 is not a provision intended to assist the Government in collecting court-fee. It is meant for the protection of respondents in

appeal and to save them from the risk of loss in the shape of costs. The court-fee that is due to Government cannot be regarded as the costs incurred by Government when Government is not a party in appeal nor was it a party in the Court below, and even if court-fee is directed to be paid to the Government, that does not convert the court-fee into costs incurred by a party.

[P 268 C 1, 2]

N. Srinivasa Ayyangar for *Govt. Pleader*—for Petitioner.

S. Ramaswami Ayyar and *V. K. Srinivasa Ayyangar*—for Opposite Parties.

Order.—This is an application by the Secretary of State for India in Council through the Collector of Madura for an order directing the appellants in Appeal No. 146 of 1934 to furnish security for payment of court-fees due by them to the Government in the lower Court and in this Court. Admittedly, this is an unusual application. The application purports to be made under O. 33, R. 13, Civil P. C., which certainly does not refer to the question of taking security from appellants. It merely provides that :

All matters arising between the Government and any party to the suit under R. 10, R. 11 or R. 12 shall be deemed to be questions arising between the parties to the suit within the meaning of S. 47.

No question has now arisen in this Court about court-fee, and I fail to see how the Government can come in at this stage in the present appeal with an application like this. This appeal was permitted to be filed in forma pauperis. That was the occasion when, no doubt, the Government could appear and oppose the application if they thought fit. After the application has been allowed and the appeal has been admitted, and only awaiting hearing, there is no scope in my opinion for any intervention by the Government in the matter of court-fee, and no reason why the provisions of O. 41, R. 10, which are meant for the protection of the respondents in an appeal, should be utilised or made available for the benefit of the Government in order to enable it to collect the court-fee which is due. O. 41, R. 10 is not a provision intended to assist the Government in collecting court-fee. It is meant for the protection of respondents in appeal and to save them from the risk of loss in the shape of costs. The court-fee that is due to Government cannot be regarded as the costs incurred by Government either in the Court below or in this Court. Government is not a party in this appeal nor was it a party in the Court below, and even if court-fee is directed to be paid to the Government, that does not convert the court-fee into costs incurred by a party. I am of opinion that this application is misconceived and incompetent.

Even on the merits I can see very little to justify the application. This is a case in which apparently and ostensibly in the interests of justice a pauper has been permitted to appeal in forma pauperis. It is therefore necessary to see that no encouragement is given to any attempt to stifle the appeal, and it is almost certain that if the prayer in the present application is granted, the appellants would be unable to find security for such a large sum as Rs. 4,500 and the result would be a summary rejection of the appeal. This result would not only be disastrous from the point of view of doing justice between the parties to the appeal, but disastrous or at least imprudent even from the point of view of the Government revenue. Any chance which the Government may have of recovering the court-fee due would be lost if the appeal is rejected as it will have to be rejected for failure to give security. I am therefore unable to see any good reason on the merits for granting the application, even if the application was maintainable. The application is accordingly dismissed with costs.

C.R.K./S.C. *Application dismissed.*

A. I. R. 1937 Madras 268

BURN AND LAKSHMANA RAO, JJ.

Thangachami Naicker and *another*—Appellants.

v.

Al. Vr. St. Veerappa Chettiar and *others*—Respondents.

Appeals Nos. 403 and 404 of 1933, Decided on 2nd September 1936, against orders of Sub-Judge, Dindigul, D/- 1st February 1933.

(a) Civil P. C. (1908), S. 47—Applicability explained—Person who is not necessary party and is exonerated from suit without his claim being adjudicated is not party within S. 47.

Section 47 does not apply unless the question arises between the parties to the suit in which the decree was passed or their representatives and relates to the execution, satisfaction or discharge of the decree. A defendant who was not a necessary party would not be a party to the suit within the meaning of S. 47 if he is exonerated without his claim being adjudicated upon : *A I R 1930 Mad 817, Rel. on.* [P 270 C 1]

(b) Civil P. C. (1908), S. 47 — Claim not arising under or in execution — Claim on ground that certain decree is not binding on claimant—S. 47 has no application as that question cannot be tried in execution.

Where property is claimed not under or in execution of a decree but the claim is for delivery of property on the ground that the decree is not binding on the claimant, the question is one that cannot be tried in execution and therefore S. 47 has no application : *30 Mad 402, Rel. on.*

[P 270 C 1]

Watrap S. Subramania Ayyar, *T. P. Gopala Krishna Ayyar* and *M. V. Harahara Ayyar*—for Appellants.

S. Srinivasa Ayyangar and *K. Rajah Ayyar*—for Respondents.

Lakshmana Rao, J.—The legal representatives of one Errammal, the senior widow of the zamindar of Thevaram, are the appellants and appeals are preferred against the orders of the Subordinate Judge of Dindigul dismissing I. A. No. 190 of 1931 filed by Errammal as zamindarini of Thevaram for a direction to the Receiver appointed under the compromise decree in O. S. No. 31 of 1925 to hand over to her the zamin villages specified in Sch. A of the compromise decree, to which she was not a party, and allowing I. A. No. 170 of 1932 filed by respondent 1, the decree-holder in O. S. No. 31 of 1925, against the Receiver for an order to deliver the properties to him in accordance with the compromise decree. A preliminary objection was taken to the competency of the appeals, and, so far as is material, the facts are that the zamin and some other properties were mortgaged by the zamindar to two Chettiars for amounts borrowed by him. The zamindar died in 1901 bequeathing the estate to his daughter Bangarammal who succeeded him and the mortgagees instituted O. S. No. 32 of 1903 for sale of the hypotheca against Bangarammal and the widows of the zamindar, including Errammal, the mother of Bangarammal. The suit was decreed in spite of contest, and sale of the hypotheca was eventually ordered. The sale was fixed for 17th March 1913 and to avert it, Bangarammal mortgaged the identical properties to the father of respondents 1 to 3 on 13th March 1913 for Rs. 2,15,000. Payments were made towards interest upto 1922 and O. S. No. 31 of 1925 was instituted by respondent 1 for recovery of Rs. 5,49,000, the balance due under the mortgage, by sale of the hypotheca. The suit was laid against Bangarammal and 24 others including respondents 2 and 3 who were impleaded as defendants 24 and 25 and Errammal was defendant 2. She and defendants 3 to 23 were impleaded as they were stated to be claiming some right in the hypotheca and defendants 3 to 7, 11 to 13 and 22 remained ex parte. The names of defendants 8 and 17 were struck off and the properties claimed by defendants 9, 10, 14 to 16, 18, 19, 21 and 23 were exonerated.

A compromise was entered into by respondent 1 with Bangarammal to receive Rs. 3,75,000 in full satisfaction if paid on or before 31st July 1931 subject to certain conditions and a decree was passed in terms of the compromise. A receiver was appointed as agreed to for Sch. A properties which form part of the hypotheca and the properties were put in his possession. He was directed to deposit the net income into Court every month for payment to respondent 1 towards the decree amount, and the decree provides that on payment of the amount agreed upon on or before 31st July 1931 the mortgage should stand discharged and the Receiver should deliver Sch. A properties to Bangarammal. The decree further provides that if for any reason the entire amount is not paid within that time, for the amount outstanding, the Receiver should deliver possession of Sch. A properties to respondent 1 without any execution proceedings as under an absolute sale and the charge of the rest of the hypotheca shall stand discharged. The decree is silent as regards the other defendants, except that it says that each party should bear his or her own costs; and Bangarammal died on 14th December 1930 without discharging the decree debt. I. A. No. 190 of 1931 was filed by Errammal as the succeeding zamindarini against respondents 1 to 3 on 29th July 1931 for a direction to the Receiver to hand over Sch. A properties to her on the ground that the decree to which she was not a party was not binding on her, and the petition was filed under Ss. 47, 151 and O. 40, R. 1, Civil P. C. It was opposed by respondents 1 to 3 and I. A. No. 170 of 1932 was filed by respondent 1 subsequently against the Receiver for a direction to him to deliver the properties in accordance with the compromise decree. The petitions were tried together and by a common judgment the Subordinate Judge dismissed I. A.

No. 190 of 1931 and ordered I. A. No. 170 of 1932.

Errammal was not a party to I. A. No. 170 of 1932, and it was rightly conceded that, apart from S. 47, Civil P. C., the order in I. A. No. 190 of 1931 would not be appealable. But S. 47 would not apply unless the question arises between the parties to the suit, in which the decree was passed, or their representatives and relates to the execution, satisfaction or discharge of the decree and as pointed out in 54 Mad 81[1] a defendant who was not a necessary party would not be a party to the suit within the meaning of S. 47 if he is exonerated without his claim being adjudicated upon. Errammal was not a necessary party to the suit on the mortgage executed by Bangarammal nor was her claim adjudicated upon. The compromise was between Bangarammal and respondent 1 and she was in effect exonerated. It is under the circumstances doubtful whether she would be a party to the suit within the meaning of S. 47 and she does not claim as the representative of Bangarammal. Further the application is for delivery of the properties on the ground that the compromise decree is not binding on her and not under or in execution of that decree and as observed in 30 Mad 402[2] at p. 405 that question is not one that can be tried in execution. S. 47 has therefore no application and it follows that the appeals are incompetent. The preliminary objection is therefore upheld and the appeals are dismissed with costs. The memorandum of objections also goes and is dismissed with costs.

C.R.K./B.D. *Appeals dismissed.*

1. Abdul Sac v. Sundara Mudaliar, A I R 1930 Mad 817=127 I C 805=54 Mad 81=59 M L J 932.
2. Tallapragada Sundarappa v. Boorugappalli Sriramulu, (1907) 30 Mad 402=17 M L J 288.

✻ A. I. R. 1937 Madras 270

MADHAVAN NAIR, J.

Marudamuthu Kadurar — Petitioner.

v.

Arumugasami Kadurar and *another*— Opposite Parties.

Civil Revn. No. 1039 of 1935, Decided on 12th November 1936, from order of Dist. Court, Trichinopoly, D/- 13th August 1935.

✻ Execution Sale—Setting aside of—Two items of property purchased by two purchasers, third item being purchased by decree-holder — Judgment-debtor privately selling the same properties to purchasers—Judgment-debtors and two purchasers applying under O. 21, R. 89, Civil P. C. to set aside sale—Purchasers expressing their willingness to allow judgment-debtors to use money deposited towards satisfying decree—Judgment-debtor paying additional amount and praying that total amount in deposit should be taken as sufficient deposit to satisfy decree and poundage fees—Money deposited by purchasers at Court sale being not theirs once it is deposited unless sale is set aside, application by judgment-debtor to set aside sale held not valid.

In execution of a decree three items A, B and C of property were sold, items A and B being purchased separately by two purchasers and item C by the decree-holder himself. Before the confirmation of the sale the judgment-debtor privately sold items A and B to the same two auction-purchasers and then the judgment-debtor along with the two purchasers applied to Court to set aside the sale under O. 21, R. 89, Civil P. C. The judgment-debtor deposited part of the decretal amount and applied that purchase money deposited in Court sale by the purchasers of A and B should be taken into account, to which proposal they expressed their willingness, and he prayed that all this together being sufficient to satisfy the decree and poundage fees also, the sale should be set aside. The question was whether on these facts the application of the judgment-debtor under O. 21, R. 89 would lie :

Held : that after making the deposit the money deposited by the auction-purchasers of A and B would be in the custody of the Court till final orders on the sale were passed. The money would be theirs if the sale was set aside, but if it was confirmed the purchasers got the property and the money could not be claimed by them. They could not therefore, while the money was in the custody of the Court, operate upon it so as to enable the judgment-debtor or any other person desiring to set aside the sale, to use it for the purpose of deposit in Court under O. 21, R. 89. Under the circumstances, therefore, the judgment-debtor could not be said to have deposited the amount in Court required by O. 21, R. 89 and his application for setting aside sale under O. 21, R. 89 was not proper. [P 271 C 2 ; P 272 C 1]

Order.—This Civil Revision Petition arises out of an application made under O. 21, R. 89, Civil P. C., to set aside a Court sale. The application was made by three petitioners, of whom the petitioner was the third petitioner before the Subordinate Judge. The other two petitioners were the purchasers of two lots of the property sold, namely lots 1 and 3. The facts are briefly these. In execution of the decree in O. S. No. 109 of 1927 in which the petitioner was the only defendant, four items of property were ordered to be sold. The first petitioner in the lower Court purchased the first lot for Rs. 1,000

which was deposited by him. Lot 2 was not sold. The second petitioner purchased the third lot for Rs. 800. He also deposited the money into Court. Lot 4 was purchased for Rs. 1,005 by the decree-holders who were minors represented by their next friend. Pending confirmation of the sale the third petitioner (that is, the judgment-debtor petitioner) privately sold lot 1 to the first petitioner for a sum of Rs. 1,200. He wanted that a sum of Rs. 957-13-0 out of this amount may be appropriated towards the decree amount, the balance being the poundage of Rupees 42-3-0. Lot 3 properties were sold by the judgment-debtor privately to the second petitioner for Rs. 1,000. He prayed that out of that sum Rs. 764-1-0 may be appropriated towards the satisfaction of the decree, the balance of Rs. 35-15-0 representing poundage. The third petitioner, the appellant, has deposited in Court Rs. 369-8-0. Thus the total amount available is Rs. 957-13-0 plus Rs. 764-1-0 plus Rs. 369-8-6, in all Rs. 2,091-6-6. This amount will cover the amount mentioned in the sale proclamation, that is, Rupees 1,998-14-6, plus five per cent. on the sale price of lot 4 purchased by the decree-holders plus the poundage in respect of the sale of lot 4. In these circumstances the three petitioners ask the Court to set aside the sale stating that they have complied with the provisions of O. 21, R. 89, Civil P. C., the relevant, portions of which are as follows:

(1) Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding any interest therein by virtue of a title acquired before such a sale, may apply to have the sale set aside on his depcsiting in Court, (a) for payment to the purchaser, a sum equal to five per cent. of the purchase money, and (b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

It will be observed that of three petitioners, petitioners 1 and 2 are themselves purchasers of two items of the property and are hence incompetent to maintain an application under O. 21, R. 89. But the judgment-debtor being one of the petitioners entitled to apply under O. 21, R. 89, the question whether the sale can be set aside in the above circumstances has to be considered; and, as already stated, he is the only petitioner before this Court. The learned Subordinate Judge set aside the Court sale, but his order was set aside by the learned District Judge. The question of law presented by this case is a novel one and has not been the subject matter of decision in any Court. It is argued by the petitioner that, inasmuch as the two purchasers have expressed their willingness that the money deposited by them in Court may be used by him as the properties have been privately sold to them, he has complied with the provisions of O. 21, R. 89, Civil P. C., by depositing in Court the necessary funds and the sale should therefore be set aside. He is supported in his application by the two other purchasers.

It appears to me that the contention of the petitioner cannot be accepted. If the money deposited by the purchasers of lots 1 and 3 can be used by the appellant, then no doubt the sale should be set aside. The question is, can it be said in the circumstances of the present case that the appellant has deposited in Court the necessary sum? It is argued that since the purchasers of lots 1 and 3 have expressed their willingness that the money deposited by them may be used by the petitioner, that money has become his for depositing in Court and that he has therefore deposited into Court the necessary amount. In support of this contention an unreported decision of this Court in C. M. A. No. 82 of 1911 has been brought to my notice, but that case is distinguishable from the present one inasmuch as the amount in Court standing to the credit of the co-parceners which they allowed defendant 5, the petitioner, to use for setting aside the sale, was their own money, that is money lying to their credit, and therefore it may well be said that it became the money of the petitioner for him to deposit in Court within the meaning of O. 21, R. 89, Civil P. C.. when they expressed their consent to that course. If in the present case the amount deposited by petitioners 1 and 2 can, after the deposit, be said to be money which they can deal with as they liked, then the argument, that taking that amount also into consideration the petitioner has deposited in Court sufficient amount to make the payments, may be accepted. It seems to me that after making the deposit the money deposited by the purchasers is in the custody of the Court till final orders are passed by it with respect to the sale. If the sale is confirmed the purchasers get

the property and the money can no longer be claimed by them. If on the other hand it is set aside they will be refunded the money and it becomes theirs. But they cannot, while the money is kept in the custody of the Court, operate upon it to enable the person wanting to set aside the sale to use it for the purpose of depositing in Court within the meaning of O. 21, R. 89. In the circumstances of the present case I am not satisfied that the petitioner has deposited in Court the amount necessary for making the payments under Cls. (a) and (b) of O. 21, R. 89, Civil P. C. In my opinion the order of the lower Court is right and the Civil Revision Petition is dismissed with costs.

C.R.K./B.D. *Petition dismissed.*

A. I. R. 1937 Madras 272

HORWILL, J.

Panchayat Board, Sivaganga—Petitioner.

v.

T. Pillathian Servai—Opposite Party.

Criminal Revn. Cases Nos. 869 of 1935 and 129 of 1936 and Petns. Nos. 799 of 1935 and 120 of 1936, Decided on 16th November 1936, from judgments of Bench of Magistrates, Sivaganga.

(a) Madras Local Boards Act (14 of 1920), Sch. 4, R. 25—List of tax payer—Half yearly lists need not be new but can be old lists duly amended—New list must be prepared every five years—Public notice of amendment is generally sufficient—Individual notice is necessary only when alteration is made on occasion other than of half yearly list.

Schedule 4, R. 25, contemplates the preparation of a list every half year, showing the persons who have to pay taxes and the amount due by each of them. It is not however necessary for the President to prepare an entirely fresh list every half year. He can adopt the old one with such amendments as may be necessary, subject only to the condition that he must prepare a completely fresh list once in every five years. Where the list was prepared in the ordinary course of business by the Board at the end of a half year for the purpose of levying taxes during the coming half year, R. 25 would apply, and that rule requires, that only public notice of the amendments made in the list is necessary. Such public notices are given as laid down in R. 23, by beat of drum in the village. But individual notice is necessary only when the President of the Panchayat Board makes an alteration in the assessment at some time other than the occasion on which he prepares the half yearly list.

[P 272 C 2; P 273 C 1]

(b) Madras Local Boards Act (14 of 1920), S. 222 and Sch. 4, Rr. 32 (2) and 33 (2)—Limitation—Time runs from first date on which prosecution could have been launched i. e., when distraint becomes impracticable.

According to S. 222 the prosecution must be launched within three years from the date on which the prosecution might first have been commenced. Under R. 32 (2) a notice of demand is to be sent to the assessee. If he does not pay within 15 days his property can be distrained; and if the distraint of the defaulter's property is impracticable, the President may prosecute him before a Magistrate. The prosecution must therefore be launched within three years of the date on which distraint becomes impracticable.

[P 273 C 1, 2]

V. Ramaswami Iyer—for Petitioner.

N. G. Krishna Iyengar—for Opposite Party.

Public Prosecutor—for the Crown.

Order.—The petitioner in Cr. R. C. No. 129 of 1936 was prosecuted under Sch. 4, R. 33, Madras Local Boards Act for non-payment of taxes. The Sivaganga Bench Court found that he was liable to pay such assessment as had been demanded of him before the Panchayat Board had increased it, and ordered him to pay at that rate for three years and to pay a fine of five rupees. One amount claimed by the Panchayat Board was disallowed on the ground that it was barred by limitation and another on the ground that as no proper notice had gone to the petitioner the rent could not be enhanced. In appeal the order of the Bench Court was confirmed. Two revision petitions have been filed, one by the Sivaganga Panchayat Board regarding the amount disallowed, and the other by the accused, in which he raises a number of technical pleas. The pleas raised in Cr. R. C. No. 129 of 1936 seem to be the same as those raised in the memo of appeal by the accused and the joint Magistrate seems to have satisfactorily answered them. A principle ground of objection to the findings of the Courts below will also fail because of my findings in Cr. R. C. No. 869 of 1935 filed by the Board. Cr. R. C. No. 129 of 1936 is therefore dismissed.

One of the points raised on behalf of the Sivaganga Panchayat Board is that the order of the Panchayat Court in holding that proper notice had not gone to the accused is wrong. Sch. 4, R. 25 seems to contemplate the preparation of a list every half year, showing the persons who have to pay taxes and the amount due by each of them. It is not however necessary for

the President to prepare an entirely fresh list every half year. He can adopt the old one with such amendments as may be necessary, subject only to the condition that he must prepare a completely fresh list once in every five years. It appears that the list complained of was prepared in the ordinary course of business by the Board at the end of a half year for the purpose of levying taxes during the coming half year. R. 25 would therefore apply, and that rule requires, that only public notice of the amendments made in the list is necessary. Such public notices are given as laid down in R. 23, by beat of drum in the village. Presumably this was done in the ordinary course of business and no allegation has been made by the accused that this rule was not complied with. The complaint of the accused, which has been upheld by the two Courts below, is that the accused was not given an individual notice. I agree with the learned counsel for the petitioning Board that such individual notice is necessary only when the President of the Panchayat Board makes an alteration in the assessment at some time other than the occasion on which he prepares the half-yearly list. The Panchayat Court has erred on this point. Allowing the higher assessment the Panchayat Board will be entitled to a further sum of Rs. 40-10-0.

It is also argued that even in respect of the rent for the year 1930-31 the claim is not barred. As I understand S. 222, Local Boards Act, the prosecution must be launched within three years from the date on which the prosecution might first have been commenced. Turning to R. 32 (2), we find that a notice of demand is to be sent to the assessee. If he does not pay within 15 days, his property can be distrained; and if the distraint of the defaulter's property is impracticable, the President may prosecute him before a Magistrate: *see* R. 33 (2). The prosecution must therefore be launched within three years of the date on which distraint becomes impracticable. In the present case, the impracticability of distraint arose because the accused removed his moveables from his house; and it is from the date of his doing so that distraint became impracticable. The Board could not take action within 15 days of the sending of the notice and it is probable that the accused removed his property upon receiving notice. If, in fact, the accused removed it at some later date than the first day upon which the distraint was permissible under R. 33, it was the duty of the Panchayat Board, especially in a criminal prosecution, to prove exactly at what later date the property was removed. They not having done that, we must presume that distraint became impracticable on the very day on which the Board is authorized by R. 33 to distrain property, i. e., 15 days after the serving of the notice. Admittedly, the prosecution was not within three years of that date, as far as 1930-31 is concerned. I therefore find that the Bench Court was right in this respect. In the result, the petition is allowed with respect to the enhanced rent, Rs. 40-10-0 and the order of the Bench Court amended accordingly.

C.R.K./B.D. *Order amended.*

✻ A. I. R. 1937 Madras 273

PANDRANG ROW, J.

T. Sreeramamurthy and *others*—Petitioners.

v.

T. Ranganayakulu—Opposite Party.

Criminal Revn. No. 458 and Petn. No. 414 of 1936, Decided on 8th December 1936, from judgment of Sess Judge, Masulipatam, in Cr. A. No. 5 of 1936.

✻ (a) Child Marriage Restraint Act (1929) —Applicability—Operation of Act is extra-territorial

The Child Marriage Restraint Act makes it an offence to celebrate child marriage. This penal law applies not only to the celebration of such marriages within British India by any one but also to the celebration of such marriages even outside British India by native Indian subjects.

[P 274 C 1]

(b) Criminal Trial—Mistake of fact when can be pleaded—Child Marriage Restraint Act—Celebration of child marriage at place within British India but under bona fide belief that it was foreign territory—Plea of mistake of fact cannot be allowed.

A mistake of fact can be pleaded successfully only if on account of such mistake an act which otherwise would be an offence ceased to be an offence. The Child Marriage Restraint Act is extra-territorial in its operation and pursues the offenders even when they have broken the law after going outside British India and *a fortiori* after going to a place, which they believed to be not part of British India but is really part of British India. Therefore if persons celebrate child marriage at a place within British India but under a bona fide belief that it is a foreign territory, the mistake of fact under which they labour cannot have the effect of rendering the celebration

of child marriage in question innocuous or innocent and they can therefore be rightly convicted. [P 274 C 1, 2]

Bura Satyanarayana—for Petitioners.

Public Prosecutor—for the Crown.

Order.—The petitioners in this case were convicted by the District Magistrate of Kistna, the first four of them under Ss. 5 and 6, Child Marriage Restraint Act of 1929 and the remaining one under S. 5 of that Act and sentenced to pay fines. Their convictions were confirmed in appeal by the Sessions Judge though the fines were reduced in the case of some of them. The only point argued in this revision petition is that the proceedings in the Court below were void ab initio, because they were instituted prior to the declaration by the Government that the locality in which the marriage took place, namely Frenchpet in Masulipatam, was part of British India. The marriage itself was celebrated in Frenchpet. It was declared by the Advocate General in a case last year in this Court that Frenchpet was part of His Majesty's dominions and this declaration was accepted by the Bench which heard the case. The marriage in the present case was no doubt celebrated before this declaration was made and it is contended at that time it was generally believed that Frenchpet was not part of British India but was French territory. Even assuming that the petitioners were labouring under a bona fide mistake of fact that Frenchpet was French territory it does not follow that their convictions are wrong or the proceedings in the Court below are void. A mistake of fact like this can be pleaded successfully only if on account of such mistake an act which otherwise would be an offence ceases to be an offence. The question therefore is whether the petitioners can say that they have not committed an offence punishable under the Child Marriage Restraint Act simply because the commission of the offence was in what they believed to be French territory. I am of opinion that they cannot do so because the Child Marriage Restraint Act makes it an offence to celebrate child marriage. This penal law applies not only to the celebration of such marriages within British India by any one but also to the celebration of such marriages even outside British India by native Indian subjects. S. 3, Penal Code provides that :

Any person liable, by any law passed by the Governor-General of India in Council, to be tried for an offence committed beyond the limits of the said territories shall be dealt with according to the provisions of this Code for any act committed beyond the said territories in the same manner as if such act had been committed within the said territories.

Reference may be made in this connexion also to Ss. 186 and 188, Criminal P. C. The Penal Code as well as the Child Marriage Restraint Act are extra-territorial to this extent, namely, that if native Indian subjects like the petitioners commit offences punishable under these laws even outside British India, they are liable to be tried, and punished when found in British India. The mistake of fact under which the petitioners are said to have laboured does not have the effect of rendering the celebration of the child marriage in question innocuous or innocent. The Child Marriage Restraint Act 1929 can pursue them even when they have broken that law after going outside the British India, and *a fortiori* after going to a place which they believed to be not part of British India but is really part of British India. I am of opinion therefore that there is nothing illegal in the convictions of the petitioners and I am not prepared to reduce the fines imposed upon the petitioners in the circumstances of the case. The petition is therefore dismissed.

C.R.K./B.D. *Petition dismissed.*

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* A. I. R. 1937 Madras 274

VENKATARAMANA RAO, J.

Mannava Rama Rao—Appellant.

v.

Mannava Venkata Subbayya and *others*—Respondents.

Second Appeal No. 1526 of 1931, Decided on 8th January 1936, against decree of Sub-Judge, Bapatla, in A. S. No. 163 of 1927.

*** (a) Hindu Law—Partition — Institution of suit—Filing of suit by adult co-parcener is prima facie evidence of intention to separate if nothing is shown to contrary—Such intention can be revoked before passing of decree—Suit by guardian of minor for partition operates as severance of status unless minor declines to adopt it on attaining majority—Minor is entitled to share as on date of filing suit, and such share is not liable to be reduced by birth of brother to him subsequent to filing of such suit.**

The filing of the suit for partition by adult co-parcener is prima facie evidence of the fixed

intention to become separate and thus operates as a severance of status, if nothing else is shown to the contrary. It is open to the co-parcener to revoke the intention, the law thus giving him *locus pœnitentiæ*, which could be availed of till something is done which may render it difficult even for him to do so, such as the other members of the family accepting his intimation to sever. Therefore till a decree is passed the severance attempted may be put an end to and the severance brought about continues and enures for the benefit of the co-parcener and his legal representatives. In the same manner the institution of the suit by the guardian of a minor for partition operates as a severance of status unless the minor on attaining majority declines to adopt it or the Court refuses to sanction it. [P 277 C 1, 2]

Where, therefore, a minor co-parcener brings a suit for partition through next friend and on attaining majority pending suit elects to continue it, he becomes a divided member from the date of the filing of the plaint and is entitled to a share as he would be entitled to on such date and that share is not liable to be reduced by the birth of a brother to him subsequent to his filing the suit for partition: *A I R 1933 Mad 890 (F B)*; *A I R 1925 P C 49* and *P. C. A. 102 of 1933, Rel. on*; *A I R 1918 Mad 379*; *A I R 1925 Mad 717* and *A I R 1930 Mad 326, Dissent.* [P 277 C 2]

*** (b) Hindu Law — Alienation —Father—After-born son—Living child should be presumed to have been conceived at least 210 days before birth—Son born within 209 days of alienation—No evidence that he was born later—Son can challenge alienation by father —Alienation without necessity is not binding on son.**

A living child should be presumed to have been conceived at least 210 days before birth, and therefore a child born within 210 days of an alienation must be presumed to be *en ventre sa mere*. [P 278 C 1]

Where therefore a son is born within 209 days of the alienation by his father of the family property made without necessity, and no evidence is given by the alienee to show that he is born later, the son can challenge the alienation by the father and the alienation made without necessity is not binding on the son: *16 Mad 76* and *A I R 1933 Mad 890 (F B), Rel. on*; *A I R 1915 Mad 52, Ref.* [P 278 C 1]

(c) Hindu Law — Alienation — Father—Antecedent debt—Recital in sale deed that it was for discharging decree debts is prima facie evidence of representation made by alienor—Actual proof of necessity is not necessary—Reasonable belief by alienee is sufficient—Alienation is binding on son.

A recital that a sale deed was in discharge of decree debts would be prima facie evidence of a representation made by the alienor at the time of the transaction. As actual proof of the necessity is not necessary for the validity of the alienation and reasonable belief in the existence of necessity will be enough, it can be presumed that having regard to the fact that the vendee is dead the vendee believed in the representation and took the sale. [P 278 C 2]

Proof of existence of decree debts subsisting against the father at the time of alienation and of reasonable belief in representation that money was needed for discharge of such debts are sufficient to justify the alienation. Such alienation is valid and binding on the son: *6 M I A 393 (P C)* and *A I R 1916 P C 110, Rel. on.* [P 278 C 2; P 279 C 1]

K. Kameswara Rao—for Appellant.

P. Satyanarayana Rao—for Respondents.

Judgment.—This is a suit for partition. The plaintiff is the son of defendant 1 by his first wife. Defendants 2 and 60 are his sons by the second wife. The plaintiff was born on 4th August 1908. He instituted the suit through his next friend on 3rd October 1922. He attained his majority on 4th August 1926, and elected to continue the suit on 20th August 1926. Defendant 60 was born to defendant 1 on 4th August 1925 and was added as a party to the suit.

One of the questions in this case is, what is the share which the plaintiff is entitled to? If the rights of the plaintiff are to be determined as on the date of the plaint he would be entitled to one-third, but if it is to be determined as on the date when he elected to continue the suit or as on the date of the preliminary decree for partition in this case, he would be entitled to one-fourth. The lower Courts took the view that the plaintiff must be deemed to have been a member of an undivided family till he attained majority and elected to continue the suit, and he can only be given such share as he would be entitled to according to the state of the family on that date, and the family on that date consisted of four members including defendant 60, and he can only be given one-fourth share in the properties to which he was held entitled. It is contended before me by Mr. Kameswara Rao, on behalf of the plaintiff, that that view is unsound. The recent Full Bench decision of the Madras High Court in 57 Mad 95[1] establishes that a suit for partition instituted on behalf of a minor operates as severance of his status from the joint family of which he was a member from the date of plaint if it ends in a decree and the suit does not abate on his death but can be continued by his legal representatives subject to the condition that the Court has still to find that circumstances existed on the date of plaint which rendered severance necessary in the interests of the minor. The ratio of the decision

1. Rangasayi v. Nagarathnamma, A I R 1933 Mad 890=146 I C 269=57 Mad 95 (F B).

is that it is competent to a guardian of a minor to manifest the intention to separate on behalf of the minor, and the Court, if it comes to the conclusion that the partition is beneficial to the minor, may adopt the act of the guardian and the minor becomes divided in status as from the date of the plaint. Ramesam, J. observes:

> The cases show that the volition indicating a desire for separation and an unambiguous intention to separate cannot be expressed by the minor himself but must be exercised on his behalf by some other person, by a guardian in a private partition and by a next friend in the filing of a plaint. . . .If in the case of a minor the option cannot be exercised by him but should be done by somebody else on his behalf, why should not the exercise of that option on his behalf effect a severance as in the case of an adult ?

Referring to the following observation in 41 Mad 442[2]:

> In the case of a minor the law gives the Court the power to say whether there should be a division or not, etc.,

Ramesam, J. remarks:

> As I said, this is a rule conceived in the interests of minors. It does not mean that the exercise of the discretion is totally inoperative until the Court records its finding. In such a case it seems to me that the proper way of describing the situation is that the exercise of the option on behalf of the minor effects a severance conditional on the Court finding that it was for the benefit of the minor.

Ananthakrishna Ayyar, J. in the same case after referring to the observation of the learned Judges in 41 Mad 442,[2] that a member of a joint family who exercises his discretion to separate must be of an age capable of exercising discretion in law observes:

> I think they have not paid due regard to the circumstances already mentioned by me, with reference to such a discretion (volition) of a minor being exercised on the minor's behalf by the minor's mother or possibly by other natural guardians of the minor, when partition is effected outside Court between the members of a joint Hindu family. If such a thing could be done on behalf of the minor by his mother, etc., outside Court when partition is effected by private arrangement, I do not see sufficient reason for holding that such a thing could not be done in a proper case on behalf of the minor when a suit for partition on behalf of the minor becomes necessary. . . . . Neither the exercise of such discretion, nor the institution of the suit, nor both combined, could bring about severance in status of the minor, unless the Court was satisfied that, having regard to the circumstances, partition was to be for the benefit of the minor. But when the Court comes to such a conclusion it would seem to follow that severance in status should be deemed to have taken place, at least on the institution of the suit. I say at least, because, logically, it would seem to follow in a proper case that the severance should be deemed to have taken place when the discretion or volition was exercised on behalf of the minor and the necessary communications made to the other co-parceners prior to the institution of the suit.

Cornish, J. also observes:

> In the case of a minor the assertion by suit of his right to separate is, as we have seen, an inchoate right until perfected by a decree of the Court. But whether the plaintiff be an adult or a minor there is no distinction as regards the date from which divided status begins.

This decision overrules the view entertained in some cases that until the Court chooses to pass a decree the minor continues to be a member of the undivided family with the result that no severance in status is effected and the guardian has no power to exercise volition indicating a desire for separation on behalf of the minor, and if the minor dies before the decree the suit abates: *vide* 41 Mad 442,[2] the view of Reilly, J. in the order of reference to the Full Bench, the view of Devadoss, J. in 48 Mad 465[3] and the view of Ramesam, J. in 52 Mad 856.[4] Some of those cases also express the view that though the minor continues to be a member of the family, yet when once the Court passes a decree severance takes place from the date of the plaint. But if the guardian has no power to act and exercise the volition on behalf of the minor it seems to me that the theory of retrospective severance in status from the date of plaint is unsound and does not accord with strict logic. The *ratio decidendi* of the Full Bench on the other hand is intelligible; the exercise of the option by the guardian does effect a severance but the severance so to speak remains in a state of suspended animation till the Court ratifies the act; the Court takes upon itself the task of deciding that which the minor if he were an adult would have done himself, namely, whether it is beneficial or not to become separate; it is not a fresh expression of volition by the Court; the volition was already expressed by the guardian on behalf of the minor; the Court puts the seal of approval on it in the place of the minor and for him. It is open to the minor on attaining majority to elect to abandon or continue the suit. If he elects to continue, he adopts the act of the

2. Chelimi Chetti v. Subbanna, A I R 1918 Mad 379=42 I C 860=41 Mad 442=34 M L J 213.

3. Krishnaswami Thevan v. Pulukuruppa Thevan, A I R 1925 Mad 717=88 I C 424=48 Mad 465=48 M L J 354.

4. Rama Rao v. Hanumantha Rao, A I R 1930 Mad 326=121 I C 837=52 Mad 856=57 M L J 720.

guardian and puts his own imprimatur on it and the Court is no longer called upon to pronounce its opinion on it ; the minor becomes separated from the date of plaint. And if he elects to abandon the suit the minor continues to be an undivided member of the family and he must be deemed to have revoked the intention to separate. This is in accordance with the law as declared by the Privy Council in regard to division of status in the case of an adult co-parcener. It is the admitted right of every co-parcener to demand a partition of his own share. The severance is a matter of individual decision. The law in regard to an adult co-parcener is thus laid down in the latest pronouncement of their Lordships of the Judicial Committee in *Babu Ramprasad Chowdhary* v. *Babuyee Radhika Devi*, P. C. A. No. 102 of 1933 :

> It is, however, well settled that a member of a joint family may effect a separation in status by giving a clear and unmistakable intimation by his acts or declarations of fixed intention to become separate, even though he goes on living jointly with the other members of the family, and there is no division of property.

The question has often arisen whether the institution of a suit for partition is evidence of an act giving such a clear intimation of the fixed intention to separate. The Privy Council thus answered it in 48 Mad 254,[5] at p. 258 :

> The fact that any member of a joint family has separated himself from his co-parceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted.

The expression 'if nothing else is proved' is significant. Their Lordships point out that a suit may be withdrawn with the result that no severance of the joint status may result, but at the same time indicate that even if it is withdrawn would, unless explained, afford evidence that an intention to separate had been entertained. Thus the filing of a suit is prima facie evidence of the fixed intention to become separate and thus operates as a severance if nothing else is shown to the contrary. It is open to a co-parcener to revoke his intention, the law thus giving him *locus pœnitentiæ* which can be availed of till something is done which might render it difficult even for him to do so, such as the acceptance of his intimation by the other members of the family. Therefore, till a decree is passed the severance attempted may be put an end to and the severance brought about continues and enures for the benefit of the co-parcener and his legal representatives. If this is the true position even in the case of an adult co-parcener, there is nothing illogical in the view that the institution of a suit by a guardian does operate as a severance of status unless the minor on attaining majority declines to adopt it or the Court refuses to sanction it. Therefore, the plaintiff in this case having elected to continue the suit became a divided member from the date of plaint, and he will be entitled to one-third share in all the properties in which it has been declared he is entitled to a share. The decree of the lower Court in this behalf must be accordingly modified.

The plaintiff impeaches the various alienations effected by defendant 1 or by defendants 1 and 3 in the suit on the ground that they were effected in circumstances which would not be binding on him as a member of the joint family. In regard to item 27 it has been found that the sale was not for a legal necessity, but the plaintiff was refused the relief because the date of the alienation was 7th January 1908, and the plaintiff was born seven months thereafter on 4th August 1908. As pointed out in 16 Mad 76,[6] at p. 79 :

> A son conceived is equal to a son born ; an alienation to a bona fide purchaser for value is liable to be set aside to the extent of the son's share, by a son who was in his mother's womb at the time of the alienation,

and under Hindu law membership with the family is considered as commencing from the date of the conception. No doubt in 27 M L J 580[7] a Division Bench of this High Court observed, though under S. 112, Evidence Act, a child is presumed to be legitimate if born within 280 days after possibility of access, there is no presumption that it was conceived 280 days before its birth, and it is incumbent upon the person attacking the alienation to prove by clear and satisfactory evidence that the child was conceived before the date of alienation. But for testing the validity of a transaction the principle to be applied is

5. Palaniammal v. Muthu Venkatachela Moniagar, A I R 1925 P C 49=87 I C 333=52 I A 83=48 Mad 254 (P C).

6. Sabhapathi v. Somasundaram, (1893) 16 Mad 76=2 M L J 244.

7. Sri Datta Venkatasubba Raju Garu v. Gattem Venkatarayudu, A I R 1915 Mad 52=26 I C 61=27 M L J 580.

that the normal course of human events took place. Taylor in his Medical Jurisprudence, Vol. 2, observes :

> The question now to be considered in reference to English practice is, what is the earliest period at which a child can be born living, and with a capacity to live after its birth and attain majority? It is universally admitted that children born at the seventh month of gestation are capable of living, although they are more delicate and in general require greater care and attention to preserve them, than children born at the ninth month. The chances are, however, very much against their surviving. It was the opinion of William Hunter, and it is one in which most modern authorities concur, that few children born before seven calendar months (or 210 days) are capable of living to manhood. They may be born alive at any period between the sixth and seventh months or even in some instances, earlier than the sixth; but this is rare, and, if born living, they commonly die soon after birth.

It is not shown that the Indian practice is different. Hence one should presume that a living child should have been conceived at least 210 days before its birth. The plaintiff in this case having been admittedly born within 209 days of the alienation the plaintiff must be deemed to have discharged the onus which 27 M L J 580[7] lays down, and in my opinion the burden is shifted on to the alienee to prove that he must have been conceived later. In 57 Mad 95[1] and 42 M L W 349,[8] a child born within 210 days of the alienation was presumed to be *en ventre sa mere*. I am therefore of opinion that the alienation of portion of item 27 covered by Ex. 28 (a) is not binding on the plaintiff and must be set aside. The next alienation impeached is of item 48. It is covered by Ex. 34, a sale deed dated 30th August 1908. The sale purports to be for Rupees 1,500 and the said sum is alleged to have been paid thus :

> We have received the consideration at the time of the sale from one Avvaru Brahmudu *alias* Venkatakrishniah resident of Ponnur whom you have caused to pay.

The vendee gave evidence as D. W. 16 to the effect that the sum of Rs. 1,500 was borrowed for the purpose of discharging a debt due to Avvaru Brahmudu. In spite of discrepancy between the recital in the sale deed and the actual evidence both the lower Courts believed the evidence of D. W. 16 and confirmed the sale. Reading his evidence it appears to me that the purpose of the sale was to discharge the debt due to Venkatakrishniah. No doubt in regard to the actual payment there is some amount of discrepancy, but looking at the evidence as a whole the lower Courts have acted rightly in accepting it as it does not conflict with the purpose recited in the sale deed. I accept the finding of the lower Courts in regard to this transaction. The next alienation impeached is as regards item 50. It is covered by Ex. 14, a sale deed dated 20th April 1913, for Rs. 700. The sale was for the purpose of discharging two decree debts against defendant 1 being O. S. Nos. 921 and 923 of 1913 on the file of the District Munsif's Court of Bapatla. The sale deed was attested by both the decree-holders. The sale being thus for antecedent debts would be binding on the plaintiff. But it is argued that beyond the recitals in the sale deed, no evidence was adduced and the lower Courts went wrong in giving a decree in favour of the alienee on the strength of the mere recitals in the sale deed. The existence of decree debts was not disputed and D. W. 1 gave evidence to the effect that there were such decree debts. The vendee in this case was dead and defendant 1 was ex parte. As laid down by their Lordships of the Privy Council in 6 M I A 393[9] :

> The representation made by a manager accompanying the loan as part of *res gestae* would be evidence against the heir.

Therefore the recital that the sale deed was in discharge of decree debts would be prima facie evidence of a representation made by defendant 1 at the time of the transaction. As actual proof of the necessity is not necessary for the validity of an alienation and reasonable belief in the existence of necessity would be enough, one can presume, having regard to the fact that the vendee is dead, the latter believed in the representation and took the sale. As stated by their Lordships of the Privy Council in 44 Cal 186[10] :

> The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed.

All that is necessary to prove in this case would be the fact of decree debts sub-

8. Ranganatha Reddi v. Ramaswami Mudali, A I R 1935 Mad 839=159 I C 1=58 Mad 886 =69 M L J 425=42 M L W 349 (F B).

9. Hunooman Pershaud Pandey v. Mt. Babooee Mundraj Koonweree, (1854-1857) 6 M I A 393=18 W R 81 (F N)=2 Suther 29=1 Sar 552 (P C).

10. Banga Chandra Dhur v. Jagat Kishore, A I R 1916 P C 110=36 I C 420=43 I A 249=44 Cal 186 (P C).

sisting against the father at the time of alienation. The belief in the representation that money was needed for the discharge of such debts would be quite enough to justify the alienation. Proof of the existence of such debts having been given in this case the lower Courts were justified in confirming the sale. The next alienation attacked is of item 55. It appears from the evidence that this property came to defendant 1 by collateral succession and as the plaintiff would not get any interest by birth in the said property he would have no right to impeach the alienation. The decree of the lower Court in regard to this property must stand.

The last point argued by Mr. Kameswara Rao is in regard to item 10. His case is that the lower Court has not given a finding as to whether the property is joint family property or the self-acquired property of defendant 3. The District Munsif held that it was not joint family property and the plaintiff had no right to claim a share therein. The case of the plaintiff is that he and his father and his brothers were together entitled to two-thirds share in the properties in the suit and defendant 3 was entitled to one-third on the ground that originally the family consisted of two brothers, his father's father Rajayya and his brother Ramchandrayya, that Ramchandrayya adopted his father and died, that defendant 3's father Ramabrahmam was the son-in-law of Ramachandrayya and was living in the family and he was also entitled to a share therein, that till the date of his death defendant 3's father was in management of the property, that no partition had ever taken place and that the various alienations effected by his father and defendant 3 were improper, that he was entitled to his legitimate share in all the properties in the suit including item 10.

The case of defendant 3 is that the alleged adoption was untrue, that long before the plaintiff was born there was a partition in the family in 1895 in and by which defendant 1 got one-third share, defendant 3's father got another share and one Ponnamma, the widow of one Viswanatham (the brother of defendant 1) got a third share as representing the share of Viswanatham, that ever since the division the three sharers and their representatives have been in continuous enjoyment and possession thereof, that item 10 among other properties is the property of defendant 3's family. Both the lower Courts have found in favour of the division in 1895 alleged by the defendants. They also further found that defendant 3's father was not the manager after the division. It is no doubt true that no finding in regard to item 10 has been given by the lower appellate Court, but the evidence on this point has been placed before me, namely, the evidence of D. W. 2 and D. W. 1. I have gone through this evidence and I do not think that the plaintiff has made out his case in regard thereto. Though no doubt the presumption is that in the case of a family which is undivided every item of property in the possession of a member may be presumed to be joint family property capable of division, yet where the division has already taken place as in this case the said presumption cannot apply. Further when it is also found that the allegation that defendant 3's father acted as manager is not true, the plaintiff must have affirmatively proved that the said item was joint family property before the division, was not divided at the partition in 1895, and continued to be in joint possession upto the date of suit. It was thus incumbent upon him to prove both title and possession of his family within 12 years before the suit and as the evidence does not establish this the plaintiff's case in regard to this item must also fail.

In the result the decree of the lower Court must be modified by awarding the plaintiff one-third share instead of one-fourth in all the items which the lower Court has declared the plaintiff to be entitled to including item 27 allowed by me herein. In adjusting the equities between the parties it would be desirable that the Court should allot to defendant 1's share the various items in respect whereof it has been held the alienations effected by him were held to be not binding on the plaintiff. Except with regard to the modifications above mentioned the second appeal fails and is dismissed. I direct each party to bear his own costs of this appeal. Leave refused.

C.R.K./K.B *Decree modified.*

A. I. R. 1937 Madras 280

PANDRANG ROW, J.

Rajaram Mudaliar—Appellant.

v.

Kothandapani Mudaliar and *others* — Respondents.

Second Appeal No. 1094 of 1934, Decided on 2nd October 1936, from decree of Dist. Court, Chingleput, in (Pauper) Appeal Suit No. 157 of 1933.

(a) Guardian and Ward — Alienation by guardian—Sale of minor's property by de facto guardian—Vendee paying half of consideration to de facto guardian in cash — De facto guardian not spending amount for minor's benefit — Minor suing de facto guardian and vendee—De facto guardian cannot give valid discharge of payment of purchase money so as to bind minor—Personal decree for consideration paid to de facto guardian without interest before date of suit can be passed against him—Property sold and in the hands of vendee can be charged for consideration paid to de facto guardian, with interest on it from date of suit.

The property belonging to a minor was sold by his de facto guardian. The vendee paid half the amount towards satisfaction of debts, due from minor's brother and half the remaining amount to the de facto guardian in cash. The de facto guardian did not spend the amount paid to him for the benefit of the minor. The minor sued the de facto guardian and the vendee :

Held : that the vendor, a minor, was represented in the transaction of sale by the de facto guardian who could not give valid discharge as to amount of half purchase money paid to him in cash so as to bind the minor. A personal decree for the amount paid to the de facto guardian without interest before the date of suit could be passed against him. [P 281 C 2; P 282 C 2]

Held also : the property sold and in the hands of vendee could be charged for the amount of consideration paid to the de facto guardian together with interest from the date of sale, inasmuch as the vendee full well knew that he was purchasing the property of the minor. [P 281 C 2]

(b) Practice—Relief— Plaintiff not asking specifically for personal decree against defendant—General clause in plaint praying for grant of proper relief — Personal decree against defendant can be granted or permission to plaintiff to amend plaint should be granted to do justice.

Where a plaintiff does not specifically ask for a personal decree against the defendant, but the plaint includes a general clause asking for such further or other relief as the Court may seem fit to grant in the circumstances of the case, the general clause should either be deemed to cover the prayer for the personal decree against the defendant, or the Court should allow the plaintiff to amend the plaint for purposes of seeing that justice is done. [P 282 C 1]

R. Somasundaram Aiyar—for Applt.

Ch. Raghav Rao for *C. G. Kalyanasundaran*—for Respondents.

Judgment.—This is an appeal from the decree of the District Judge of Chingleput dated 21st December 1933 reversing on appeal the decree of the District Munsif of Poonamalle dated 7th October 1932 in O. S. No. 321 of 1930 and dismissing the suit. The suit was one based on the following allegations. The plaintiff became an orphan in her eighth year and was under the protection of her elder brother who died in 1924. Thereupon, her brother's widow was protecting her for some time and when she wanted to go to her parent's house she sold the house described in the plaint schedule to the plaintiff in September 1925, defendant 1 who is the sister's husband of the plaintiff, being shown as her guardian in the deed. One of the provisions in the deed was that the plaintiff's deceased brother's debts were to be paid by the plaintiff and the remainder utilised for the purpose of the plaintiff, in particular to meet the expenses of her marriage. This took place when the plaintiff was about 15 years old.

The next year, that is to say, in 1926, defendant 1 sold the plaint property to defendant 2 for Rs. 1,200 though there was no necessity for the sale. Out of the consideration for the sale deed, Rs. 600 odd was utilised for discharging the debts of the plaintiff's deceased brother which were no doubt binding on the property. The balance of Rs. 543-8-0 was paid in cash to defendant 1 by the vendee, defendant 2, who took security in respect of the same from defendant 1. Out of this amount of Rs. 543-8-0 not a single pie was utilised for the benefit of the plaintiff. Defendant 2 knowing that defendant 1 had no right to the sale proceeds bought the property and paid the money and further made a nominal sale afterwards to defendant 3 in order to defraud the plaintiff. The plaintiff instituted the suit when she was 19 years old and she claimed to recover the balance of the sale proceeds, namely Rs. 543-8-0, together with interest at 12 per cent. per annum and also a charge on the plaint property for the amount claimed. Defendant 1 contended that he had spent more than the amount received by him for the benefit of the minor including the expenses connected with her marriage, and that therefore nothing is due by him. Defendants 2 and 3 adopted this contention of defendant 1 and contended further that the plaintiff was not entitled to get a charge

on the suit property and that she could only enforce the security bond taken by defendant 2 and recover only the amount of Rs. 400 specified in the deed of 1925. They denied their liability to pay any interest.

The first issue in the suit was whether defendant 1 had spent the amount of Rs. 543-8-0 for purposes binding on the plaintiff. This issue was found in the negative by the trial Court, though the trial Court was of opinion that as defendant 1 had maintained the plaintiff she would not be entitled to the entire amount of Rs. 543 but only to Rs. 400. The trial Court also found that the plaintiff was not entitled to interest and that she was not entitled to a charge on the plaint property. In the judgment the trial Court held that the plaintiff was entitled to recover Rs. 400 from defendant 1 and from the property tendered as security under Ex. 3. In the decree however nothing was said about the plaintiff's right to recover the amount by enforcing the security bond referred to, apparently because the bond could not be enforced in the suit as the plaintiff was not a party to it and the person who executed the bond was not a party to the suit. Appeals were preferred from the decree of the trial Court by defendant 1 as well as by the husband of the plaintiff who succeeded her as heir on the plaintiff's death. In dealing with these appeals the lower appellate Court was of opinion that the following questions arose for decision, namely:

(1) Whether defendant 1 spent the whole of the Rs. 543-8-0 for purposes binding on plaintiff 1; (2) whether plaintiff 2 is entitled to the interest claimed; (3) whether plaintiff 2 is entitled to a charge on the properties sold to defendant 2 for the said sum of Rs. 543-8-0 and interest thereon; and (4) whether in the absence of a prayer for a personal decree against defendant 1, such a decree could be passed against him in this suit.

The first question was found in the negative, the finding being that defendant 1 had not proved that he had spent anything for the benefit of the deceased plaintiff. The other points were found against the plaintiff with the result that the suit was entirely dismissed without any relief being given to the plaintiff. The present second appeal is by plaintiff 2, that is, the husband of the deceased plaintiff. The facts stated above coupled with the concurrent findings on both the Courts below to the effect that no portion of the money received in cash by defendant 1 which amounted to Rs. 543-8-0 was spent by him for the benefit of the minor clearly show that there has been a miscarriage of justice in this case. The facts briefly are that the minor's property was sold by the de facto guardian and not the legal guardian when the only necessity, if any, was to discharge the debts of her deceased brother which were binding on the property. The debts amounted to a little over Rs. 600 at the time of the sale by defendant 1. The rest of the consideration which was nearly one-half of the entire consideration was paid in cash by the vendee to the de facto guardian. No doubt he took the precaution of taking security to protect himself, but he failed to see that there was no protection to the minor by reason of the course adopted by him in paying nearly one-half of the consideration in cash to the de facto guardian. Even if it be assumed that there was a necessity to pay the debts and that the debts could not be paid except by selling the property, the vendee must have known that the payment made to the de facto guardian of nearly half the consideration in cash would not be binding on the real owner of the property, that is to say, the minor. Such payment would certainly not amount to payment of the purchase money to the vendor. The vendor was a minor and defendant 1 only represented her in the transaction as a de facto guardian and not as a legal guardian. He had no authority to give a valid discharge binding on the minor. The amount therefore paid in cash to the de facto guardian, defendant 1, cannot be deemed to be a valid payment of the purchase money to that extent. It must therefore be held that to the extent of Rs. 543-8-0 there was no payment to the vendor and this amount with interest thereon from 19th June 1926, the date of Ex. 2, at 6 per cent. per annum, must be charged on the property that was sold and the appellant is entitled to have a charge in respect of that amount on the plaint property. The remedy by way of proceeding against the security bond is one which is available to defendant 2 but not the appellant.

As regards defendant 1's liability, it is established beyond doubt by the concurrent findings of both the Courts below; the reason given by the learned District Judge for setting aside the decree passed against defendant 1 by the trial Court is, to say the least, technical and really

unsatisfactory. It is not as if defendant 1 was taken by surprise. It was never his case that no decree should be passed against him because such a decree had not been asked for. His defence throughout was that he had spent the whole of the money for the benefit of the minor and this contention was found to have been not proved according to both the Courts below. The plaint does include a general clause asking for such further or other relief as the Court may seem fit to grant in the circumstances of the case and the lower appellate Court should have either held that this general clause covered the prayer for a personal decree against defendant 1, or, if it was not prepared to do so, given an opportunity to the appellant to amend the plaint for the purpose of seeing that justice was done. So far as defendant 1 is concerned there was no ground for dismissing the suit as against him entirely. So far as he is concerned however there is no legal liability to pay interest and the personal decree against defendant 1 will therefore be limited to the amount of Rs. 543-8-0 with interest thereon at six per cent. per annum from the date of plaint till payment. The appellant is entitled to have his costs including the court-fee to be paid by him in all the three Courts from defendants 1 to 3, who will bear their own costs. Leave to appeal is refused.

C.R.K./W.D. *Order accordingly.*

A. I. R. 1937 Madras 282

PANDRANG ROW, J.

Tummalapalli Veeramma and *another* —Appellants.

v.

Akkivarapu Veerappa and *others* —Respondents.

Second Appeal No. 1058 of 1932, Decided on 1st October 1936, against decree of Sub-Judge, Rajahmundry, in A. S. No. 119 of 1930.

(a) Jurisdiction—Civil Court—Claim based neither on right to village office nor to emoluments but for possession of trespassed property—Jurisdiction of civil Court is not barred.

Where an office is claimed or any emoluments attached to a village office are claimed as such, the civil Court cannot decide competing claims either as regards the office or as regards the emoluments attached to that office, but where the claim is not based on the right to the office or to anything on the ground that it forms the emoluments of an office but is merely for the possession of property on which there was a trespass, the civil Court's jurisdiction is not ousted. [P 283 C 1, 2]

(b) Civil P. C. (1908), S. 100—Appellate Court upsetting reasoned and elaborate judgment of trial Court on general ground that evidence not satisfactory—No discussion of evidence whatever — Finding is contrary to law.

A provisional finding upsetting a very closely reasoned and elaborate judgment of the trial Court without any discussion of evidence whatever or without giving any reason except the general reason that the evidence is not satisfactory is contrary to law. [P 283 C 2]

Judgment.—This second appeal arises out of a suit instituted by the two plaintiffs for recovery of possession of the plaint properties with mesne profits. The plaintiffs claimed to recover possession on the strength of the following allegations, viz., that the plaint properties fell to the share of their father during the partition which took place between him and his brother, the late Bapadu, father of defendants 1 and 2, that this partition took place a long time ago, that the plaint properties were being enjoyed by the plaintiffs' father exclusively and after his death by his widow, i. e., the mother of the plaintiffs, till her death in 1919, or thereabouts and that the defendant's father usurped possession of the lands and caused obstruction when the plaintiffs attempted to get back possession in 1920 or thereabouts. In other words the suit was clearly one for recovery of possession based on the plaintiffs' possession and their unlawful dispossession by the defendants. In such a simple suit the real question for decision was whether the plaintiffs were in possession and whether they were dispossessed by the defendants as alleged. The trial Court recognized that this was the most important issue in the case and devoted considerable attention to it and discussed the evidence very fully and came to the conclusion that the properties in question had fallen to the share of the plaintiff's father and that he and his widow were in exclusive enjoyment of the same and that the contention of the defendants to the effect that the widow was let into possession as a provision for her maintenance was not true. There was no doubt a further question raised as to whether the civil Court had jurisdiction to entertain the suit as the properties were said to be, and were in fact admitted to be, part of the washerman service inam in

the village. This question was decided in the affirmative by the trial Court and a decree was passed in favour of the plaintiffs.

On appeal however the Subordinate Judge reversed the judgment of the trial Court on the sole ground that the civil Court had no jurisdiction to entertain the suit. The present suit is not one brought by the plaintiffs either as holders of the office or for anything which is alleged to be the emoluments of any village office. There was thus nothing to prevent the civil Court from dealing with the claim set up in the plaint which was to recover possession of the properties from which the plaintiffs had been dispossessed by the defendants. The previous possession and the subsequent dispossession were sufficient to give the plaintiffs a cause of action cognizable by the civil Court and there was no necessity to raise the question of the jurisdiction of the civil Court on the ground that the lands were actually service inam lands. The prohibition contained in S. 21, Madras Hereditary Village Offices Act, relates only to the consideration or decision of any claim to succeed to any village office or of any question as to the rate or the amount of the emoluments or any claim to recover the emoluments of any such office. In other words, where an office is claimed or any emoluments attached to a village office are claimed as such, the civil Court cannot decide competing claims either as regards the office or as regards the emoluments attached to that office, but where the claim is not based on the right to the office or to anything on the ground that it forms the emoluments of an office the civil Court's jurisdiction is not ousted. I have no doubt that the learned Subordinate Judge was wrong in coming to the conclusion that there was no jurisdiction in the civil Court to entertain the present suit.

The further question that was decided by the learned Subordinate Judge, viz. that the plaintiffs should not have been given a decree on the basis of title obtained by adverse possession, need not be considered, for the plaintiffs' claim was really not rested in the plaint on any title acquired by adverse possession. Apparently such a prescriptive title was put forward in the trial Court in the course of the argument on behalf of the plaintiffs and the lower appellate Court chose to deal with it and expressed an opinion in favour of the plaintiffs. But the basis of the claim is not any such prescriptive title. The basis of the plaint claim is, as stated above, the dispossession by the defendants of the properties of which the plaintiffs and their parents were in possession. Such possession can be protected when there is dispossession and the remedy is certainly to be sought in a civil Court. In short the suit was one based on trespass and it is a matter for surprise that there should be any doubt on the question whether a civil Court has jurisdiction to decide a suit based on a trespass, and in which only possession is sought to be recovered of the properties on which there was a trespass.

The learned Subordinate Judge has not really decided the substantial issue that arose in the suit, viz., whether the plaintiff's father and mother were in exclusive possession of the plaint properties. No doubt he has stated that though it is unnecessary to record a finding on this point he would, if he had been called upon to give a finding, do so against the plaintiff because he did not accept the view of the trial Court that it was satisfactorily proved that the plaintiff's parents were in possession. This provisional finding is not according to law because there has been no discussion whatever of the evidence and no reason has been given, except the general reason that the evidence is not satisfactory, to upset a very closely reasoned and elaborate judgment of the trial Court on this point. This so-called finding of the lower appellate Court must be regarded as being contrary to law and the point must be decided afresh after due consideration of the evidence in the case. The decree of the Subordinate Judge is therefore set aside and the appeal is remanded to the lower appellate Court for fresh disposal according to law in the light of the observations contained in the judgment, and in particular after deciding on the merits the question whether the plaintiff's father and mother were in exclusive possession of the plaint properties as alleged in the plaint. The appellants in this appeal are entitled to their costs in this Court; the costs in the Courts below should be provided for in the revised decree of the lower appellate Court. The appellants are entitled to a refund of the court-fee paid on the memorandum of appeal as the lower appellate Courts' decree was based on its decision on the preliminary

point of jurisdiction. Leave to appeal is refused.

C.R.K./V.B.B. *Case remanded.*

A. I. R. 1937 Madras 284

MOCKETT AND LAKSHMANA RAO, JJ.

Dhoolipala Venkateswaralu—Petitioner.

v.

District Election Officer, Kistna and *another*—Opposite Parties.

Civil Misc. Petn. No. 4536 of 1936, Decided on 20th November 1936.

Madras Local Boards Act (14 of 1920), Rules under, for preparation of Electoral Rolls—Rr. 12 and 14—Appeal under R. 12 against order of Election Officer—Appellant not intimating appellate authority, his intention to be heard personally or by agent even during one month's time after filing of appeal — Appellate authority disposing of appeal on documents filed by Election Officer —Order held not without jurisdiction—Issue of writ of certiorari held not necessary.

In order to avail of the right given under R. 14, it is for the person appealing to intimate his intention of appearing in person or through an agent because, although there is provision under R. 13 for notice to be sent by the Election Officer to the person concerned, under R. 2 (a), there is no provision for the appellate authority to give notice to anybody. There is nothing to prevent an appellant intimating his desire to be heard under R. 14 in his appeal notice in Form VI, and if the appellate authority disposes of the matter in such time that it was impossible for the person aggrieved to intimate to him his intention of appearing, then in such a case High Court might possibly think fit to interfere. [P 284 C 2]

Where therefore a person appealed from the order of Election Officer but did not intimate his intention to appear personally or by an agent before appellate authority even during a month's time after filing of the appeal, and the Inspector decided the appeal on the documents filed by the Election Officer:

Held: that the Inspector did not act without jurisdiction and hence High Court would not issue a writ of *certiorari*. [P 284 C 2; P 285 C 1]

V. T. Rangaswami Ayyangar — for Petitioner.

Govt. Pleader—for Opposite Parties.

Mockett, J.—The facts in this case are not relevant to the point which we have to decide. The following only is relevant. The Election Officer of Kistna passed an order to which one Mr. Rama Yogi took objection. Mr. Rama Yogi filed an appeal in Form VI in accordance with R. 12 of the rules for the preparation of Electoral Rolls. That Rule says:

> Any person, feeling aggrieved by any order passed under sub-r. (a), R. 11 by the Election Officer, may prefer an appeal against such order to the election authority or to such person or persons as he may empower for hearing and disposing of such appeals.

The rule then goes on to prescribe that the appeal shall be in Form VI and shall be addressed to the appellate authority through the Election Officer and presented to the latter within five days of the passing of the order appealed against. Under sub-r. (2) the Election Officer shall forward every such appeal to the appellate authority together with a statement of the material facts of the case, the relevant papers and his own remarks on the grounds of appeal. The order of the appellate authority on such appeal shall be final and shall not be liable to be questioned in any legal proceeding.

It would seem on a reading of that rule that what is contemplated is that the appeal to the appellate authority shall be considered by him on the written material forwarded through the Election Officer by the appellant. But under R. 14 a right is given to the appellant to appear and be heard either in person or by an agent duly authorized in writing. It seems to me that it is for the person appealing to intimate his intention of appearing in person or through an agent because, although there is provision under R. 13 for notice to be sent by the Election Officer to the persons concerned, under R. 2 (a) there is no provision for the appellate authority to give notice to anybody. There is nothing to prevent an appellant intimating his desire to be heard under R. 14 in his appeal notice in Form VI. I specially wish to guard myself against any suggestion that ample opportunity should not however be given to any person to appear, by which I mean that if the appellate authority disposes of the matter in such time that it was impossible for the person aggrieved to intimate to him his intention of appearing, then I think that in such a case this Court might possibly think fit to interfere. But in this case what happened was this: The appeal was filed on 1st October 1936. It was disposed of on 2nd November. Between 1st October and 2nd November, Mr. Rama Yogi appears to have done nothing. He did not intimate that he desired to be heard personally or by an agent; he does not appear even to have written to the appellate authority and so on the facts before him, i. e., the documents forwarded by the Election Officer,

the Inspector disposed of the appeal dismissing it. There is therefore before us no question of jurisdiction.

There appears to be no matter here contrary to the well known rules governing writs of *certiorari* because it does not appear on these facts that the appellate authority, the Inspector, has acted in any way in conflict with the jurisdiction conferred upon him by the rules. There is one other aspect of this case which may be referred to. Mr. Tampoe in an affidavit which has been placed before us states that full instructions were given to two persons whom he understood to be representing the objector regarding the rolls of the villages of Jaggayyapet with which we are not now concerned and Muppala with which we are. According to Mr. Tampoe he told these two gentlemen that they must represent everything that was necessary before him in writing and in the case of one of them we are told that he was at one time an advocate of this High Court. This is mentioned because it does not appear that even on the merits in fact there has been any denial of a hearing to the petitioner. Speaking for myself I think he was abreast of everything that was going on and he has only invoked these proceedings because he has failed. I might add that in order to avoid a repetition of petitions of this sort it would be advisable for the Inspector to issue some sort of a notice—and I would suggest perhaps the office of the Election Officer might be a convenient spot—giving some simple instructions to people proposing to file appeals or at least to put up a notice in his own office. For the above reasons this petition is dismissed with costs, Rs. 100.

Lakshmana Rao, J.—I agree.

C.R.K./S.C. *Petition dismissed.*

A. I. R. 1937 Madras 285

PANDRANG ROW, J.

Ambalathilakath Kuttoossa and *another* —Petitioners.

v.

Mundayatan Korothveetil Kunhamma Amma and *others*—Opposite Parties.

Civil Misc. Petn. No. 2702 of 1936, Decided on 20th October 1936, against decree of Sub-Judge, Tellicherry, in O. S. No. 8 of 1933.

Civil P. C. (1908), O. 41, R. 10—Object of—Promptness— Object is to secure respondent from risk of incurring further costs—Poverty of appellant must be considered when appeal is bona fide — Application must be made promptly — Application filed one and half years after appeal was dismissed as belated.

The object of the rule enabling the Court to require the appellant to furnish security for costs is to secure the respondent from the risk of having to incur further costs which he might never recover from the appellant and this being the object, any application which is made under this Rule must be made promptly. But where the appeal is bona fide and the risk is not great, the amount involved not being really very large, other considerations, e. g., poverty of appellant, must be given their due weight so that a poor appellant is not deprived in effect of his right of appeal. (Application filed after one and half years held belated and not bona fide particularly the appellant being litigating in his own right.) [P 285 C 2; P 286 C 1]

P. Govinda Menon for *B. Pocker* — for Petitioners.

K. Kuttikrishna Menon — for Opposite Parties.

Order. — This is an application under O. 41, R. 10, Civil P. C., to require the appellants to furnish security for the balance of costs in the lower Court awarded to the petitioners, who are respondents 9 and 10 in the appeal, and also for costs of the appeal now pending in this Court, namely Appeal No. 292 of 1934. The application was made in July 1936, that is to say, more than a year and a half after the appeal had been filed. The balance of costs in the Court below which the petitioners claim is about Rs. 109 and they estimate their costs in this Court at Rs. 400. It is contended by the appellants that this application is not bona fide but has been made merely because another application by one of the respondents for an order requiring the appellants to furnish security was allowed and as the security was not furnished, the appeal was dismissed as against that respondent, and that the present application is dictated by the desire to see the same result happen as regards the petitioners. It may be that this is the motive behind the present application but that motive by itself would not be sufficient to put them out of Court.

It is however to be observed that the object of the Rule enabling the Court to require the appellant to furnish security for costs is to secure the respondent from the risk of having to incur further costs which he might never recover from the appellant, and this being the object, any

application which is made under this Rule must be made promptly. No promptitude is observed in the present case. Secondly even though the risk to the respondents is to be borne in mind, it is not conclusive in the sense that wherever there is risk to the respondents, security will be taken. If the risk is very great, it may by itself be sufficient to justify an order requiring the appellants to furnish security ; but where the risk is not great, as in the present case and the amount involved is not really very large, other considerations must to given their due weight, for instance, one must be careful to see that a poor appellant is not deprived in effect of his right of appeal. Poverty is always a handicap in matters of litigation and there is no justification in my opinion for the Court to add to this handicap by requiring impossible things to be done. Of course, the case would be different if there was any reason to suppose that the appeal was not a bona fide one or that the appellants were only puppets in the hands of others. It is stated that the Subordinate Judge in the Court below has made an observation to the effect that the present litigation is being engineered by defendant 1, but that does not perhaps mean more than that he sympathises with the appellants and is helping them with evidence so far as he can.

There is nothing to show that the appellants have no real or substantial interest in the subject matter of the litigation, or that they are mere name-lenders for defendant 1 in the present appeal. Defendant 1 is the karnavan and it is his dealings with the property that form the subject matter of some of the issues in the suit and his attitude may not perhaps be quite straightforward. That is no reason for coming to the conclusion that the present appellants are not litigating in their own right and in their own interest. On the whole, I am of opinion that this application is belated, is not bona fide, and that even otherwise it is not desirable in the interests of justice that an order should be made for furnishing security which might very likely stifle the appeal itself. The application is therefore dismissed but without costs.

C.R.K./K.B. *Application dismissed.*

A. I. R. 1937 Madras 286

PANDRANG ROW, J.

In re *Muthuswami Iyer* and *others*—Petitioners.

Criminal Revn. Case No. 569 and Petn. No. 523 of 1936, Decided on 26th November 1936, from judgment of Sub-divisional Magistrate, Cheyyar, in C. C. No. 19 of 1936.

Penal Code (1860), S. 159—Place where public are actually in habit of going is public place—Presence of large crowd at time of disturbance is sufficient proof of breach of public peace—Proof that particular member was alarmed is not necessary—Likelihood of alarm is sufficient.

Whether a place is public or not does not necessarily depend on the right of the public as such to go to the place, though of course a place to which the public can go as of right must be a public place. The place where the public are actually in the habit of going must be deemed to be public for the purpose of the offence of affray, for instance, place like railway platforms, theatre halls, and open spaces resorted to by the public for purposes of recreation, amusement, etc.: *Case law referred.* [P 287 C 1]

The presence of large numbers of the public at the time of the disturbance shows that the members of the public must have been alarmed by reason of the disturbance and that there is sufficient breaking of the public peace within the meaning of S. 159, I. P. C. It is not necessary that any particular member of the public must give evidence to the effect that he was alarmed or frightened before a conviction can be had for an offence punishable under S. 159, I. P. C. If it is likely that such alarm would have been caused to the public or members of the public, the necessary ingredient is established. [P 287 C 1, 2]

V. T. Rangaswami Iyengar and *K. Ramaswami*—for Petitioners.

Public Prosecutor and *Parakat Govinda Menon*—for the Crown.

Order.—The petitioners, who are 20 in number, and four others were convicted of an affray by the Sub-divisional Magistrate of Cheyyar and fined Rs. 10 each.

The principal objections taken to the convictions are: (1) that the occurrence was not in a public place, and (2) that there was no breach of the public peace. The second point does not seem to have been raised in the Court below; in any case, there is no reference to it in the judgment of the Magistrate. With regard to the first point, the Magistrate expressed himself as follows:

> The scene of offence is an open field with no compound walls. It is a place where the public go no matter whether they have a right to go or not.

I think this is a correct and sufficient decision on the point raised. Whether a

place is public or not does not necessarily depend on the right of the public as such to go to the place, though of course a place to which the public can go as of right must be a public place. The place where the public are actually in the habit of going must be deemed to be public for the purpose of the offence of affray, for instance, place like railway platforms, theatre halls, and open spaces resorted to by the public for purposes of recreation, amusement etc. Reference has been made to a number of decisions on this point, viz., 17 All 166;[1] A I R 1922 All 542;[2] 49 All 913;[3] 29 Bom 386[4] and 30 Bom 348[5] and also 31 Cal 542[6] which was approved in 40 Mad 556.[7] A consideration of these rulings shows that the Magistrate's view which is tersely put is substantially correct. The evidence in the case even on the side of the defence shows that there was a large crowd present at the spot, from 150 to 300 while the number of people who took part in the disturbance by throwing stones was only about 25. It is very clear from this, namely, the presence of a large crowd at the spot, that the place must have been actually a public place at the time, besides being open to access by the public.

As regards the second point, the presence of large numbers of the public at the time of the disturbance which took at least a quarter of an hour, shows that the members of the public must have been alarmed by reason of the disturbance and that there was sufficient breaking of the public peace within the meaning of S. 159, I. P C. It is not necessary that any particular member of the public must give evidence to the effect that he was alarmed or frightened before a conviction can be had for an offence punishable under S. 159, I. P. C. If it is likely that such alarm would have been caused to the public or members of the public the necessary ingredient is established. It follows therefore that there is no reason to interfere with the conviction of the petitioners in revision; and as regards the sentence it cannot be said to be unnecessarily and unduly severe. The petition is accordingly dismissed.

C.R.K./S.C. *Petition dismissed.*

1. Queen-Empress v. Shri Lal, (1895) 17 All 166 =1895 A W N 42.
2. Sukhanandan Singh v. Emperor, A I R 1922 All 542=65 I C 419=23 Cr L J 67=20 A L J 80=44 All 265.
3. Emperor v. Babu Ram, A I R 1927 All 560= 103 I C 202=28 Cr L J 666=25 A L J 578= 49 All 913.
4. Emperor v. Jusub Ali, (1905) 29 Bom 386=2 Cr L J 252=7 Bom L R 333.
5. Emperor v. Hussain Nur Mahomed, (1906) 30 Bom 348=3 Cr L J 216=8 Bom L R 22.
6. Hari Singh v. Jadu Nandan Singh, (1904) 31 Cal 542=1 Cr L J 349=8 C W N 458.
7. Emperor v. Musa, A I R 1917 Mad 124=36 I C 839=18 Cr L J 7=40 Mad 556=31 M L J 285.

A. I. R. 1937 Madras 287

PANDRANG ROW, J.

Hathi Belagal Venkateswara Rao and *another*—Appellants.

v.

R. Mare Gowd and *others* — Respondents.

Second Appeal No. 331 of 1934, Decided on 6th October 1936, against decree of Dist. Court, Bellary, in A. S. No. 140 of 1931.

(a) Madras Revenue Recovery Act (2 of 1864), S. 36—Property purchased by Government according to Board's standing order which was inconsistent with provisions of Revenue Recovery Act—Provisions of statute prevail—If deposit is not made and no sale certificate is issued sale is invalid.

Standing orders merely contain executive instructions by the Board of Revenue to their subordinate officers prescribing the procedure to be adopted when either no bid is made for the land brought to sale for arrears of land revenue or when there is good reason to suspect combination among the bidders. Where this standing order is inconsistent with the provisions of the Revenue Recovery Act, it cannot prevail over the express provisions of the statute. [P 288 C 2]

Certain property was sold for arrears of land revenue. Government purchased it under Board's Standing Order 45 and sold it to third persons. The procedure prescribed by Revenue Recovery Act such as deposit to be made at the time of sale and issuing of sale certificate etc., was not followed. The defaulter brought the suit for declaration of his title to the sold property:

Held: that the sale was not in accordance with the provisions of the Act and so was not valid and binding. [P 289 C 1]

(b) Madras Revenue Recovery Act (2 of 1864), S. 38 (3) — Order of confirmation—Evidence—Mere references to confirmation in notices sent by Tahsildar and entries in village register are not sufficient evidence to prove that order was in writing.

The confirmation of the sale is a matter required by law to be in writing and such confirmation can be proved only by production of the order or a copy thereof certified or proved to be a correct copy. [P 289 C 1]

Where on a sale by Government of certain property for arrears of land revenue no sale certificate was issued and there was no admissible evidence to show that there was written order of

confirmation of sale, but only reference to confirmation in certain notices and village register:

Held: that these notices and entries were not sufficient in law to prove that there was an order in writing confirming the sale. [P 289 C 1]

K. Srinivasa Rao—for Appellants.

*S. Alagasingaracharia*r, *V. Krishnamachariar* and *Government Pleader* —for Respondents.

Judgment.—This is an appeal from the decree of the District Judge, Bellary, dated 18th September 1933, confirming on appeal the decree of the Principal District Munsif of Bellary, dated 24th September 1931 in O. S. No. 513 of 1930. The suit was one for a declaration of the plaintiff's title to the plaint property. The plaintiff's case was that the sales of the plaint properties purported to have been held by the Revenue Officers for arrears of revenue in 1927 and 1928 were wholly void. The plaintiff is said to have been in jail at the time when the alleged sales took place and he was not personally aware of the circumstances attending the sales. It was expressly alleged in the plaint that even the procedure prescribed by the Board's standing order 45 was not followed and that there was no confirmation of the sale nor any certificate of sale issued as required by the Revenue Recovery Act under which the sales are said to have been conducted. The defendants were the subsequent purchasers from the Government, namely defendants 1 and 2, and the Secretary of State for India in Council, defendant 3. It was contended by defendant 3 that the plaintiff's statement that he was undergoing imprisonment at the time of the revenue sales was not true and that he was actually on bail on the dates on which the sales were held. The substantial defence was that the sales were valid and binding on the plaintiff. There was also a contention that the suit was barred by limitation. The trial Court upheld both these contentions and dismissed the suit with costs. The lower appellate Court disagreed with the lower Court's finding on the question of limitation but dismissed the appeal on the merits, because it came to the conclusion that though no sale certificate had been issued, the sales had been confirmed. The present second appeal is by the plaintiff.

Both the Courts below appear to have proceeded on the assumption that the provisions of the Board's standing order 45, which relates to buying in for Government of property brought to sale for arrears of revenue, have the force of law. Only para. 1 of that Board's standing order was relied upon by the lower appellate Court and these provisions have certainly not the force of law. They merely contain executive instructions by the Board of Revenue to their subordinate officers prescribing the procedure to be adopted when either no bid is made for land brought to sale for arrears of revenue or when there is good reason to suspect combination among the bidders. In the former case the direction is that the land should be purchased on behalf of Government at a nominal price, the amount of the purchase money being written off the accounts as an irrecoverable arrear with the sanction of the Collector. In the latter case, the officer conducting the sale is authorized to bid on behalf of Government, whether there are bidders or not, up to an amount not exceeding the annual assessment of the land. The last sentence in that paragraph is to the effect that:

> When land is bought in by Government, the certificate should be issued in the name of the Secretary of State for India in Council.

The Madras Revenue Recovery Act (Act 2 of 1864) under which the sales were held makes no provision for buying in of lands brought to sale for arrears of revenue by Government, but that is not to say that the Government are not entitled to buy in lands if they think fit and to give such instructions in the matter of buying in lands to their subordinate officers as they think fit. To that extent, no objection can be taken to the provisions of the Board's Standing Order 45. But where this standing order is inconsistent with the provisions of Revenue Recovery Act, it cannot prevail over the express provisions of the statute. For instance, it is stated in the Board's Standing Order 45 that the amount of the nominal bid or any bid up to the assessment should be written off as irrecoverable. This does not, in my opinion, take away the force of the provisions in the Revenue Recovery Act which require that in the case of every sale, 15 per cent. of the price of the land should be deposited by the purchaser at the time of the purchase, this amount being liable to forfeiture if the remainder of the purchase money is not paid within 30 days: *vide* S. 36 (3). The succeeding clause provides that:

> Where the purchaser (and in this case, the purchaser was the Government) may refuse or omit

so deposit the said sum of money, or to complete the payment of the remaining purchase money, the property shall be re-sold at the expense and hazard of such purchaser.

It is not pretended that any deposit was made in the case of these sales on behalf of Government by anybody. It is found that there was no certificate of sale granted to the purchaser and as regards the question whether any order confirming the sales was passed as required by S. 38, sub-s. 3 of the Act, there is no admissible evidence to show that such an order was passed. Neither the order itself, nor a copy of it has been produced. No doubt there are references to such a confirmation in certain notices sent by the Tahsildar and there are entries of the lands in the village register in the name of the Government. But these notices and these entries are not sufficient in law to prove that there was an order in writing confirming the sale. The confirmation of the sale is a matter required by law to be in writing and such confirmation can be proved only by production of the order or a copy thereof certified or proved to be a correct copy. It would also appear that in the case of some of the lands said to have been sold even the amount of the bid made on behalf of the Government was not clearly entered. It is not known whether the amount of the bids was ever credited to the defaulter; this however is a matter of no importance so far as the present case is concerned. It is clear that the sale of the lands held under the Act was not in accordance with the provisions of that Act and that therefore they are not valid and binding on the plaintiff.

It has been contended by the purchasers from the Government, namely defendants 1 and 2, that they are bona fide transferees for value and therefore entitled to remain in possession even if their vendor's title is found to be non-existent. This aspect of the case was not put forward in the form of an issue nor raised in either of the Courts below. I do not think there is real substance in this claim, and I am certainly not prepared to allow this point to be raised for the first time in second appeal and to remand the whole case to the trial Court for this purpose. So far as these defendants are concerned, they have a remedy open to them which will give compensation to them, whereas the plaintiff will have no other remedy except in the present suit. The second appeal is therefore allowed and the decrees of the Courts below are set aside. The plaintiff will have a declaration as prayed for. The plaintiff is entitled to recover his costs in all the three Courts from defendant 3. Defendants 1 and 2 will bear their own costs. Leave to appeal is refused.

C.R.K./S.C. *Appeal allowed.*

A. I. R. 1937 Madras 289

PANDRANG ROW, J.

Firm Lachiram Santhokchand Ameechand—Appellant.

v.

Firm Tarachand Jayarupji—Respondent.

Appeal No. 92 of 1933, Decided on 24th April 1936, against order of Dist. Court, Bellary, D/- 7th February 1933.

Res judicata—Execution proceedings—Plea of adjustment by judgment-debtor — Execution dismissed on decree-holder not pressing — Subsequent application for execution — Question as to truth of adjustment is not barred by res judicata.

There is a difference between the dismissal of suits and dismissal of execution applications for default when they are not pressed. In the case of dismissal of execution petitions for default or on the ground that they are not pressed, the only point that is decided is that that application is dismissed and there is no bar in the way of a fresh application being made, if necessary, the next day with the same prayer; and unless it can be said that there was a decision or adjudication which either directly decided the question on which the parties are at issue or which must be deemed to have impliedly decided it on the ground that the orders could not have been made without such implied decision having been arrived at, the rule of res judicata cannot operate or apply.

[P 290 C 2]

In an application for transfer of a decree for execution, the judgment-debtor pleaded an adjustment and this agreement or adjustment was denied by the decree-holder but the application was dismissed as not being pressed by the decree-holder. In a subsequent application for execution by the decree-holder the judgment-debtor contended that the adjustment or agreement pleaded by him in the previous application for transmission of the decree must be deemed to have been decided in the previous application in his favour:

Held: that the question that arose between the parties as to the truth of the adjustment was not decided either expressly or impliedly and that it was not barred by res judicata but could be decided in the subsequent application. [P 290 2; P 291 C 1]

D. Ramaswami Aiyangar and *L. Krishna Doss*—for Appellant.

T. R. Arunachalam—for Respondent.

Judgment.—This is an appeal from the decree of the District Judge of Bellary, dated 7th February 1933, affirming in appeal the order of the District Munsif of Bellary dated 8th August 1932, in E. A. No. 325 of 1932 which was an application for transfer of the decree to the District Munsif's Court, Gooty, for execution. There was a previous application for transfer of the same decree to the same Court viz., E. A. No. 274 of 1931 and in that application the judgment-debtor pleaded an adjustment whereby the amount due by him under the decree was agreed to be only Rs. 150 with interest. This agreement or adjustment was denied by the decree-holder. After a partial examination of the judgment-debtor himself in support of his case in August 1931, the objection was overruled because he did not appear on the adjourned date of hearing and there was an order for transmission of the decree for execution as prayed for. That order was appealed from, and on appeal the matter was remanded for further enquiry.

Several adjournments were asked for and given. On the final date, viz., 19th February 1932, an important witness, whom the decree-holder wanted to examine in support of his case, not having returned from Marwar to Bellary, adjournment was applied for and in the affidavit the decree-holder offered even to pay the costs of the other side if the adjournment was granted. In the alternative he stated that if adjournment is refused he was not pressing his petition for the present. Thereupon the following order was passed on the application "Not pressed. Dismissed with costs." So far the previous history of the case. The present application was made on 16th June 1932, and the amount in respect of which execution was sought was the entire amount due under the decree. The judgment-debtor opposed the application on the ground that the adjustment or agreement which he had pleaded in the previous application for transmission of the decree must be deemed to have been decided in the previous application and in his favour and that the decree could be transmitted only in respect of the admitted sum of Rs. 150 with interest thereon.

The point therefore which the Courts below had to decide was whether this question as to the truth of the agreement or adjustment pleaded by the judgment-debtor in the previous application of 1931 was res judicata and had been decided by the order in the previous application. The question was answered in favour of the judgment-debtor by both the Courts below, but the reasons given in support of this conclusion do not appear to me to be sound. The general proposition laid down by the learned District Munsif to the effect that a dismissal for default operates equally as res judicata and that dismissal even when the application is not pressed has the same effect fails to take into account the difference between the dismissal of suits and dismissal of execution applications. In the case of dismissal of execution petitions for default or on the ground that they are not pressed, the only point that is decided is that that application is dismissed and there is no bar in the way of a fresh application being made, if necessary, the very next day with the same prayer. This is settled law, and unless it can be said that there was a decision or adjudication which either directly decided the question on which the parties are at issue or which must be deemed to have impliedly decided it on the ground that the order could not have been made without such implied decision having been arrived at, the rule of res judicata cannot, in my opinion, operate or apply.

In the present case, the order that was passed was that the petition is dismissed with costs because it was not pressed. It is clear therefore that the only point decided by that order was that the application was to stand dismissed and that the judgment-debtor was to be paid his costs by the decree-holder. No other point was decided, and in view of the circumstances that have been narrated above it is impossible to accept the view that there was any abandonment of contest by the decree-holder by his not pressing the petition. He did not press the petition merely because that was the only other alternative favourable to him if his application for adjournment was going to be refused. The circumstances are such that it is impossible in my opinion to accept the learned District Judge's view that in this case though the decree-holder said in effect "I do not press my petition," he must be held to have meant, "I accept the defendant's objection." I am of opinion that there was no question of abandonment of the issue or any acceptance of the plea put forward by the judgment-debtor. The question that arose between the parties has not been decided either expressly or

impliedly till now, and the decree-holder as well as the judgment-debtor have a right of having the matter decided after getting a reasonable opportunity of adducing evidence. The orders of the Courts below are set aside and the application is remanded to the executing Court, viz., the District Munsif of Bellary for fresh disposal after giving the parties a reasonable opportunity to adduce evidence as regards the agreement or adjustment pleaded by the judgment-debtor and after deciding upon its truth and validity. Costs in all the Courts up-to-date will abide the event and should be provided for in the revised order to be passed by the District Munsif of Bellary.

C.R.K./K.S. *Order set aside.*

A. I. R. 1937 Madras 291

PANDRANG ROW AND VENKATARAMANA RAO, JJ.

T. S. Ramaswami Iyengar—Accused—Applicant.

v.

Sivakasi Municipality—Respondent.

Criminal Revn. No. 185 and Referred Case No. 15 of 1936, Decided on 5th November 1936, referred by Sess. Judge, Madura, D/- 21st February 1936.

Madras District Municipalities Act (5 of 1920), Sch. 4, R. 30, Cl. (2)— Prosecution under—It is incumbent upon prosecution to establish affirmatively that tax was legally leviable on accused—It is also open to accused to plead and prove that he is not liable to pay tax and as such not liable to be prosecuted.

Ordinarily where a person is prosecuted for any criminal offence it is incumbent upon the prosecution to affirmatively prove that an offence has been committed, and if prima facie proof has been let in by the prosecution, it is open to the accused to plead and prove that he has not committed any offence. The fact that the prosecution has been launched under the provisions of a special Act would not displace this elementary rule unless there are provisions in the said Act to the contrary. There is nothing in the provisions of the District Municipalities Act which would relieve the prosecution of the onus of proving that an offence has been committed or negativing the right of the accused to plead that he has not committed any offence. So it is incumbent upon the prosecution to establish affirmatively that the profession tax was legally leviable from the accused and it is also open to the accused to plead and prove that he is not liable to pay the tax and therefore he is not liable to be prosecuted under R. 30, Cl. (2), Sch. 4 of the Act: *A I R 1924 Mad 389*; *A I R 1923 Mad 847*; *A I R 1928 Mad 682* and *A I R 1929 Mad 600, Rel. on.*

[P 291 C 2; P 292 C 1, 2; P 293 C 1]

Parakat Govinda Menon — for the Crown.

B. Sitarama Rao and *K. P. Ramakrishna Iyer*—for Respondent.

Venkataramana Rao, J.—This Criminal Revision Case arises out of a reference made by the Sessions Judge of Ramnad in regard to a prosecution for non-payment of profession tax under the District Municipalities Act, 5 of 1920. One Mr. T. S. Ramaswami Iyengar was prosecuted as the property guardian and manager of the estate of a lunatic Thenammal for non-payment of an alleged profession tax under R. 30, Cl. 2, Sch. 4, District Municipalities Act. The case for the prosecution is that the said lunatic Thenammal was residing within the limits of the Sivakasi Municipality, that profession tax was payable in respect of the income alleged to have been received by her, and T. S. Ramaswami Iyengar who is representing her estate ought to pay the said tax. Under R. 19 (1) he was asked to submit a return showing the income. He submitted a return stating that he was not liable to pay the profession tax on the ground that he was not residing within the local limits of the Municipality and even otherwise the property tax in respect of the estate has been paid and in any event profession tax could not be levied. But the Municipal Council overruled his objection and instituted this prosecution. He raised the same defence before the Sub-Magistrate of Virudunagar but he overruled his defence and convicted him. This conviction was confirmed by the joint Magistrate of Sivakasi. Revision was preferred against the said order to the Sessions Judge of Ramnad who was of opinion that it was open to him to raise the said defence, but however he referred the matter to us under S. 438, Criminal P. C.

Two questions fall to be decided, namely (1) whether it is open to the accused in a prosecution under R. 30, Cl. 2, Sch. 4, District Municipalities Act, to plead that the tax is not leviable; and (2) whether it is not incumbent upon the prosecution to establish affirmatively that the tax is payable and the default committed in payment of the tax and an offence has been committed. Ordinarily where a person is prosecuted for any criminal offence it is incumbent upon the prosecution to affirmatively prove that an offence has been committed, and if prima facie proof

has been let in by the prosecution, it is open to the accused to plead and prove that he has not committed any offence. The fact that the prosecution has been launched under the provisions of a special Act would not displace this elementary rule unless there are provisions in the said Act to the contrary. So far as we have been able to see, there is nothing in the provisions of the District Municipalities Act which would relieve the prosecution of the onus of proving that an offence has been committed or negativing the right of the accused to plead that he has not committed any offence. Mr. Sitarama Rao has not been able to show us any provision excepting R. 28, Sch. 4. So far as that rule is concerned, it only states that where an assessment has not been objected to, or on objection the assessment has been confirmed, it is treated as final. But the said finality is only for the purpose of the Act and it has been held that the said finality would not prevent a person from impeaching the legality or validity of the assessment in a civil Court. So far as the right of the Municipality to levy any tax is concerned, they must strictly conform to the provisions of the Act. If they do not do so, they have no right to enforce the tax. In fact S. 354 says that a charge can be validly imposed if the provisions of the Act are substantially complied with. If not, there is no jurisdiction to levy it. The imposition of a tax on a person not taxable under the Act would be a substantial disregard of the provisions of the Act and in a suit for refund of the tax it is open to a person to prove that he is not taxable under the Act. We do not see why a different principle should apply in the case of a criminal prosecution and how a person can be convicted of a criminal offence for non-payment of a sum which he is not legally liable to pay. If Mr. Sitarama Rao's argument is to be pushed to its logical conclusion, it comes to this : that when once the Municipality imposes an assessment, it becomes final ; the assessee must pay the tax and then go to a civil Court and in the meanwhile if he is prosecuted criminally he must undergo punishment even though ultimately the civil Court may give him redress. It will be a sorry state of affairs if such were to be the state of the law. But there is nothing in the provisions of the District Municipalities Act to countenance such a proposition as is contended for by Mr. Sitarama Rao. There is clear authority for the view that we are now taking. In 45 M L J 731,[1] Krishnan, J., in connexion with a prosecution under S. 288, Madras City Municipal Act, made the following observations :

> There is finally an argument used by the Magistrate in support of the judgment, namely, that as the accused did not go to the Standing Committee and seek redress before them, it should be taken as settled that the accused is bound to pay the tax imposed upon him, that it has become final under the law and that the Magistrate could not question its legality. I am unable to agree with this view because the accused is being prosecuted for an offence for non-payment of the license fee and he is entitled to say that he is not bound to pay it. There is no kind of estoppel in a criminal case as the Magistrate seems to think. The prosecution must establish affirmatively to his satisfaction that the tax was payable and that there was a default in payment of the tax. The fact that the accused did not appeal to the Standing Committee cannot be treated as in any way preventing him from raising the plea before the criminal Court, where he is sought to be convicted of an offence by the prosecutor.

Devadoss, J. cited with approval the above observations of Krishnan, J., with reference to a prosecution under S. 338, District Municipalities Act, and observed thus in 51 Mad 876[2] at 884 :

> In order to sustain a conviction it must be shown that the accused violated a legal order which a public servant or a statutory body was authorized under the law to pass. I have no hesitation in holding that, where an act is *ultra vires* a statutory body, whether it be of the Chairman or of the whole Council, the Court which is asked to convict a person for the violating of the order of the statutory body is not prevented from considering the legality of the order.

We may also observe that this is the view taken by Phillips and Madhavan Nair, JJ., in 51 Mad 866,[3] and also by Waller and Krishnan Pandalai, JJ., in 52 Mad 714[4] with the reference to S. 221, Madras Local Boards Act. In our opinion this is the correct view. We are therefore clearly of the opinion that it is incumbent upon the prosecution to establish affirmatively that the profession tax was legally leviable from the accused and it is also open to the accused to plead and

1. *In re* Smith, A I R 1924 Mad 389=81 I C 72=25 Cr L J 584=45 M L J 731.
2. Chairman, Municipal Council, Chidambaram v. Thirunarayana Ayyangar, A I R 1928 Mad 847=110 I C 454=29 Cr L J 710=51 Mad 876=55 M L J 566.
3. *In re* Gopayya, A I R 1928 Mad 682=110 I C 233=29 Cr L J 691=51 Mad 866=55 M L J 27.
4. *In re* Rahim Sahib, A I R 1929 Mad 600=1929 Cr C 56=118 I C 278=30 Cr L J 911=52 Mad 714=57 M L J 317.

prove that he is not liable to pay the tax and therefore he is not liable to be prosecuted under R. 30, Cl. 2, Sch. 4, District Municipalities Act. But none of the Magistrates have gone into the matter on the merits. However having regard to the triviality of the amount involved in this case, we do not think this is a fit case for sending the case back for re-trial. We therefore quash the conviction and the sentence and acquit the accused.

C.R.K./S.C. *Conviction set aside.*

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* A. I. R. 1937 Madras 293

VARADACHARIAR, J.

Ellappa Naicker and *others* — Petitioners.

v.

Sivasubramanian Maniagaram—Opposite Party.

Civil Revn. Nos. 403 and 404 of 1934, Decided on 14th August 1936, from proceedings of Dist. Collector, Tinnevelly, D/- 13th November 1933.

(a) Mortgage—Extinguishment—Agreement to sell to mortgagee mortgaged property—Unless title in property mortgaged passed to mortgagee, mortgage is not discharged even if possession is already transferred.

Where in pursuance of an agreement to sell certain mortgaged property to the mortgagee, possession is transferred to the mortgagee but the title to the property intended to be sold in discharge of the mortgage debt has not passed to the mortgagee, the mortgage cannot be deemed to have been extinguished. [P 294 C 1]

(b) Madras Estates Land Act (1 of 1908), Ss. 131 and 205—Order of Collector on petition under S. 250 against order of Sub-Collector on application under S. 131—Revision is competent.

Where the Collector passes an order on petition under S. 205 against the order of the Sub-Collector on application under S. 131, the High Court can interfere in revision, though it is doubtful as to whether the revision is to be of the Collector's order or of the Sub Collector's order: *A I R 1919 Mad 672* and *A I R 1921 Mad 157, Rel. on.* [P 294 C 1]

*** (c) Civil P. C. (1908), O. 3, R. 2 (a), (b)—Person merely looking after factory on behalf of another—He is not recognized agent of such another for presenting petitions specially in matters not connected with factory—"Carrying on business" in Cl. (b) is used in restricted sense as relating to commercial business.**

Under S. 20, Civil P. C., and Cl. 12, Letters Patent, Madras, the expression "carrying on business" is used in a restricted sense, viz., as relating to commercial business. The same interpretation should be put upon that expression in O. 3, R. 2, Civil P. C. Hence a person who is merely looking after factory of another is not a recognized agent of such another within the meaning of O. 3, R. 2 (a) or (b), specially for purposes of presenting petitions in matters not relating to the factory. Presentation by such person is no valid presentation: *A I R 1935 Mad 786, Rel. on.* [P 294 C 2]

T. M. Krishnaswamy Aiyer and *A. Balasubramania Aiyer*—for Petitioners.

B. Jagannadha Doss—for Opposite Party.

Facts.—Certain lands in a zamindari were sold for arrears of rent under the provisions of the Madras Estates Land Act and the highest bid was accepted. Later the amount required to set aside the sale was deposited in the name of one *V* and two others by a person who represented to be their agent with an application requesting that the sale be set aside as the depositors had an interest in the land by way of a prior mortgage. The auction-purchaser contended that the alleged mortgage had been discharged. On evidence before the Deputy Collector it was found that the person who deposited the money in the name of the depositors and applied for setting aside the sale had no power of attorney and therefore could not act for the depositors and that his presentment of the application and the amount to the Court was invalid. The Deputy Collector held that the deposit and the application was valid but holding that the mortgage had been discharged and therefore the depositors had no interest confirmed the sale to the auction-purchaser. The matter was taken in revision before the District Collector under S. 205, Madras Estates Land Act, who confirmed the order. This Revision Petition was filed against that order of the District Collector.

Order.—These petitions ask for the revision of two orders passed by the District Collector of Tinnevelly, in petitions presented to him under S. 205, Estates Land Act, against the orders of the Sub-Collector passed on two applications under S. 131, Estates Land Act. The application to the Sub-Collector purported to be made on behalf of a mortgagee of the holding, a portion whereof had been sold for arrears of rent. An objection was raised before the Sub-Collector that the applications should not be treated as properly presented, because Subbaya Naidu who purported to present the petitions was not an agent of the mortgagee in the sense contemplated by Ss. 36 and 37 of the old Civil P.C., corresponding to Rr. 1 and 2, O. 3

of the present Code. The Sub-Collector however treated that objection as not fatal; but, on the merits, he was of opinion that as deposed by the Village Officers who had been examined as witnesses on the counter-petitioner's side, the mortgage relied on in support of the applications must have been discharged by a subsequent arrangement between the mortgagor and the mortgagee. It does not appear to have been brought to the notice of the Sub-Collector that even admitting every statement of the counter-petitioners' witnesses to be true, no title has as yet been conveyed to the mortgagee in respect of the portion proposed to be sold to him and even the transfer of possession to him of the properties so intended to be sold would not in the present state of the law vest the title in him. If the title in the portion intended to be sold in discharge of the mortgage debt had not passed, it is impossible to hold that the mortgage had been extinguished either. It was no doubt at one time held by a Full Bench of this Court that the transfer of possession in pursuance of an agreement to sell would suffice to convey title even in the absence of a registered deed of sale, but that view has now been overruled by a decision of the Privy Council.

I regret to find that even before the District Collector this matter does not seem to have been clearly stated. Some objections under the Evidence Act and under the Civil Procedure Code are all that appears from his order to have been taken and I see no reason to think that he was not justified in overruling those objections. It has been argued before me that it is open to this Court, to interfere in revision and make the correct order. The decision in 42 Mad 310[1] and the decision of the Full Bench in 44 Mad 554[2] would no doubt justify my interference notwithstanding some doubt as to whether the revision is to be of the Collector's order or of the Sub-Collector's order. But Mr. Jagannadha Doss, the learned counsel for the respondent, insists that if I consider myself at liberty to examine the correctness of the Sub-Collector's order so far as it is against the petitioner, I should in fairness also consider the correctness of his order so far as it is against the respondent, i. e., of the view taken by the Sub-Collector that the petition was validly presented. It will be open to me to interfere in revision only on the footing that the application under S. 131 was a judicial proceeding. If it is to be so regarded, it is obvious that the presentation of the petition must be held to be governed by the provisions of the Civil Procedure Code including those enacted in Rr. 1 and 2, O. 3. That those rules were intended to be applicable to proceedings under the Estates Land Act is made clear by sub-cl. (c), S. 192, where the only modification made in S. 37 of the old Code is by substituting the words "whether resident or not" for the words "not resident."

It is impossible to hold that Subbaya Naidu who presented the petition comes under Cl. (a), R. 2. Nor is it possible for me to hold that he will come within the terms of Cl. (b). On his own statement as P. W. 1, he is merely looking after a factory on behalf of the mortgagee. He no doubt adds "I do general business for my master in the off season" and also says that he has personally asked the mortgagor for payment of the mortgage amount. Mr. Krishnaswami Ayyar argues that on this statement he must be held to be "carrying on business" for the mortgagee. I am unable to accede to this contention. It has been held in cases dealing with S. 20, Civil P. C., and Cl. 12 of the Letters Patent that the expression "carrying on business" is used in a restricted sense, viz., as relating to commercial business. Having regard to the context and purpose, the same interpretation should be put upon that expression in O. 3, R. 2, Civil P. C.; sub-cl. (b) also requires that the application must relate to matters connected with such trade or business only. It would follow that the presentant of the petition could at best represent his master only in respect of matters relating to the factory but not in respect of the management of his land or the collection of money due to him under the mortgage. My attention has been drawn by Mr. Jagannada Doss to the judgment of King, J. in A I R 1935 Mad 786 confirmed in L. P. A. 62 to 64 of 1935[3] where it has been

1. Ramasami Goundan v. Kali Goundan, A I R 1919 Mad 672=52 I C 634=42 Mad 310=36 M L J 571.
2. Sundaram v. Mamsa Mavuthar, A I R 1921 Mad 157=63 I C 937=40 M L J 497=44 Mad 554 (F B).
3. Modono Mohono Deo v. Kunja Behari Ananga Bhima Deo, A I R 1935 Mad 786=158 I C 891; confirmed on appeal in A I R 1937 Mad 239=165 I C 659=71 M L J 604.

held that an execution application presented by a vakil without a vakalat is no presentation at all in the eye of the law. The reasoning of the learned Judges in that case is to a considerable extent applicable to the present case. I am therefore unable to say that this is a case in which I will be justified in interfering in revision though, I am of opinion that the Sub-Collector was not right in his view that according to the evidence adduced before him the mortgage in favour of the petitioner's master had been discharged. The Revision Petition must accordingly be dismissed with costs.

C.R.K./K.S. *Petition dismissed.*

A. I. R. 1937 Madras 295

VENKATARAMANA RAO, J.

Annamalai Pathar — Appellant.

v.

Sri-la-sri Vythilinga Pandara Sannadhi Avergal and *another*—Respondents.

Second Appeal No. 162 of 1932, Decided on 4th May 1936, against decree of Dist. Court, East Tanjore, in A. S. No. 10 of 1930.

(a) Limitation Act (1908), Art. 143—Incidents of Kasavargam tenancy—Alienation by tenant causes forfeiture of tenancy—Landlord has right to recover possession from the moment forfeiture is incurred—No overt act is necessary—Art. 143 applies and time begins to run from date of forfeiture, that is from date of alienation.

Some of the incidents of Kasavargam tenancy are (1) the Kasavargamdar is not entitled to alienate the land by sale or mortgage but the tenancy passed by inheritance to his heirs subject to the same conditions of tenure, and (2) on alienation the landlord is entitled to evict the alienee without any notice to quit. The effect of an alienation by a Kasavargamdar is to cause a forfeiture of the tenancy and the alienee does not acquire status of the tenant unless and until he is recognized as such by the landlord and thus the landlord has got a right to recover possession the moment the forfeiture is incurred, and no overt act, i.e., no act or intimation of election to avoid the lease is necessary before bringing an action of ejectment. Under such circumstances Art. 143, Lim. Act, applies and limitation begins to run from the date of the forfeiture if incurred, i. e., the date of alienation of the property, unless the lessor by a positive act affirms the tenancy and thereby waives the forfeiture: *Case law discussed* and *English law referred.* [P 297 C 2; P 298 C 1, 2]

(b) Limitation Act (1908), Arts. 139 and 143—Art. 139 applies where overt act is necessary to determine lease after forfeiture but before landlord can sue for possession—Art. 143 applies where forfeiture itself gives rise to action for possession.

Both Arts. 139 and 143 apply to the case of landlord and tenant though their operation is different. If it is necessary that forfeiture should be followed by an overt act determining the lease before the landlord can sue for possession, the forfeiture and the overt act determine the lease and Art. 139 would apply and the landlord will have 12 years to recover possession from the time when the lease is determined by the overt act. But where forfeiture itself gives rise to an action for possession at once, Art. 143 would apply. If a period of 12 years is allowed to elapse from the time the right to sue for possession has accrued, the tenant acquires title to hold the land absolutely by the operation of S. 28, Lim. Act. But if the landlord waives the forfeiture, he can wait until the termination of the lease in cases where the lease is terminable otherwise and take advantage of Art. 139. [P 299 C 1]

K. Rajah Ayyar—for Appellant.

K. Narasimha Ayyangar—for Respondents.

Judgment.—This is a suit for recovery of possession of the suit site and the value of trees alleged to have been cut and removed by the servants of defendant 1. The suit property is Town Survey No. 726 in Mayavaram town and forms part of the village Abisheka Kattalai which belongs to the temple of Sri Mayuranathaswami whereof defendant 1 is the trustee, defendant 2, being alleged to be a lessee under him. The pymash numbers of the said site are 1234 and 1235. The entry relating to No. 1235 in the pymash account shows that a portion thereof was in the occupation of one Samu Mudali who was described as Kasavargam Samu Mudali. The learned District Munsif inferred from this that in 1829 Samu Mudali was occupying a portion of Pymash No. 1235, as a Kasavargam tenant of the temple and the learned District Judge also concurs with the District Munsif. But in or about 1837 Samu Mudali purported to sell half of both Pymash Nos. 1234 and 1235 as absolute owner by a deed of sale dated 25th December 1837 to one Somu Mudali. The sale deed recites that Somu Mudali was already in possession of a half of the said survey numbers by virtue of a gift and the remaining half was being sold to him. Thus by 1837 Somu became the absolute owner of both survey numbers and was in possession and enjoyment thereof. In the sale deed there is no reference to the said lands or any portion thereof being held on Kasavargam tenure. From the date of sale the said property appears to have continued in the family of Somu Mudali till about 1884 when there was a sale of the said property in favour of the plain-

tiff's father by one Parvathi Anni, widow of one Rangaswami Mudali, brother of Somu Mudali. It appears that during the lifetime of Somu Mudali he effected two mortgages once in 1880 and again in 1882. It was to discharge the mortgage of 1882 that Parvathi Anni sold the said property. After the death of the plaintiff's father at a family partition in 1900 the suit property fell to the share of the plaintiff. The case of the plaintiff is that up to 1927 it was in his enjoyment when defendant 1's servant unlawfully trespassed upon the land and dispossessed him. He traces his title and ownership to the suit property from Somu Mudali. Defendant 1, trustee pleaded that the suit property belonged to the temple and continued to belong to it, that Samu Mudali was in occupation of a portion thereof

in consideration of his doing service to the temple on festival occasions and also in consideration of his giving coconuts to the temple from the trees standing thereon on festival and other occasions, i. e., as a Kasavargam tenant,

that Somu Mudali was similarly in occupation doing the same service but after his death the properties came into the possession of the temple and continued to be in its possession. He denied that the plaintiff or his father was in possession and also the trespass alleged. It will thus be seen that on the pleadings the title asserted on either side was one of absolute ownership. The written statement clearly indicates that after Samu Mudali's death the Kasavargam tenancy came to an end and the property was not in the possession of anybody on Kasavargam tenure. The issues do not raise any question of tenure. Issues 1, 2 and 5 raise the question of the plaintiff's title as alleged in the plaint and his possession within 12 years before suit and also acquisition of title by prescription by the plaintiff. If at all the question of Kasavargam tenancy may be said to be involved in the issue relating to prescription. The learned District Munsif on a review of the entire evidence, in a carefully considered judgment found that after the site had passed into Somu's possession none had been doing any service to the temple, that he, his brother and his brother's widow were enjoying it as their absolute property, that after its sale to the plaintiff's father in 1884, he was enjoying it as his private property and that after his death, the plaintiff's family was enjoying it as such, that the temple was never in possession of the property within 12 years before suit and he acquired title thereto by adverse possession.

The learned District Munsif in discussing the question of adverse possession observes though from Ex. IV-b Samu Mudali appeared to be a Kasavargam tenant in regard to a portion of pymash No. 1235, still from the fact of his dealing with both the pymash numbers it could fairly be presumed that he occupied the entire suit property as a tenant, but the tenancy became forfeited on alienation, that Somu was not in possession as a tenant and even assuming that Somu and his brother Rangaswami were Kasavargam tenants and after Rangaswami's death the property was inherited by his widow as such a tenant, the tenancy must have been determined on the alienation of the suit land by Rangaswami's widow, Parvathi Anni, to the plaintiff's father and that to the knowledge of the temple authorities the site was enjoyed by persons who were not Kasavargam tenants. He accordingly held that if the tenancy is deemed to be determined by the alienation the temple's right was lost under Art. 139, Lim. Act, and in any event it must be held to be barred by Art. 143 and the tenant must be deemed to have acquired indefeasible right to the property. The learned District Judge concurred in every one of the conclusions of the learned District Munsif save on the question of adverse possession. He said:

As the learned District Munsif says the presumption is that he (Samu) came into possession of it as a tenant; and I think it may also be fairly presumed that his tenancy of the whole of the two numbers was the same as the tenancy which he undoubtedly had of a portion of 1235, i. e., a Kasavargam tenancy. The argument which was addressed to me for the temple on the question of adverse possession went on the assumption that Samu Mudali was a Kasavargam tenant of the whole of the land now in suit.

But he held that the tenancy was not forfeited on alienation and that the temple could have in 1927 called upon the representatives of the original tenant to render the Kasavargam service for 1927 and on their refusal could have sued to eject them. He was also of opinion that though the agents of defendant 1 might have knowledge that the land was being in the possession of the plaintiff's father there were no grounds for presuming that the trustees must have realized that the plaintiff and his father were claiming to hold adversely to the temple. He finally came to the conclusion that the plaintiff has not ac-

quired title by prescription and dismissed the suit. Mr. Rajah Ayyar on behalf of the plaintiff contends that on the concurrent findings of both the lower Courts the alienation of the suit property having taken place in 1836, the tenancy, such as it was, must be deemed to have come to an end and the right to possession of the temple became barred by Art. 143 and the plaintiff and his predecessor-in-title have acquired title by prescription.

It seems to me that the inference of both the lower Courts that Samu Mudali was in occupation of both the pymash numbers as a Kasavargam tenant is not correct. In the first place from the mere description of Samu Mudali as a Kasavargam Samu Mudali in Ex. IV-b, it is not safe to infer that Samu Mudali was occupying the particular plot as a Kasavargam tenant under the temple. From the treatment of the entire property as the absolute property by Samu Mudali so early as 1837, the presumption would seem to be that the entire property was not held on a Kasavargam tenure. Assuming that Samu Mudali held the entire plot as a Kasavargam tenant on the date of alienation in favour of Somu, did Somu after alienation hold the same as a tenant? That the property came into the possession of Somu is admitted in the written statement. To say the least, the plea of Pandarasannadhi in this behalf is disingenuous. There is in my opinion a distinct admission of the alienation in favour of Somu, but to get over the effect of alienation, service to the temple was alleged but both the Courts have found that the said allegation was false, and that neither he nor his members of the family did any such service. Thus if to the knowledge of the temple possession came into the hands of the alienee of Samu and he and his successors were not doing any service to the temple, but on the other hand they were dealing with the property as their own, would it not be legitimate to presume that even assuming in its inception Samu came to be in possession as a Kasavargam tenant of a portion of pymash No. 1235, by the date of the alienation by Samu to Somu, the entire property was not the subject of any tenure and Samu came to own the property as absolute owner and there was a grant in favour of Samu by the temple. There is nothing to prevent such a presumption being made because the property belonged to the temple: *vide* 46 Bom 481[1] at pp. 487 and 488.

Assuming the entire property down to the date of alienation in the hands of Somu was held by him as a Kasavargam tenant, the question is, what is the effect of an alienation by him as a Kasavargam tenant or even assuming Somu was such a tenant, what is the effect of an alienation by his successors? The incidents of a Kasavargam tenancy in districts in which it prevails and especially in the Tanjore District with which this second appeal is concerned, so far as they have been ascertained by judicial decisions may be thus stated: (1) The Kasavargamdar has no proprietary interest in the land which he occupies; (2) he is the proprietor of the superstructure if any he built thereon and is entitled to compensation for the value of the superstructure on eviction; (3) he and his heirs are entitled to occupy the land so long as he or they perform the service and are willing to do so, 22 M L J 1;[2] (4) mere cessation of service does not put an end to tenancy. He forfeits his right to occupy the land only if he refuses to perform service: *vide* 14 I C 689.[3] Therefore there must be refusal by the tenant before the landlord is entitled to evict him; (5) the Kasavargamdar is not entitled to alienate the land by sale or mortgage but the tenancy passes by inheritance to his heirs subject to the same conditions of tenure, 22 M L J 1;[2] (6) on alienation the landlord is entitled to evict the alienee without any notice to quit: *vide* 14 Mad 98.[4]

The effect of the alienation therefore by the Kasavargamdar is to cause a forfeiture of the tenancy and the alienee does not acquire the status of a tenant unless and until he is recognized as such by the landlord. Thus the landlord has got a right to recover possession the moment the forfeiture is incurred. There is authority for the position that in such circumstances Art. 143, Lim. Act, may be applied. In 58 M L J 89,[5] the learned

1. Magniram Sitaram v. Kasturbhai Manibhai, A I R 1922 P C 163=66 I C 162=49 I A 54=46 Bom 481 (P C).
2. Natharsa Rowther v. Amirtham, (1912) 22 M L J 1=12 I C 414.
3. Saminatha Iyer v. Marimuthu, (1912) 14 I C 689.
4. Subbaraya v. Nataraja, (1891) 14 Mad 98.
5. Ayyaswami Pathar v. Manavikrama Zamorin Rajah Avergal, A I R 1930 Mad 430=124 I C 273=58 M L J 89.

Chief Justice and Cornish, J. dealt with case of a customary tenure in Malabar. His Lordship the Chief Justice in the course of the judgment observed thus ;

The Subordinate Judge found that, as the tenure was determined by forfeiture, the plaintiff, the respondent here was entitled to resume the properties ; but with regard to the question of limitation he held that as the alienation took place in 1900 the forfeiture was incurred then and as the suit was instituted more than 12 years after that, it was clearly barred by Art. 143, Lim. Act .... His plaint is quite clear and the claim is based upon a forfeiture by reason of alienation and nothing else. In this Court we intend to confine ourselves to that claim. The article applicable is clearly Art. 143 and limitation commenced to run from the date of alienation. In my view, the respondent's claim in the Court below was clearly barred.

This is also the view taken in two earlier cases, 15 Mad 123[6] and 38 M L J 275.[7] But it is contended by Mr. K. S. Krishnaswami Iyengar that the said decisions are wrong, that Art. 143 would not apply to the case of a landlord and tenant but Art. 139 would ; that for the application of Art. 143 mere forfeiture will not do but it should have been perfected by an overt act and that as there was no determination of the tenancy by an overt act following the alleged forfeiture the plaintiff or his predecessor in title has not acquired any title to the property by lapse of time. In my opinion this contention is untenable. The effect of a forfeiture by reason of the breach of the conditions in a lease is thus stated by Redman on Landlord and Tenant at pp. 579 and 580 :

An act or default whether in terms defeating the estate or giving a right of re-entry does not absolutely determine the lease but makes it voidable at the election of the landlord alone and not of the tenant who may not take advantage of his own wrong. And the landlord must by some unequivocal act evince his intention to avoid it, such as commencing proceedings in ejectment.

Thus it will be seen that no overt act i. e., no act or intimation of election on the part of the plaintiff to avoid the lease is necessary before bringing an action of ejectment, the action itself being treated as manifestation of an election to avoid the lease. But under S. 111, T. P. Act, there must be an overt act signifying the landlord's intention to determine the lease and the suit is liable to be dismissed in the absence of proof of such an act. But Courts in India have applied the English rule to cases of tenancies before the Transfer of Property Act or to cases which are not governed by it. The effect of forfeiture in Indian law is accurately summed up by Sadasiva Aiyar, J. in 38 Mad 445[8] at p. 448 :

The provision in S. 111, T. P. Act (about a further act being necessary besides the breach of the covenant in the forfeiture clause before a suit could be brought) was probably a relic brought over into that Indian statute from the antiquated technicality of the old English Common Law which required the formality of re-entry by the lessor of the leased lands before the lease could be determined for breach of covenant ; but this formality is unnecessary in the case of leases not governed by the Transfer of Property Act. As said in 34 Mad 161,[9] the forfeiture is complete when the breach of the condition or the denial of the title occurs. But as it is left to the lessor's option to take advantage of it or not the election was not a condition precedent to the right of action, but the institution of the action was simply a mode of manifesting the election.

I would put it even more strongly by saying that, as the breach of the condition gives rise to a cause of action at once, there is strictly no question of election between two different rights, but there is only an election whether the lessor is to retain the right created or to give up the right. Thus the legal position is this. In a case which is not governed by S. 111, T. P. Act, a forfeiture though it does not determine the lease *ipso facto*, gives an immediate right to sue for possession. No doubt it is open to the landlord until the institution of the suit to waive the forfeiture if he does not in the meantime express any intention to claim it. The reason of the rule is, the happening of the cause of forfeiture only renders the lease void as to the lessee. It may be affirmed by the lessor ; then the rights and obligations of both parties will continue without regard to the forfeiture, but until there is a positive act affirming the tenancy and thereby waiving the forfeiture, the right to sue for possession by reason of the incurring of the forfeiture will continue to subsist in the landlord and if he does not avail himself of it his right will be barred. But if he does any act indicating his election to waive the forfeiture, his right of action is barred and he must wait until forfeiture is again incurred or the lease is determined otherwise.

6. Madavan v. Athi Nangiyar, (1892) 15 Mad 123=2 M L J 81.
7. Zamorin Rajah of Calicut v. Unikat Karnavan Samu Nair, A I R 1922 Mad 290=55 I C 380 =38 M L J 275.
8. Korapalu v. Narayana, A I R 1915 Mad 813= 20 I C 930=38 Mad 445=25 M L J 315.
9. Padmanabhayya v. Ranga, (1910) 34 Mad 161=6 I C 447=20 M L J 930.

If these principles of substantive law are borne in mind, it will be seen that both Arts. 139 and 143 apply to the case of landlord and tenant though their operation is different. If it is necessary that forfeiture should be followed by an overt act determining the lease before the landlord can sue for possession, the forfeiture and the overt act determine the lease and Art. 139, Lim. Act, would apply and the landlord will have 12 years to recover possession from the time when the lease is determined by the overt act. But where forfeiture itself gives rise to an action for possession at once, Art. 143 would apply. If a period of 12 years is allowed to elapse from the time the right to sue for possession has accrued, the tenant acquires title to hold the land absolutely by the operation of S. 28, Lim. Act. But if the landlord waives the forfeiture, he can wait until the termination of the lease in cases where the lease is terminable otherwise and take advantage of Art. 139. It is wrong to view the question as one of adverse possession. Art. 143, Lim. Act, is based on Ss. 2 and 3 (1833, 3 & 4 Will. IV, Ch. 27) and the relevant provisions run thus:

2. No person shall make any entry or distress or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within 20 years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

3. . . . And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

On a construction of this statute it has been held that where an estate is liable to be determined by forfeiture time prima facie runs from the date of forfeiture but under S. 4 of the said statute (a provision corresponding to which is not found in the Limitation Act) if advantage is not taken of the forfeiture it does not run till the estate falls into possession. In (1878) 8 Ch D 709,[10] a question arose as to when the right to sue for possession accrued to a landlord under the said statute to recover possession of property let under a voidable lease. Thesiger, L. J. discussed the effect of the said provisions 2 and 3 and observed thus:

Where a lease is made in breach of trust, the avoidance of such lease takes effect ab initio, and may render the lessee liable to account for back profits, while the lessee under a voidable lease has a lawful possession until the lease is actually avoided and is not liable in an action for mesne profits for anything prior to the avoidance. It may be said therefore that in the former case the possession is adverse throughout, while in the latter it only becomes adverse when the determination to put an end to it is communicated either by service of writ or otherwise. But the distinction referred to, although existing in point of fact, does not necessarily carry with it different legal consequences so far as the Statute of Limitation is concerned. That statute has got rid of the doctrine of adverse possession and renders immaterial the inquiry into the nature of the possession of the person against whom the claim to land or rent is made. The question under it, and upon which the case in *Magdalen College* v. *Attorney-General*[11] and the cases following it proceeded, is, whether 20 years have elapsed since the claimant's right of entry or action accrued..... A right to issue a writ of ejectment to recover land held under a voidable lease, without proof of any prior act evidencing an election to avoid it is a right to bring an action within the meaning of the second section of the statute in question.

See also (1834) 3 M & K 325,[12] a case to which S. 4 of the Statute is not applicable. And the effect of the statute has been held to be to make a parliamentary conveyance of the land to the person in possession after that period of 20 years has elapsed: *vide* (1845) 14 M & W 39, at p. 42=153 E R 380,[13] at p. 381.

No doubt in (1879) 4 A C 324,[14] at p. 336, the case in (1878) 8 Ch D 709[10] was affirmed on the ground that the lease was void differing from the Court of appeal, but the observations of Theisiger, L. J. remain unaffected and they would directly apply to cases coming under Art. 143, Lim. Act. Therefore the question under that Article is whether 12 years have elapsed from the date of forfeiture and not whether the tenant was holding adversely. There can be no doubt in this case that under the incidents appertaining to the Kasavargam tenure, the tenancy would determine on forfeiture; even assuming it is not ipso facto determined by forfeiture still the landlord had a right to sue for immediate

10. Governors of Magdalen Hospital v. Knotts, (1878) 8 Ch D 709=47 L J Ch 726=38 L T 624=26 W R 646.

11. (1857) 6 H L C 189=26 L J Ch 620=3 Jur (N S) 675.

12. Whitton v. Peacock, (1834) 3 M & K 325.

13. Doe D. Jukes v. Sumner, (1845) 14 M & W 39 =14 L J Ex 337=9 Jur 413=153 E R 380.

14. Governors of Magdalen Hospital v. Knotts, (1879) 4 A C 324=48 L J Ch 579=40 L T 466 =27 W R 602.

possession. Therefore on the date of alienation by Samu to Somu, forfeiture had been incurred and the temple had an immediate right to sue for possession and it cannot for a moment be doubted that the temple must have known that the property was being dealt with by Somu and his successors in title as absolute owners and the possession of Somu was admitted by the trustee himself as already stated by me; Art. 143 would therefore apply and the plaintiff's predecessors-in-title and therefore the plaintiff must be deemed to have acquired an indefeasible right to hold the land absolutely, and the defendants have no right to resist his claim. I would therefore reverse the decree of the learned District Judge and restore that of the learned District Munsif with costs throughout. Leave refused.

C.R.K./S.C. *Decree reversed.*

✻ A. I. R. 1937 Madras 300

SPECIAL BENCH

BEASLEY, C. J., MOCKETT AND LAKSHMANA RAO, JJ.

Commissioner of Income-tax, Madras—Petitioner.

v.

P. T. Chengalvaroya Chettiar and *another*—Opposite Parties.

O. P. No. 187 of 1936, Decided on 4th December 1936.

✻ (a) Income-tax Act (1922), S. 10 (2) — Lease by Government to assessee for excavating shells—Lease money payable in instalments — Instalment amount described in agreement as 'annual lease amount' — Such description of amount does not alter nature of instrument and make it rental agreement —Payment under instrument is not revenue expenditure but capital expenditure.

An income-tax assessee by a deed dated 2nd July 1930 got the exclusive right to excavate shells lying under the Government property for three years for a payment of Rs. 30,450 payable by certain instalments and described in the instrument as regards Rs. 10,150 (being one-third of the amount stated) as 'the annual lease amount.' This amount was originally allowed to be deducted by the Income-tax Officer as being payment out of revenue and not a capital expenditure. Subsequent to the decision in *A I R 1934 Mad 617 (S B)*, the allowance was cancelled and the sum was treated as capital expenditure in the hands of the assessee:

Held: that the transaction in question was exactly the same as that in *A I R 1934 Mad 617 (S B)* and that the use of the additional words 'annual lease amount' in the instrument did not alter the nature of the instrument and render it a rental agreement showing the payment to be made under the instrument a payment by way of rent and therefore a revenue expenditure and not a capital expenditure: *A I R 1934 Mad 617 (S B)*, *Foll.* [P 300 C 2; P 301 C 1]

✻ (b) Income tax Act (1922), S. 44 — Words 'tax payable' mean 'tax due to be paid,' 'tax which firm or partnership would be liable to pay if it had not been discontinued,' 'tax either found due already or will be found due in future'—Partners of discontinued firm are jointly and severally liable to be assessed in respect of profits of firm before its discontinuance.

The object of S. 44 is perfectly clear. It is to enable the tax on the profits of firm which has been discontinued to be got by the income-tax authorities and to prevent the avoidance of taxation by the discontinuance of the firm. The words 'tax payable' in the section mean 'tax that is due to be paid', 'tax which the firm of partnership would be liable to pay, if it had not been discontinued', or 'tax either found to be due already or that will be found to be due in the future.' Therefore the partners of the discontinued firm are jointly and severally liable to be assessed in respect of the profits earned by the firm before it was discontinued. [P 301 C 1, 2]

M. Patanjali Sastry—for Petitioner.

M. Subbaroya Ayyar — for Opposite Parties.

Judgment.—Two questions have been referred to us by the Commissioner of Income-tax, viz. :

(1) Whether the sum of Rs. 30,450 paid by the assessee to the Government under the instrument of lease dated 2nd July 1930 is inadmissible as a revenue expenditure; and

(2) Whether after dissolution of the partnership the Income-tax Officer had jurisdiction to assess the firm as a unit and whether S. 44 of the Act gives jurisdiction to the officer both to make a joint and single assessment or whether the individual partners alone are liable to be assessed in respect of their proportionate shares.

With regard to question 1, the facts are quite sufficiently stated by the Commissioner of Income-tax, in his letter of reference but, quite briefly, they are that the assessee by a deed dated 2nd July 1930 got the exclusive right to excavate shells lying under Government property for three years for a payment of Rs. 30,450 payable by certain instalments and described in the instrument as regards Rs. 10,150 (being one-third of the amount stated) as 'the annual lease amount.' This sum of Rs. 30,450 was originally allowed to be deducted by the Income-tax Officer as being a payment out of revenue and not a capital expenditure. Subsequently, having regard to this High Court's decision in 7 I T C 323,[1] that allowance was can-

1. U. Chengalvaroya Mudaliar v. Commissioner of Income-tax, Madras, A I R 1934 Mad 617 =152 I C 48=58 Mad 1=67 M L J 350=7 I T C 323 (S B).

celled and the sum was treated as a capital expenditure in the hands of the assessee. Hence this reference. In our view, the facts of this case are not distinguishable from the facts in 7 I T C 323.[1] There it was held that having regard to the instrument, the expenditure was an initial expenditure without which the assessee could not even have begun winning the shells and it was, therefore, a capital expenditure. We have had addressed to us a strenuous argument by Mr. Subbaroya Ayyar that there is a very material distinction between the words in the instrument in this case to those in 7 I T C 323.[1] He contends that as the words 'annual lease amount' appear in the instrument in question here and do not appear in the instrument in 7 I T C 323,[1] it renders the agreement in question a rental agreement and that full significance must be given to the words 'annual lease amount' and they must be taken as showing that the payment to be made under the instrument was a payment by way of rent and therefore a revenue expenditure and not a capital expenditure as in 7 I T C 323.[1] We are unable to see that those words make any material difference. The transaction in question is exactly the same as that in 7 I T C 323[1] and the use of the words 'annual lease amount' does not, in our opinion, alter its nature. The answer to the first question must be in the affirmative. With regard to the second question the assessment here was made by the Income-tax authorities under S. 44 of the Act which reads as follows :

> Where any business, profession or vocation carried on by a firm has been discontinued, every person who was at the time of such discontinuance a member of such firm shall be jointly and severally liable for the amount of the tax payable in respect of the income, profits and gains of the firm.

The object of that section is perfectly clear. It is to enable the tax on the profits of a firm which has been discontinued to be got by the income-tax authorities and to prevent the avoidance of taxation, by the discontinuance of the firm. The words are, in our opinion, perfectly clear but Mr. Subbaroya Iyer contends that unless an assessment upon the firm has already been made before its discontinuance, which is not the case here the partners of it cannot be assessed jointly after its discontinuance because according to him the words 'tax payable' in the section mean 'payable as the result of an assessment already made upon the firm.' If this contention is correct, it leads to a strange result. The object of the section being perfectly clear, viz., to get at the tax on the profits of the firm made before its discontinuance, and bearing in mind that that is its object, the result of the contention, if correct, would be that the tax recoverable would be less than that recoverable if the business had not been discontinued. In such a case the tax would have been upon the profits of the business, but if a separate assessment is made upon the partners separately and not jointly after the discontinuance of the business it is conceded that the tax recoverable would be less. We are unable to see why the fact that an assessment has not been made upon the firm previous to its discontinuance should bring about such a result. It seems to us that 'tax payable' means 'tax that is due to be paid'; 'tax which the firm or partnership would be liable to pay if it had not been discontinued'; 'tax either found to be due already or that will be found to be due in the future.' That being so, we are clearly of the opinion that the income-tax authorities were correct in assessing the partners of the discontinued firm jointly and severally in respect of the profits earned by the firm before it was discontinued. Question 2 is answered accordingly. The Income-tax Commissioner will get Rs. 250 costs.

C.R.K./W.D. *Reference answered.*

✻ A. I. R. 1937 Madras 301

FULL BENCH

BEASLEY, C. J., PANDRANG ROW AND KING, JJ.

In re *Muthu Moopan* and *another* — Petitioners.

Criminal Revn. Case No. 327 and Petn. No. 302 of 1936, Decided on 2nd December 1936, from order of Sub-Magistrate, Perundurai, D/- 2nd April 1936.

✻ Criminal P. C. (1898), Ss. 530, 403 and 195—Incompetency of Court — Absence of complaint under S. 195 (1) (a)—Prosecution of accused under S. 186, Penal Code—Acquittal of accused as complaint was not filed by public servant concerned under S. 195 (1) (a), Criminal P. C.—Magistrate though empowered to try offence under S. 186, Penal Code, was prevented by S. 195 of Code to take notice of offence till proper complaint was filed—Accused can be tried again on fresh complaint by proper person and such trial is not barred under S. 403 (1): *36 Mad 308=19 I C 310, Impliedly overruled.*

The accused were charged with an offence under S. 186, Penal Code. But as no written complaint was filed by the public servant concerned, as required by S. 195 (1) (a), Criminal P. C., the Court acquitted the accused. On the filing of a second complaint by the public servant concerned for the same offence it was contended that having been tried and acquitted, they cannot be tried over again for the same offence on a fresh complaint owing to the provisions of S. 403(1), Criminal P. C.:

Held: that though the Magistrate was empowered to try an offence under S. 186, Penal Code, he was prevented by S. 195, Criminal P. C., from taking cognizance of such offence unless a proper complaint was made to him. He could not therefore try the accused in view of S. 530 of the Code. The trial, the charge and the acquittal were therefore void as no such complaint was made by the public servant concerned. The second complaint was not therefore barred under S. 403, Criminal P. C., and the accused should be tried again for the same offence: *Rex* v. *Marsham*, *(1912) 2 K B 362, Rel. on*; *36 Mad 308=19 I C 310, Impliedly overruled.* [P 302 C 2; P 303 C 1]

K. Desikachari—for Petitioners.

Public Prosecutor—for the Crown.

King, J.—On 10th September 1935, the Revenue Inspector of Modakurichi firka, Coimbatore District, made a complaint to the police under S. 353, I. P. C., against two accused, Mari Mooppan and Mootha Moopan. A charge sheet was filed by the police before the Sub-Magistrate of Erode, who, after hearing the prosecution evidence, came to the conclusion that a prima facie case was made out not under S. 353 but only under S. 186. He thereupon framed a charge under that section and took the evidence for the defence. When the case came to be argued the plea was raised for the accused that the trial was illegal as S. 195 (1) (a), Criminal P. C., enacts that no Court shall take cognizance of an offence under S. 186, I. P. C., except upon the complaint of the public servant concerned or some other public servant to whom he is subordinate. The Sub-Magistrate upheld this plea and acquitted the accused. The Revenue Inspector thereupon filed his complaint in person before the Court and the case was transferred to the file of the Sub-Magistrate of Perundurai. The accused petitioned the District Magistrate to withdraw the prosecution, urging that having already been acquitted of the offence they could not under the provisions of S. 403 (1), Criminal P. C., be tried for it again. The District Magistrate refused to withdraw it. Then they raised their plea of *autrefois acquit* before the Sub-Magistrate. He naturally, with the District Magistrate's order before him, refused to entertain it. The accused have accordingly filed this revision petition in the High Court, and as there is a conflict of authority on the point in issue, the petition has been referred to a Full Bench. The material portion of S. 403 (1) runs as follows:

> A person who has once been tried by a Court of competent jurisdiction for an offence and ..... acquitted of that offence, shall, while such ..... acquittal remains in force, not be liable to be tried again for the same offence.

The conflict of authority is concerned with the expression 'Court of competent jurisdiction.' In Madras it has been held (*vide* 36 Mad 308[1]) with reference to the similar expression 'competent to try' in sub-s. 4, S. 403, that it refers only to the character and status of the tribunal, which means that a Second Class Magistrate, like the Sub-Magistrate of Erode, is always competent to try a 'second class case,' such as an offence under S. 186, I. P. C. Four other High Courts, on the other hand, Bombay, Calcutta, Allahabad and Patna, take the wider view that a Court, which tries an offender on a complaint which it is forbidden by the Code to entertain unless certain conditions are satisfied, acts without jurisdiction. I do not think it necessary to examine these cases, or to come to any final conclusion on the meaning of the word 'competent' in S. 403. I prefer to approach the problem from a slightly different direction. The accused in this case are being prosecuted for an offence. They say they have already been acquitted of that offence. Is that acquittal valid? Does it 'remain in force'? Has it ever had any force? Can a Court take any notice of it? The answer to these questions is in my opinion clear and apparent at once on a perusal of S. 530 of the Code. According to that section if any Magistrate 'not being empowered by law in this behalf' tries an offender his proceedings shall be void. The Sub-Magistrate of Erode was certainly empowered by S. 28 to try an offence under S. 186, I. P. C., but was he empowered to try these offenders for this particular offence? Clearly not, for S. 195 prevents him from taking any notice whatever of the offence until a proper complaint is filed. His trial was therefore void. His charge was void. His judgment of acquittal was void. There is nothing which the

1. *In re* Ganapathi Bhatta, (1913) 36 Mad 308=19 I C 310=14 Cr L J 214=24 M L J 463.

accused can compel the Court to recognize in support of a plea under S. 403. I accordingly hold that the order of the Sub-Magistrate of Perundurai refusing to drop the proceedings against the accused is right and would dismiss this petition.

Beasley, C. J.—I agree.

Pandrang Row, J.—I agree and wish only to add that the conclusion we have come to is in consonance with the rule of English law on the subject laid down in (1912) 2 K B 362,[2] at p. 365 by Avory, J. as follows :

It is clear that in order to plead such a plea effectually, either a plea of *autrefois acquit* or *autrefois convict*, it must appear that the defendant has been legally convicted or legally acquitted, and it is laid down in Chitty on Criminal Law, 2nd Edn., Vol. 1, p. 455, that 'the point in discussion always is whether in fact the defendant could have taken a fatal exception to the former indictment; for, if he could, no acquittal will avail him.'

C.R.K./K.B. *Petition dismissed.*

2. Rex v. Marsham; *Ex parte* Pethick Lawrence, (1912) 2 K B 362=81 L J K B 957=107 L T 89=76 J P 284=28 T L R 391.

A. I. R. 1937 Madras 303

VENKATARAMANA RAO, J.

Adivikolanu Chakrapani Rao and *others*—Appellants.

v.

Sri Rajah Venkatadri Appa Rao Bahadur Zamindar—Respondent.

Second Appeal No. 1331 of 1931, Decided on 4th March 1936, against decree of Sub-Judge, Ellore, in A. S. No. 355 of 1928.

(a) Grant—Service grant—Karnams rendering private service to zamindar for long time—Inference can be drawn that lands granted to them were for such service.

Where it is found that for a long time the Karnams were rendering private service to the zamindar, from this and from other circumstances an inference could be drawn that the lands granted to them by the zamindar were granted only for doing such service and the zamindar is entitled to dispense with the services and resume the lands. [P 304 C 2]

(b) Madras Proprietary Estates' Village Service Act (2 of 1894), S. 17 (2)—Lands granted in lieu of 'lavajamas' are service inam lands granted by proprietor within meaning of S. 17, Cl. (2).

Even where the lands are granted by the State or by the zamindar for doing public service, the theory is that the service inams were granted as wages for the performance of services and therefore it follows that once the emoluments are replaced by money salaries the lands are liable to be resumed if granted by the State, by the State ; if granted by the zamindar, by the zamindar. Therefore lands granted in lieu of "lavajamas" would be service inam lands granted by the proprietor within the meaning of S. 17, Cl. 2, Madras Act 2 of 1894: *A I R 1927 Mad 448, Doubted ; 22 Cal 938, Disting.* [P 304 C 2 ; P 305 C 1]

(c) Res judicata—Question of title is not within exclusive cognisance of revenue Court—Dismissal of previous suit by revenue Court on ground that relationship of landlord and tenant did not exist—Decision is not res judicata in subsequent suit for declaration of right to resume land granted for service inam and from adjudging the relative rights of parties.

Section 189, Madras Estates Land Act, can be a bar on a matter which is exclusively within the jurisdiction of the revenue Court. The question of title is never within the exclusive cognisance of the revenue Court. It is always open to a landlord to bring a suit in a civil Court that he is entitled to melwaram or agitate a similar question. [P 305 C 2]

A suit for a declaration that the plaintiff is entitled to resume the suit lands, that is, if the lands are granted for service inam they are entitled to recover physical possession or if melwaram alone, to recover melwaram, that is to have the full assessment imposed, is one for title and it is after establishing the right claimed in one way or the other that the relationship of landlord and tenant is constituted and any proceeding under S. 77, Estates Land Act, is maintainable in a revenue Court. Therefore a dismissal of a previous suit instituted by a person in the revenue Court on the ground, that the relationship of landlord and tenant did not exist, will not operate as res judicata in the subsequent suit for a declaration of the right of that person to resume the land and to have the relative rights between the parties adjudged: *A I R 1928 Mad 1122, Disting.*; *A I R 1920 Mad 558*; *A I R 1916 Mad 826* and *A I R 1917 Mad 195, Ref.* [P 305 C 2]

(d) Jurisdiction—Civil Court—Claim for declaration that person is entitled to impose full assessment is not covered by S. 45 Madras Estates Land Act — Civil Court alone can grant such relief.

The claim for declaration that the plaintiff is entitled to impose full assessment would not be covered by S. 45, Estates Land Act. The relief is one which the civil Court alone can grant and in so doing it can also declare what the full assessment is : *A I R 1924 Mad 833* and *A I R 1916 Mad 826, Foll.*; *A I R 1928 Mad 170, Disting.* [P 306 C 1]

(e) Limitation Act (1908), Art. 144—Melwaram right when consisting of imposition of full assessment is interest in immoveable property—Suit for recovery of such right is governed by Art. 144.

Article 144, Limitation Act, would be applicable to a suit for recovery of the melwaram right of the land by the zamindar because, when the melwaram right consists of the imposition of the full assessment it would be an interest in immoveable property within the meaning of that Article. The fact that the zamindar claims in the notice possession of the land would not preclude him from getting the lesser interest of melwaram and if the suit is instituted within 12 years of the date from which the land was resumed it is not barred. [P 306 C 2]

(f) Limitation Act (1908), Arts. 131 and 120—Suit for bare declaration of right to impose full assessment on land without consequential relief—Art. 131 applies and not Art. 120.

Even where a suit is one for a bare declaration of the right to impose full assessment on land without consequential relief, Art. 131, Limitation Act applies and Art. 120 does not apply because a bare declaration would prima facie come within the meaning of Art. 131 which is for "establishing a periodically recurring right.": *16 Mad 294, Not foll.*; *A I R 1914 Mad 377* and *7 Mad 341, Foll.*; *26 Mad 291, Disting.*; *Case law discussed.* [P 306 C 2; P 307 C 1]

V. Suryanarayana—for Appellants.

Y. Govindarajulu and *B. Lakshminarayana*—for Respondent.

Judgment.—This second appeal raises the question of the right of the plaintiff to resume certain service inam lands in the possession of the defendants in the village of Adivikolanu in the Baharzalli Pargana of the Nidadavolu estate which originally formed part of the ancient Nuzvid Zamindari. The ground of resumption was that in or about 1852 the plaintiff's predecessor-in-title granted these lands to the defendants' predecessor-in-title who were karnams of the village and who were doing personal and private services to the proprietors of the estate. Money salaries were provided for the karnams in the place of emoluments annexed to their office by putting into operation the provisions of Act 2 of 1894, and as the services have been dispensed with by the plaintiff he was entitled to resume the lands. The main question in this case is whether the suit lands were service inam lands, and when they were granted and for what purpose. The learned District Munsif who tried the suit was of opinion that they were granted in or about 1852 by the Government who were then managing the zamindari, and that they came into existence in the place of 'lavajamas' and they were not granted for any private and personal services to be rendered by the karnams to the zamindar. But the learned Subordinate Judge took a different view. He held that they were granted for doing personal services. In para. 5 of this judgment he sums up his conclusions thus :

> It is, I think, therefore beyond reasonable doubt that defendants held the suit lands on account of the service which their family was doing to the zamindar, and now that they are not doing any service to the zamindar as defendant 3 himself admits, they are, I think, liable to restore what had been granted to them as remuneration for the service.

This is a finding of fact which would not warrant my interference in second appeal. Mr. Suryanarayana contends that the learned Subordinate Judge must be deemed to have proceeded upon an erroneous view that because the karnams were doing private services to the zamindar these lands must be deemed to have been granted to them. No doubt it was held in 30 M L W 129[1] that the fact that the karnam rendered some private services to the zamindar would not make him a servant of the zamindar, and from that it cannot be inferred that any land granted by the zamindar must be deemed to be for private services. But it does not follow from that decision that the zamindar cannot grant lands to a karnam for doing private work. If for a long period they were rendering private service to the zamindar, from this and other circumstances it is open to the Court to infer that certain lands were granted by the zamindar for doing such service. The learned Subordinate Judge draws from the evidence in the case that the suit lands must have been granted by the zamindar to the defendants as remuneration for private services. If this finding is accepted the zamindar is certainly entitled to dispense with their services and resume the lands. I am not prepared to say that in arriving at this finding he committed any error which would justify interference in second appeal. In this view it is unnecessary to canvass the correctness or otherwise of the dictum of Venkatasubba Rao, J. in 50 M L J 251[2] regarding the presumption in case of service inam lands granted for private services by the zamindar.

Even assuming that these lands were granted in lieu of 'lavajamas' they would be service inam lands granted by the proprietor within the meaning of S. 17, Cl. 2, Madras Act 2 of 1894. On the finding that they were granted in lieu of remuneration for services, when money salaries were substituted for the emoluments, it is certainly open to a zamindar to resume the lands by virtue of the said provisions. The decision of the Privy

1. Secy. of State v. Chandra Mouleswara Prasada, A I R 1929 Mad 676=119 I C 305=30 M L W 129.

2. Thiruvenkatacharlu v. Shaik Altoo Sahib, A I R 1926 Mad 511=94 I C 458=50 M L J 251.

Council in 69 M L J 123[3] is decisive on this matter. At p. 125 their Lordships observe :

> The Legislature did not, however, intend to deprive a private proprietor of his right to recover the land, if it was granted by him or his predecessor in interest. This is made clear by a proviso to that section. . . . . .

Lower down they further observe :

> The main question raised on this appeal is whether the lands were granted to the karnams by the appellant's ancestor. This was the ground upon which he based his claim; and there can be no doubt that, if that ground be established, he would be entitled under the proviso, referred to above, to recover the property.

It is doubtful how far the observation of Ramesam, J. in 52 M L J 283=A I R 1927 Mad 448[4] that once a grant is shown to be for public service, the presumption is that it is irresumable, is correct. 22 Cal 938[5] is again relied on for this purpose. In that case the learned Judges had not to deal with any provision corresponding to S. 17, Cl. 2, Act 2 of 1894. This decision cannot be an authority for cases covered by the said Act. Whether the lands were granted by the State or by the zamindar for doing public services, the theory is that the service inams were granted as wages for the performance of services. This is clear from the preamble to the Madras Regulation 6 of 1831 which begins thus :

> Whereas certain emoluments derived from lands, from fees in money or grain, and from other sources, have been annexed by the State to various hereditary village and other offices, in the Revenue and Police Departments, as wages for the performance of public services. . . . . .

It follows that once those emoluments are replaced by money salaries, the lands are liable to be resumed, if granted by the State, by the State, if granted by the zamindar, by the zamindar. The next question argued by Mr. Suryanarayana is that the suits are barred by res judicata by reason of the prior judgments between the parties, viz. : (1) the decision in S. A. No. 425 of 1918 and the connected batch of cases. These suits were filed as summary suits before the Sub-Collector of Narasapur under S. 77, Madras Estates Land Act to recover arrears for Faslis 1320, 1321 and 1322. But the suits were dismissed under S. 77 on the ground that they could not be brought under S. 77, being service inam lands; the moment the services are dispensed with, they do not become raiyati lands until the defendants were admitted as raiyats, and no relationship of landlord and tenant was established by mere resumption; and therefore S. 77 would not apply to the case and the suits for recovery of rent would be barred by virtue of S. 45 of the Act. (2) The other judgment is that in S. A. No. 1828 of 1927. This related to a suit for enforcement of acceptance of pattas and it was dismissed following the above judgment in S. A. No. 425 of 1918 on the ground that no relationship of landlord and tenant was established between the parties. But the present suits are brought for the express purpose of having the relative rights between the parties adjudged. The suit is for a declaration that the plaintiff is entitled to resume the suit lands, that is, if the lands are granted as service inams, they are entitled to recover physical possession or if melwaram alone, to recover melwaram, that is, to have the full assessment imposed. The suit is therefore virtually one of title. It is only after the title is declared and the plaintiff's right of resumption on one or other of the bases stated above is established, and the plaintiff's claim for assessment is declared the relationship of landlord and tenant would be constituted. Therefore I do not think any question of res judicata arises nor does S. 189, Estates Land Act, bar the suit. Further S. 189 can only be a bar on a matter which is in the exclusive cognizance of the revenue Court. The question of title is never within the exclusive cognizance of the revenue Court.

The case in 52 Mad 332[6] relied on by Mr. Suryanarayana is distinguishable for as pointed out by Phillips, J. that under S. 57 of the Act it was the bounden duty of the Court to find on a question of title; whereas it has been pointed out in a number of cases in this High Court (*vide* 43 Mad 859,[7] 30 I C 416[8] and 34 I C 354)[9] that a question of title is for the civil

3. Chandra Mouleswara Prasada Bahadur v. Secy. of State, A I R 1935 P C 115=156 I C 1=62 I A 166=58 Mad 711=69 M L J 123 (P C).
4. Rajah of Vizianagaram v. Ramaswami, A I R 1927 Mad 448=101 I C 49=52 M L J 283.
5. Radha Prashad Singh v. Budhu Parshad, (1895) 22 Cal 938.
6. Raja Rajeswara Sethupathi v. Muthudayan Pillai, A I R 1928 Mad 1122=112 I C 406=55 M L J 379=52 Mad 332.
7. Sobhanadri Appa Rao v. D. Venkataraju, A I R 1920 Mad 558=60 I C 700=43 Mad 859=39 M L J 476.
8. Siyyadi Garu v. Visweswara Nissanka Bahadur Garu, A I R 1916 Mad 826=30 I C 416.
9. Subbanna Achariar v. Gopalakrishna Achariar, A I R 1917 Mad 195=34 I C 354.

Court and it is always open to a landlord to bring a suit that he is entitled to melwaram or agitate a similar question in a civil Court. Therefore I overrule the plea of res judicata raised in this case.

The next contention raised is that the civil Court has no jurisdiction to declare or fix the assessment due on the lands. I do not see any objection to this course either. There is no provision in the Estates Land Act to have the rent fixed except under Ss. 25, 30 and 45 of the Act. Ss. 25 and 30 obviously cannot be applied to this case; and S. 45 also would not apply. The right to kudivaram was given up by the plaintiff and the claim was limited only to a declaration that he is entitled to resume the melwaram and to impose the full assessment. The claim for a declaration that the plaintiff is entitled to impose full assessment would not be covered by S. 45 of the Act. The relief is one which the civil Court alone can grant, and in so doing it can also declare what the full assessment is. Such a declaration was granted in two cases which came up before this High Court in 47 M L J 598[10] and 30 I C 416.[8] 47 M L J 598[10] was a case almost similar to the present one. A suit was filed for a declaration that certain service inam lands were resumable and for possession thereof. The learned Judges negatived the right to ejectment but gave the plaintiff a declaration that he was entitled to the full assessment on the lands, and also declared what the full assessment was, and gave a decree therefor. In 30 I C 416[8] a similar relief was granted. I am bound by the said decisions and following them I overrule the contention. Mr. Suryanarayana relied very strongly on the decision in 27 M L W 12.[11] In that case it has been held that it would be open under S. 77, Estates Land Act, to determine what the rent is, where no rent has been previously ascertained. But as aforesaid the suit filed by the present plaintiff under S. 77 was dismissed on an objection taken by the defendants; and it does not lie in the mouth of the defendants to say now that the plaintiff must seek relief under S. 77.

10. Chidambara Gurukkal v. Sundaram Pillai, A I R 1924 Mad 833=79 I C 619=47 M L J 598.
11. Narayana Patrudu v. Manager of Peda Marangi Estate, A I R 1928 Mad 170=109 I C 869=54 M L J 564=51 Mad 228=27 M L W 12.

The last point urged by Mr. Suryanarayana is the question of limitation. His contention is that the suit was originally brought for the recovery of lands; after the decision of the first Court the plaintiff gave up the relief for the recovery of the land but contented himself with the prayer for a declaration of his right to the full assessment as will appear from the valuation in the memorandum of appeal in the lower appellate Court : *vide* p. 46 of the pleadings book. According to him therefore the suit having been instituted more than six years after the right to sue accrued, the claim for declaratory relief is barred by limitation. Even assuming that 12 years should be applied his contention is that even then the suit is barred, because the cause of action must be deemed to have accrued to the plaintiff the moment the Act 2 of 1894 was put into force in 1910 or at any rate from 30th June 1911 because in the plaints in the prior suits the causes of action for the recovery of full assessment was given as commencing from 30th June 1911. But it was pointed out in answer that in the prior suit full assessment was claimed only from 1st July 1912 : *vide* para. 10 of the judgment of the learned Subordinate Judge herein. From the pleadings in the prior suit it appears that notices were sent only in December 1911 : *vide* para. 6 of the written statement in the pleadings book in S. A. No. 425 of 1918 and Ex. B in the present suit. If it were a question of recovering actual possession of land Art. 144 would certainly apply.

I am of opinion that even if it was for recovery of the melwaram right Art. 144 would still apply. The melwaram right which consists in this case in the imposition of the full assessment would be an interest in immoveable property within the meaning of that article. The cause of action for resumption would arise only from 1st July 1912, the date on which the plaintiff signified he would resume the lands : *vide* Exs. A, B and H. Till that date the defendants will be entitled to occupy on the previous terms because it is open to the plaintiff not to put an end to the tenure or to put an end to it from a particular date, and if from a particular date the tenure was intended to be put an end to, it is this date which would give rise to the cause of action. And the prayer in para. 13 (1) of the plaint would entitle the

plaintiff to get this relief. The fact that he claimed the land would not preclude him from getting the lesser interest of melwaram and the suit having been instituted within 12 years from 1st July 1912 is not barred.

But assuming that this is not a correct view and that the suit must be deemed to be one for a bare declaration, the question is whether Art. 120 or Art. 131 applies. In support of the position that Art. 120 will apply Mr. Suryanarayana relies upon 16 Mad 294[12] which lays down that Art. 131 is only applicable to cases where consequential relief is asked for by virtue of the periodically recurring right, but where the suit is only for a bare declaration Art. 120 should govern the case. But to my mind this decision is in direct contravention of the plain language of the article. Under that article the suit is for establishing a periodically recurring right and a bare declaration would *prima facie* be within the meaning of that article. In fact this view was taken in an early decision of the Madras High Court in 7 Mad 341.[13] In that case the suit was brought for a declaration that the plaintiff therein was entitled to a certain allowance payable out of the revenue of the Ramnad zamindari. Defendant 1 in that case was the minor zamindar of Ramnad and defendant 2 was one Kolanthai Nachiar, the senior widow of the said plaintiff's deceased father, who was disputing the legitimacy of the plaintiff. So far as defendant 1 was concerned the only relief claimed against him was a declaration; and so far as defendant 2 was concerned, there was a claim for arrears. Having regard to the claim against defendant 1 which was a bare declaration their Lordships held that Art. 131, Lim. Act, would apply. Their Lordships observe at p. 343 as follows :

> The respondent, on 9th October 1879, instituted the suit, in which this appeal arises, against the minor zamindar of Ramnad to establish his right to the allowance, and the claim is resisted on the ground that it is barred by limitation . . . the right which the respondent seeks to establish is a recurring right, and he is entitled by the present Limitation Act to sue within a period of 12 years from the date on which he demanded and was refused the right : Act 15 of 1877, Sch. 2, Cl. 131.

Ayling, J. noticed this decision in his Order of Reference in 38 Mad 916[14] at p. 918 :

> The first of these 7 Mad 341[13] calls for little remark inasmuch as the decree which was the subject of appeal before the Court was merely one declaring the Ramnad zamindari liable for a certain periodical payment, and not for any consequential relief.

In 16 Mad 294[13] the decision in 7 Mad 341[13] was not noticed and, as pointed out by Ayling, J., the decision in 16 Mad 294[12]

> appears to involve the somewhat surprising result that a man asking merely for a decree declaring his periodically recurring right must sue within six years under Art. 120, whereas, if he asked for relief consequential on the said right, he could claim 12 years under Art. 131.

It is doubtful if the claim in 16 Mad 294[12] relates to a periodically recurring right. In 26 Mad 291[15] there is an *obiter dictum* at pp. 313 and 314 by Bhashyam Ayyangar, J.:

> Article 131, however, which provides for a period of 12 years in respect of a periodically recurring right, does not relate to a mere declaratory suit;

and the reason given is, that the expression used in that article is not "for a declaration" but "to establish". I am not able to agree with this view. I do not see why the expression 'establish' would not include a suit for a declaration whether it was intended to convey more or not. 'To establish' literally means 'to make good'. Tyabji, J. in 38 Mad 916,[14] was inclined to the opinion that Art. 131 would apply to a case of bare declaration, and this also seems to be the view of White, C. J., from the opening sentence of his judgment in the Full Bench case. So far as the view of the other High Courts is concerned Art. 131 would apply to a suit for a bare declaration without any consequential relief : *vide* 34 All 545;[16] 5 Pat 249;[17] 95 I C 622[18] at p. 624 and 55 Bom 193.[19] The observations of their Lordships of

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12. Balakrishna v. Secretary of State, (1893) 16 Mad 294=3 M L J 98.
13. Ramnad Zamindar v. Doraiswami, (1884) 7 Mad 341.
14. Zamorin of Calicut v. Achutha Menon, A I R 1914 Mad 377=23 I C 806=26 M L J 377=38 Mad 916 (F B).
15. Ratnamasari v. Akilandammal, (1903) 26 Mad 291=13 M L J 27.
16. Muhammad Yasin v. Illahi Baksh, (1912) 34 All 545=16 I C 455=10 A L J 73.
17. Sri Sri Baidyanath Jiu v. Har Dutt Dwari, A I R 1926 Pat 205=94 I C 826=5 Pat 249=7 P L T 465.
18. Devendra Narayan Majumdar v. Jhumur Pramanik, A I R 1926 Cal 883=95 I C 622=43 C L J 387.
19. Janardan Trimbak v. Dinkar Hari, A I R 1931 Bom 189=131 I C 465=55 Bom 193=33 Bom L R 127.

the Privy Council in 58 Bom 306[20] would seem to support this view though in that case there was a prayer for a consequential relief. I am therefore inclined to follow the view indicated in 7 Mad 341[13] in preference to that in 16 Mad 294.[12] If Art. 131 is to be applied it cannot be disputed that the suit is not barred as the refusal to pay the full assessment is within 12 years before the suit. In the result the second appeal fails and is dismissed with costs. Leave refused.

C.R.K./S.C. *Appeal dismissed.*

20. Secretary of State v. Parashram Madhav Rao, A I R 1934 P C 108=148 I C 796=61 I A 190=58 Bom 306 (P C).

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* A. I. R. 1937 Madras 308

SPECIAL BENCH

VARADACHARIAR, BURN AND PANDRANG ROW, JJ.

Secretary, Board of Revenue, Madras—Petitioner.

v.

Rm. Pl. N. Rm. Alagappa Chettiar and *another*—Opposite Parties.

Referred Case No. 5 of 1935, Decided on 17th November 1936.

(a) Stamp Act (1899), S. 2 (15)—Point for consideration under S. 2 (15) is whether common ownership has ceased to exist—Allotment to each individual amongst common owners or to groups of individuals is immaterial.

In the definition of an instrument of partition as defined in S. 2 (15), the true antithesis is between the original common ownership and the subsequent cessation of that common ownership. Whether the substituted ownership is created by way of allotments to each individual amongst the original common owners or to groups of individuals is not really the point for consideration but whether the original common ownership has ceased to exist or not. [P 309 C 1]

*** (b) Stamp Act (1899), S. 6—Instrument relating to dissolution of partnership also falling under definition of instrument of partition—It can be charged under that head as well.**

An award by arbitrators purported to direct a partition of two firms between the five partners three of whom were undivided members of a family, the fourth their distant and separated co-parcener and the fifth a stranger. The arbitrators assigned one firm with all assets and liabilities to the group of the first three partners and the other firm to the other two members. The document was executed on a stamp paper of Rs. 5 as a deed of dissolution of partnership :

Held : that the document fell as well under the definition of an instrument of partition and was therefore liable to be charged to stamp duty as an instrument of partition: *Christie* v. *Commissioners of Inland Revenue*, (*1866-67*) *2 Ex 46* and *Phillips* v. *Commissioners of Inland Revenue*, (*1866-67*) *2 Ex 399* and *3 Bom L R 132*, *Rel. on.* [P 309 C 1]

(c) Partnership — Co-ownership and partnership—There is no inherent incompatibility between conception of co-ownership and position of partners.

The difficulty in applying the conception of co-ownership to individual items of partnership assets, is no reason against applying that description to the net assets of the partnership on a dissolution. S. 265, Contract Act, was worded in a form suggesting that it was for the Court to distribute the net assets as amongst the partners; but S. 46, Partnership Act of 1932 puts it clearly as a right of the partners to claim to have the surplus distributed amongst them or their representatives according to their rights. There is accordingly an inherent incompatibility between the conception of co-ownership and the position of partners. [P 309 C 2]

Government Pleader and *N. Srinivasa Ayyangar*—for Petitioner.

K. Rajah Ayyar, *V. Ramaswami Ayyar* and *N. G. Krishna Ayyangar*—for Opposite Parties.

Varadachariar, J.—The nature of the document with reference to which this reference under S. 57, Stamp Act, has been made is briefly described as follows in para. 2 of the Board's reference. It is

> an award by arbitrators and purports to direct a partition of two firms (A. L. R. M. of Nattanjan and A. L. R. M. of Kayan in Burma) between the five parties to the deed named therein. Of these five parties, Nos. 1 to 3 are undivided members of a family, No. 4 is their distant and separated co-parcener and No. 5 is a stranger. The arbitrators after examining the parties orally and looking into the accounts have assigned by casting lots the A. L. R. M. Firm at Nattanjan with all its assets and liabilities to the first group of parties Nos. 1 to 3 and the other firm at Kayan to the parties Nos. 4 and 5.

The document was executed in Burma on a stamp paper of Rs. 5 as a deed of dissolution of partnership. The Collector of Ramnad was of opinion that the document should be stamped as an instrument of partition. The Board's reference indicates the difficulty which the Board felt in agreeing with the Collector's view. In S. 2, Cl. (15), Stamp Act, an instrument of partition is defined as

> any instrument whereby co-owners of any property divide or agree to divide such property in severalty,

and it includes also "an award by an arbitrator directing a partition". Having regard to the meaning of the word 'severalty' as given in the Concise Oxford Dictionary, the Board thought that the division could be said to be one in

'severalty' only if the allotments had been made to each individual sharer and not when the allotments were made as between several sub-groups of sharers all of whom together originally owned the properties in common. We do not think there is any force in this distinction. The true antithesis is between the original common ownership and the subsequent cessation of that common ownership. Whether the substituted ownership is created by way of allotments to each individual amongst the original common owners or to groups of individuals is not really the point for consideration but whether the original common ownership has ceased to exist or not.

Before us however the objection has been stated in a different form by Mr. K. Rajah Ayyar who appears for the party. He contended that there being a special article, namely, Art. 46, providing for an instrument of dissolution of partnership, there is no reason why the document in the present case should be held to fall by a strained construction under the definition of an instrument of partition. This argument ignores the provision in S. 6, Stamp Act, which enacts that wherever an instrument is so framed as to come within two or more of the descriptions in Sch. 1 and the duties chargeable thereunder are different, that document will be chargeable only with the higher of such duties. It is therefore no argument to say that the instrument in question is one relating to the dissolution of a partnership if according to its terms it also falls under the definition of an instrument of partition. The decisions in (1866-67) 2 Ex 46[1] and (1866-67) 2 Ex 399[2] indicate that even according to the English practice where a dissolution of partnership is carried out by a document which in form effects an assignment of a partner's share to another partner, the document is charged to stamp duty as a 'conveyance'. This shows that the fact of its being part of a scheme for the dissolution of a partnership does not prevent its being chargeable to stamp duty under other heads as well, if the terms of the document fall under some other head.

Mr. Rajah Ayyar next contended that the document is not an instrument of 'partition' because it would not be proper to regard partners as co-owners of the partnership property. The alternative views on this question have been stated in 49 Mad 738[3] and 60 M L J 527[4] respectively. As pointed out in the latter case, there was a specific provision in S. 253, Contract Act, declaring the partners to be the "joint owners" of the partnership property in the absence of any contract to the contrary. It will not therefore be correct to say that partners cannot be regarded as joint owners of the partnership property. It is true that the wording of S. 14, Partnership Act of 1932, is slightly different but it does not appear to us that it was intended to indicate any difference in principle (*see* Lindley on Partnership, Book III, Ch. 5, S. 1). Mr. Rajah Ayyar instanced the possibility of a person being a working partner without any share in the partnership property but this involves no inconsistency with the above conception because the conception of co-ownership will be only in proportion to their shares in the partnership and is always qualified by 'contracts to the contrary' if any. The difficulty in applying the conception of co-ownership to individual items of partnership assets, is no reason against applying that description to the net assets of the partnership on a dissolution. S. 265, Contract Act, was worded in a form suggesting that it was for the Court to distribute the net assets as amongst the partners; but S. 46, Partnership Act of 1932, puts it clearly as a right of the partners to claim to have the surplus distributed amongst them or their representatives according to their rights. There is in our opinion accordingly no inherent incompatibility between the conception of co-ownership and the position of partners. On what basis the valuation is to be made for the purpose of assessing stamp duty is a matter on which we are not called upon to express any opinion.

Our attention was drawn to a case in 10 M L W 67,[5] where a Bench of this Court laid down that no partner has a right to claim a division of any specific item of partnership property. This case

1. Christie v. Commissioners of Inland Revenue, (1866-67) 2 Ex 46=4 H & C 664=36 L J Ex 11=15 L T 282=15 W R 258.
2. Phillips v. Commissioners of Inland Revenue, (1866-67) 2 Ex 399=36 L J Ex 199=16 L T 839.
3. Venkatarathnam v. Subba Rao, A I R 1926 Mad 1040=96 I C 881=51 M L J 410=49 Mad 738.
4. Samuvier v. Ramasubbier, A I R 1931 Mad 580=132 I C 305=60 M L J 527=55 Mad 72.
5. Annamalai Chetty v. Annamalai Chetty, A I R 1919 Mad 146=52 I C 456=10 M L W 67.

does not touch the question whether, taking the partnership assets as a whole, the partners are co-owners or not. On the other hand, in 3 Bom L R 132[6] where an arrangement had been made between partners dividing certain items of partnership assets between themselves without dissolving the partnership, a Bench of three Judges held that the document amounted to an instrument of partition. We do not see any reason for applying a different principle merely because such an allotment takes place as part of a scheme of dissolution. Our answer to the reference is that the document is liable to be charged to stamp duty as an instrument of partition.

C.R.K./S.C. *Reference answered.*

6. Choturam v. Ganesh, (1901) 3 Bom L R 132.

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* A. I. R. 1937 Madras 310

FULL BENCH

BURN, KING AND VENKATARAMANA RAO, JJ.

Sri Vuppalapati Suryanarayaneswara Jogi Jagannadharaju and *another* — Appellants.

v.

Rajah of Vizianagaram—Respondent.

Second Appeals Nos. 1060 and 1061 of 1932, Decided on 25th November 1936, against decree of Dist. Court, Vizagapatam, in A. S. Nos. 426 and 442 of 1929.

*** Easement—Riparian rights — Tank and its feeder stream owned by *A* and *B*—Tributaries of stream rising in and flowing through *B's* village in defined and natural channels—*B* blocking tributaries—*A's* suit for injunction—*A* held entitled to accustomed course of water even from tributaries and *B's* rights were subject to those of *A*.**

A tank and its feeder stream were owned by *A* and *B*. The stream had the tributaries rising in and running through the village of *B* which were flowing in well defined channels and were natural streams. *B* intercepted the course of the tributaries thereby cutting off the supply of water to the stream. In a suit by *A* for injunction and removal of obstruction :

Held : that *A* had right to have the water flowing in its accustomed course not only through the stream but also through the tributaries which fed it. The rights of *B* were subject to the rights of *A* to have the water of the stream and its tributaries flow in the customary manner down to him : *11 Mad 16, Rel. on.* [P 311 C 1, 2]

P. Somasundaram—for Appellants.

S. Venkatesa Iyengar—for Respondent.

Burn, J. — The defendants are the appellants. The plaintiff, the Rajah of Vizianagaram, filed two suits O. S. No. 284 of 1927 and O. S. No. 505 of 1927, the subject of which was the supply of water to a tank called Vooracheruvu in the village of Kottavalasa in the Vizianagaram zamindari. The facts have been fully stated by the learned District Munsif and by the learned District Judge. The two suits were tried together by consent of both parties. The zamindar's complaint was that the defendants had interfered with the supply of water to Vooracheruvu which it received through a stream called Pedda Gedda. This stream takes its rise in a jeryoti village of the zamin and passes through the defendants' mukhasa village. During its passage through the defendants' village it was receiving tributary supplies from four streams which take their rise entirely within the defendants' village. In or about 1924 the defendants intercepted the courses of three of these streams and put up a long bund so as to form a tank, thereby cutting off the supply of water which was formerly flowing through these tributaries into the Pedda Gedda.

In O. S. No. 284 of 1927 the plaintiff prayed for a mandatory injunction to compel the defendants to remove the obstruction to the courses of the natural streams. O. S. No. 505 of 1927 was concerned with the course of the same stream further south. It was alleged by the plaintiff that the course of the stream had been diverted towards the west and that this diversion caused damage to Survey Nos. 17, 18, 19 and 20 of Kottavalasa and also the Malapalli Survey No. 21-B. The plaintiff prayed for a direction in this suit that the defendants might be compelled to close the portion of the channel newly diverted towards the west and to restore it to its original condition. The learned District Munsif dismissed both the suits holding that the rights claimed by the plaintiff were rights of easement and that the plaintiff must fail because those rights had been interrupted more than two years before the suits were filed. On appeal, the learned District Judge disagreed with the learned District Munsif on this point of law and granted the plaintiff the mandatory injunc-

tion which he sought. His finding with regard to the applicability of S. 15, Easements Act, has not been challenged before us in appeal.

In S. A. No. 1060 of 1932, Mr. Somasundaram who appears for the appellants concedes that the findings of facts are against him and does not seriously press this appeal. It is found as a fact that the course of the stream was diverted towards the west and that the diversion has caused damage to the plaintiff's lands and in these circumstances it cannot be said that the injunction given by the learned District Judge is in any way wrong. Mr. Somasundaram has addressed almost the whole of his argument to the question of the blocking up of the tributary streams with which O. S. No. 284 of 1927 was concerned. As to this, it is found by both the lower Courts that the tank Vooracheruvu and the stream Pedda Gedda which supplies it belong both to the plaintiff and to the defendants. Mr. Somasundaram has criticized the learned District Judge for describing the plaintiff as a 'riparian owner' of the stream. We do not think that much turns upon the adjective 'riparian'. It was definitely admitted by the defendants in their written statements in both the suits that the plaintiff and the defendants were both owners of the tank and of its feeder called Pedda Gedda. It is also found as a fact that the water of the tributaries was flowing in well defined channels and that these were natural streams. That being so, the plaintiff is entitled to have the water flowing in its accustomed course not only through the Pedda Gedda but also through the tributaries which feed it : *vide* 11 Mad 16.[1] Mr. Somasundaram relied upon the fact that these tributaries rise on the defendants' lands and that the course of them is entirely within the defendants' lands. But this does not really improve his position, since according to his own admission, he is a riparian owner and his rights are limited to those of a riparian owner.

The cases which have been quoted by Mr. Somasundaram lay down that a riparian owner is not entitled to impound the water flowing in defined natural channels but is entitled only to use it as it passes. The rights of the defendants, whatever they may be, are subject to the right of plaintiff to have the water of the Pedda Gedda and its tributaries flow in the customary manner down to him. The learned District Judge is quite right in holding that interference with such flow is an actionable wrong, especially in a case like this where the flow is totally cut off. We think the view of the law taken by the learned District Judge is correct. The injunction granted by the learned Judge orders that the bund of tank newly put up by the defendants shall be breached at the points in the Commissioner's plan marked, 1, 2, 3 and 4 in order to allow the water to flow in its usual courses. The plan shows that if breaches are effected in the bund at these points, the object will be achieved. The injunction granted by the learned Judge in O. S. No. 284 of 1927 seems to us therefore to be proper. In the result, both the appeals are dismissed with costs.

C.R.K./S.C. *Appeals dismissed.*

1. Perumal v. Ramaswami, (1888) 11 Mad 16.

✻ A. I. R. 1937 Madras 311

HORWILL, J.

In re *R. S. Srikanta Iyer* and *another* —Petitioner.

Criminal Revn. Cases Nos. 498 and 499 and Petns. Nos. 453 and 454 of 1936, Decided on 16th November 1936, from orders of 2nd Class Magistrate and Subdivisional Magistrate, Gobichettipalayam, D/- 8th April 1936 and D/- 25th April 1936, respectively.

(a) Criminal P. C. (1898), S. 144—Scope—Rescission or alteration—Superior Magistrate can rescind or alter order of Subordinate Magistrate though Subordinate Magistrate himself passed order on petition to rescind or alter order or has refused to pass such order.

It is open to a superior Magistrate to rescind or alter an order passed by a Subordinate Magistrate under S. 144 of the Code even though the subordinate Magistrate has himself passed an order on the petition to rescind or alter the order or has refused to pass such an order. S. 144 contains no provision prohibiting the superior Magistrate from exercising such power: *A I R 1937 Mad 167, Foll.* [P 312 C 1]

✻ (b) Criminal P. C. (1898), S. 144—Revision — Public meeting prohibited by order under S. 144—Where interference with right to speak is expected, opponents should be prohibited from interfering and not reformers from speaking — High Court will not however interfere in revision with order of Magistrate under S. 144 forbidding persons to hold meetings if it is passed in interest of public peace.

Ordinarily, where interference with the right to speak is expected the opponents should be prohibited from interfering and not the reformers from speaking. Occasions do however arise when in the interests of peace private rights have to be encroached upon by those responsible for public order. [P 312 C 2]

As long as a Magistrate bears in mind the fact that normally the police should protect persons who are exercising their rights even though the exercise of those rights might be objected to by the others, the High Court will not interfere in revision with the order of the Magistrate under S. 144 forbidding certain persons to hold public meetings and thus interfering with their lawful right to express their opinions. [P 312 C 2]

K. Bhashyam Iyengar, J. R. Gundappa Rao and *V. P. Chakravarthi*—for Petitioners.

Public Prosecutor—for the Crown.

Order.—The petitioners, the President and members of Congress Committee, have filed these petitions to revise the order of the Subdivisional Magistrate of Gobichettipalayam refusing to interfere with the order passed by the Sub-Magistrate of Gobichettipalayam forbidding the holding of Congress meetings within a furlong of Easwarankoil in the Brahmin Agraharam of Gobichettipalayam town. It is conceded by the learned Public Prosecutor that the Subdivisional Magistrate was wrong in holding that he had no jurisdiction to interfere with the order passed by the Sub-Magistrate because the petitioners had approached the Sub-Magistrate and asked him to rescind his ex parte order. S. 144 contains no provision which suggests that a superior Magistrate is prohibited from rescinding or altering an order merely because a Subordinate Magistrate has done so or refused to do so. It has already been held by Pandrang Row, J. in 1936 M W N 1089[1] that it is open to a superior Magistrate to rescind or alter an order passed by a Subordinate Magistrate even though the Subordinate Magistrate has himself passed an order on a petition to rescind or alter the order.

As two months have already elapsed since the date of the passing of the order, the question whether the order of the Sub-Magistrate was a proper one is an academic one; but in view of the fact that by the time most petitions are ready to be argued in this Court, the periods for which orders under S. 144 are made have usually passed, it would not be satisfactory if this Court always refused to express its opinion on the merits of an order. I agree with Mr. Bhashyam Iyengar for the petitioners that every man has a right to express his opinion in public and in general he should be entitled to support of the police and Magistracy in the expression of those opinions. Provided that these opinions are made with a genuine desire to convince people and not to irritate them, he ought not to be muzzled merely because those who dislike these opinions threaten opposition. Where interference with the right to speak is expected the opponents should ordinarily be prohibited from interfering and not the reformers from speaking. Occasions do however arise when in the interests of peace private rights have to be encroached upon by those responsible for public order. The police cannot always have a number of men posted wherever persons are expressing opinions which may call upon them the wrath of the people among whom they are speaking. This is particularly the case during elections when public meetings are many and when feelings run high. The petitioners were not prohibited from expressing their opinions altogether; but were told only that they should not do so within a furlong of the Eswaran temple, near which a number of orthodox brahmins live. It appears that in spite of the fact that a meeting was held no breach of the peace occurred; but that in itself is not a sufficient guarantee that no breach of the peace will occur at any other time.

It is impossible for me to say under the circumstances that there was no justification at all for the Sub-Magistrate's order. He is in the best position to know how far it is necessary to interfere with the lawful rights of a person or body of persons to express their opinions. As long as a Magistrate bears in mind the fact that normally the police should protect persons who are exercising their rights, even though the exercise of those rights might be objected to by others, this Court will not be ready to interfere in revision. Under the circumstances, the petitions are dismissed.

C.R.K./W.D. *Petitions dismissed.*

1. Mooka Pandaram v. Sinnu Muthirian, A I R 1937 Mad 167=166 I C 77=71 M L J 761=1936 M W N 1089.

A. I. R. 1937 Madras 313

HORWILL, J.

C. R. Subbarama Ayyar—Petitioner.

v.

Kizhakke Perukkal Pazhani Velon's son, Damodaran—Opposite Party.

Criminal Revn. Case No. 525 and Petn. No. 479 of 1936, Decided on 17th November 1936, from order of Sess. Judge, South Malabar, D/- 2nd July 1936.

Criminal Trial—Revision—Accused obtaining jewel by cheating owner and pledging it with third person—Bona fides of pledgee not raised or decided—Magistrate after convicting accused ordering under S. 517, Criminal P. C., jewel to be returned to its owner—Order held not wrong and High Court would not interfere in revision.

Under S. 517, Criminal P. C., a Magistrate is given a wide discretion, and unless it is clear that he exercised it on some wrong principle and that he returned the property to somebody obviously not entitled to have it, the High Court in revision will be unwilling to interfere. [P 314 C 1]

An accused obtained the jewel by cheating the owner of it and pledged it with a third person. The bona fides of the pledgee were not raised or decided in the trial Court and Magistrate after convicting the accused ordered under S. 517, the jewel to be returned to the owner of it. On revision by the pledgee:

Held: the order of Magistrate was not wrong and High Court would not interfere in revision: *A I R 1915 Bom 265*; *A I R 1924 All 189* and *A I R 1927 Rang 322, Disting.* [P 313 C 2]

P. V. Venugopala Aiyar and *C. R. Venkatachala Aiyar*—for Petitioner.

K. V. Ramaseshan for *T. S. Anantharaman*—for Opposite Party.

Order.—The accused in C. C. No. 57 of 1935, was found guilty of cheating with respect to a jewel. He falsely represented to the owner of the jewel that he wanted it for the use at a wedding, and upon that representation the complainant gave it to him. The accused, instead of using it for that purpose, pledged it with the petitioner and raised a sum of money on it. The Joint Magistrate, after convicting the accused, ordered the jewel to be returned to the complainant. P. W. 5, the present petitioner, appealed to the Sessions Judge of South Malabar, who upheld the order of the Joint Magistrate with respect to the jewel.

Two questions seem to arise in this petition: (1) Whether the order of the Joint Magistrate was right; and (2) whether, even if it was wrong, this Court should interfere in revision. I have been taken through a number of rulings on the question whether a right to possession accrues to a pledgee where the pledge is taken bona fide; but all that it is necessary to say in these proceedings is that the matter is open to doubt, and that in this criminal case the question was of course never raised or decided whether P. W. 5, the petitioner, took the jewel bona fide or mala fide, and neither of the lower Courts could possibly have given a finding on that point. The Joint Magistrate had therefore to decide whether the jewel should be returned to the admitted owner or to a person whose legal right was in doubt, even if he had acted bona fide. Under such circumstances, I am not prepared to say that the order of the Joint Magistrate was wrong. A number of cases has been quoted in which a High Court in revision has found that the order of the lower Court was wrong and has ordered possession to be given back to persons from whom property was taken. One such case is 40 Bom 186,[1] where the right to possession was a very obvious one, in that the property passed was a currency note, with regard to which title passes with possession. In 74 I C 708,[2] 59 bags of mustard seeds were stolen, a part of which was sold bona fide to some merchants. Long afterwards, when the case came up for trial, the Magistrate ordered the merchants to refund to the complainant, not the mustard seeds actually stolen, but the equivalent of them; that is to say, the merchants were ordered to recompense the complainant and not merely to return stolen property. The case in 5 Rang 553,[3] was more like the present one, in that there was a breach of trust. The principle was laid down that where a question of right to possession exists between the complainant and a third person, the property should be returned to the third person. With all respect to the learned Judge who decided that case, I doubt whether we are entitled to go as far as that. If that were always the rule, then one would expect the wording of the Criminal Procedure Code in S. 517 regarding the return

1. *In re* Pandharinath Pundlik, A I R 1915 Bom 265=31 I C 383=16 Cr L J 783=40 Bom 186=17 Bom L R 922.
2. Naini Mal v. Emperor, A I R 1924 All 189=74 I C 708=24 Cr L J 804.
3. Shwe Wa v. C. I. Mehta, A I R 1927 Rang 322=105 I C 452=28 Cr L J 932=5 Rang 553.

of property to be much more explicit than it is. Moreover, in that case the Judge assumed that there could be no doubt that the person from whom the property was recovered was entitled in law to retain possession. The Magistrate is given a wide discretion, and unless it is clear that he exercised it on some wrong principle and that he returned the property to somebody obviously not entitled to have it, this Court in revision will be unwilling to interfere. The petition is accordingly dismissed.

C.R.K./P.R. *Petition dismissed.*

A. I. R. 1937 Madras 314

KING, J.

Rathnammal — Appellant.

v.

Secretary of State — Respondent.

Second Appeal No. 146 of 1933, Decided on 18th December 1936, against decree of Sub-Judge, Coimbatore, in A. S. No. 7 of 1932.

(a) Madras Irrigation Cess Act (7 of 1865), S. 1 (b)—Scope—Lands classified as sing e crop wet land—Throughout whole year ry.. growing crop on such lands and receiving water in contravention of understanding that water would be required for ordinary wet crop i. e., for period shorter than year—Ryot must be deemed to have taken water without due authority from source, different from and in addition to source assigned by Revenue authorities for irrigation.

A ryot owning certain lands which had been classified as single crop wet, was growing upon his land certain crop which had remained upon the land throughout the whole fasli and had received water during that period. The Government accordingly assessed him penal water rate under S. 1 (b) of the Act on the ground that he had taken water without due authority from a source in addition to that he had been assigned by the Revenue authorities to his land. The ryot filed a suit which was dismissed in both the lower Courts:

Held: that though the ryot was entitled to the water of the particular channel for his field yet as his land had been assessed as single crop wet land and the rate of assessment was calculated on the assumption that he would require water only for the normal length of time required for the growing of an ordinary wet crop and not for the crop which was actually grown which would require water throughout the year and that having taken a year's supply of water instead of a restricted supply, he had clearly taken water without due authority from a source which was in essence both different from and in addition to the source which had been assigned by the Revenue authorities for the irrigation of his land within the meaning of S. 1 (b) of the Act: *A I R 1914 Mad 155, Foll.* [P 315 C 1]

(b) Madras Irrigation Cess Act (7 of 1865), S. 1 (b)—Meaning of "source".

The meaning of the word 'source' in S. 1 (b) of the Act must be given a more extended meaning than some such body of water as a tank or a channel. [P 314 C 2]

T. M. Krishnaswami Ayyar and *K. S. Sankara Iyer*—for Appellant.

Govt. Pleader—for Respondent.

Judgment.—This Second Appeal raises an interesting point with regard to the interpretation of the proviso to S. 1 (b), Madras Irrigation Cess Act of 1865. The appellant here is a ryot owning certain land which has been classified as single crop wet. He has however been growing upon this land certain crops which have remained upon the land throughout the whole fasli and have received water during that period. The Government accordingly assessed him to penal water rate on the ground that he has taken water without due authority from a source in addition to that which has been assigned by the Revenue authorities to his land. Both the Courts below have dismissed his suit and he has now appealed to the High Court. The proviso in question runs as follows:

> No cess shall be leviable under this Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the same be irrigated by using without due authority water from any source hereinbefore mentioned and such source is different from or in addition to that which has been assigned by the Revenue authorities or adjudged by a competent civil Court as the source of irrigation of such land.

The decision of the appeal would obviously turn mainly upon the definition of the word 'source'. It is argued for the appellant that 'source' can only mean some such body of water as a tank, or a channel and that in so far as the appellant in this case is taking water not from any unauthorized tank or channel, it cannot be said that he is taking water from an unauthorized source. It is however clear that some more extended meaning than this must be given to the word 'source'. For, if 'source' were tobe confined to, for instance, a channel, then the Government would be precluded from laying down any regulations which would define the quantity of water, or proportion of the water flowing in that channel, or the time during which the water of that channel might be utilised. A case very similar in principle

came before this Court in 26 M L J 210.[1] There it appears that there were two pipes from which the water of a certain channel was taken to the lands of the ryot though the Revenue authorities had authorized the ryot concerned in that case to take water through one only of those two pipes. The ryot however had taken water through both the pipes and it was held that the proviso to S. 1 (b), Madras Irrigation Cess Act applied to that case. Clearly of course in that case the ryot had taken water from the channel from which he was authorized to take it. What he had done was to take a larger quantity of water than the Government permitted him to do. That in my opinion, is clearly the situation in the present case. No doubt the appellant is entitled to the water of this particular channel for his field. But his land has been assessed as a single crop wet land and the rate of assessment is calculated on the assumption that he will require water only for the normal length of time required for the growing of an ordinary wet crop and not for the crop which was actually grown and which would require water throughout the year. If he has actually taken a year's supply of water instead of a more restricted supply which would have been available to him during a few months, then it seems to me quite clear that he has been taking without due authority water from a source which is in essence both different from and in addition to the source which has been assigned by the Revenue authorities for the irrigation of his land. I would accordingly hold that the decision of the Courts below is correct and dismiss this appeal with costs. (Leave to appeal is granted.)

C.R.K./W.D. *Appeal dismissed.*

1. Krishna Row v. Collector of Kistna, A I R 1914 Mad 155=22 I C 692=26 M L J 210.

A. I. R. 1937 Madras 315

VENKATARAMANA RAO, J.

K. Govinda Chettiar and *others* — Petitioners.

v.

A. N. Muniswami Chettiar and *others*— Opposite Parties.

Civil Revn. No. 1748 of 1935, Decided on 28th October 1936, from order of Dist. Court, Chingleput, D/- 13th November 1935.

Restitution—Suit for assertion of certain rights—Plaintiffs taking advantage of injunction granted and unlawfully taking possession of defendants' property—Proper remedy of defendant is not by way of restitution but by way of suit.

Where the plaintiffs, who sued for assertion of their right as against the defendants, taking advantage of the order of injunction granted to them, unlawfully took possession of certain properties to which they were not entitled:

Held: that the proper remedy of the defendants who were aggrieved by the said action of the plaintiffs was by suit and not by way of restitution inasmuch as the defendants did not lose their possession because of any action taken by the plaintiffs under the decree, but by an act of violence on plaintiffs' part, independent of it and inconsistent with the case on which it was obtained: *A I R 1918 Mad 1293, Foll.* [P 316 C 1]

Bhashyam—for Petitioners.

Order.—This is a petition to revise the order of the learned District Judge of Chingleput declining to grant restitution of the possession of a certain temple called Sri Kalatheeswaraswami in Chunnambukulam village together with all the keys, articles of worship, jewels, vahanams, etc., appurtenant thereto. The view taken by the learned District Judge is that no question of restitution arose, because there was no delivery of the property in pursuance of any order of Court. It seems to me that this view is sound. The case of the petitioners is that there was an order for a temporary injunction made in the suit at the instance of the plaintiffs and taking advantage of that order, the plaintiffs without notice to defendants forcibly took possession of the temple and its properties by breaking open the locks of the temple; this was according to them on or after 18th March 1935 when the lower Court made the said order of temporary injunction in the plaintiffs' favour. On 1st May 1935, in pursuance of an order of the High Court suspending the said order, the defendants applied for restitution of the said properties. The learned District Judge by his order dated 4th May 1935 without notice to the plaintiffs passed the following order :

> The temple and its appurtenances will therefore be delivered to the defendants through Court and the police will be addressed to help the Court if necessary to do so and the lock of the outer door broken open if necessary.

In pursuance of this order the Amin broke open the locks and delivered to the defendants possession of the temple and its articles on or about 5th May 1935. On a revision petition preferred against the said order being C. R. P. No. 802 of 1935,

K. S. Menon, J. set it aside and directed the said petition for restitution to be re-heard after giving the plaintiffs an opportunity of representing their case. The question is whether the order of the learned District Judge on rehearing in declining restitution is correct. It is contended by Mr. Bhashyam that possession was taken of the temple and its properties by the plaintiffs in pursuance of the order of injunction and therefore the application for restitution properly lies. I think this contention is untenable. In my judgment in A. A. O. No. 169 of 1935 which is an appeal against the order granting the said temporary injunction, I pointed out that the nature of the relief sought therein was to assert the individual right of the plaintiffs to perform the Kalasandhi and Sayarakshai pujas and to restrain the defendants from interfering with the said right and to have a Gurukkal of their own to do the said pujas. What was granted by the lower Court was the said reliefs as prayed for. This is clear from the order dated 18th March 1935. If in pursuance of the said order, delivery of the said properties was given through Court Mr. Bhashyam may be right in his contention, but if in excess of what was granted, they, the plaintiffs, unlawfully took possession of the temple and its properties, it is not a matter for restitution at all. In 39 I C 933,[1] where the plaintiffs taking advantage of an order of injunction unlawfully took possession of certain properties to which they were not entitled, it was held that the proper remedy for persons aggrieved by the said action was by suit and not by way of restitution. The learned Judges observe thus :

> In the present case defendants did not lose their possession because of any action taken under the decree, but by an act of violence on plaintiffs' part, independent of it and inconsistent with the case on which it was obtained. In respect of such an act the defendants' remedy is by suit.

This is the view taken by the learned District Judge in the Court below and I therefore overrule the contention of Mr. Bhashyam and dismiss the application but in the circumstances I make no order as to costs.

C.R.K./B.D. *Application dismissed.*

1. Periyasamy Thevan v. Karuthiah Thevan, A I R 1918 Mad 1293=39 I C 933.

✻ A. I. R. 1937 Madras 316

SPECIAL BENCH

BEASLEY, C. J., MOCKETT AND LAKSHMANA RAO, JJ.

M. Kanniappa Naicker & Co.—Petitioner.

v.

Commissioner of Income-tax, Madras—Opposite Party.

O. P. No. 17 of 1936, Decided on 18th December 1936.

✻ (a) Income-tax Act (1922), S. 26 (2)—Scope—S. 26 (2) requires succession to same business and not succession to business of same nature—Two firms separately carrying on same business of supplying labour—On termination of their contracts both firms entering into partnership and making fresh contract on offering joint tender—Held that though new partnership carried business of similar nature there was no succession to business under S. 26 (2).

Section 26 (2) of the Act requires succession to the same business and not succession to the business of the same nature. [P 319 C 2]

Two firms were carrying on separately the same business of supplying labour, with a certain Port Trust. On termination of their contract both the firms formed a partnership and made a fresh contract with the Port Trust after offering a joint tender :

Held : that there was nothing on record to show that on the termination of any contract, the next contract was bound to go to either of the firms carrying on the businesses of supplying labour. The new partnership did not also take over any of the assets or liabilities of the businesses carried on by the two old firms. The new partnership, therefore, though started to carry on a business of a similar nature, was not a 'succession' to a business as required by S. 26 (2) of the Act : *Bell* v. *National Provincial Bank of England*, *(1904) 5 T C 1* and *A I R 1932 Mad 434*, *Disting.* [P 319 C 2; P 320 C 1]

✻ (b) Income-tax Act (1922), S. 26-A—Scope—Partnership with firm as one partner—Firm having itself four partners—Individual shares of such partners not mentioned in deed of partnership though shares of firm as one partner and of other partners specified therein—Registration of partnership can be refused under S. 26-A—Individual shares of partners must be specified in instrument of partnership—S. 26-A is mandatory.

The words of S. 26-A of the Act do not permit of any elasticity of construction. The individual shares of the partners must be specified in the instrument of partnership. The object in requiring this information is in order that the Income-tax authorities may determine what the profit received by each of the partners from the partnership profits is and in order to prevent the profits from being distributed to the partners otherwise than in accordance with the shares of the partners, as shown in the instrument of partnership registered under the Act and to prevent any partner from returning his income below its real amount. [P 320 C 2]

A partnership was constituted with a firm as one of the partners. The firm itself consisted of four partners. The instrument of partnership specified the shares of the partners but it did not mention the individual shares of the four persons who constituted the firm. The shares of the said firm were mentioned in the deed which constituted the firm and was shown before the Income-tax authorities. In the partnership deed no mention thereof was made :

Held **: that even though the Income-tax authorities were aware of the individual shares of the persons constituting the firm as it was previously registered by them, the registration of the partnership could be refused as there was no mention of the said shares in the partnership deed itself and as the provisions of S. 26-A were mandatory and did not admit of any elasticity of construction.** [P 320 C 2]

G. Ramakrishnaswamy Ayyar and *T. Muniswamy Reddiar*—for Petitioner.

M. Patanjali Sastrier—for Opposite Party.

Judgment.—The questions propounded are :—

"(a) Whether on the facts of this case the assessee firm did succeed to the business of the individual partners within the meaning of S. 26 (2), Income-tax Act ?"

and

"(b) Whether a firm constituted under a registered deed of partnership of which one member is a firm is not entitled to be registered as a firm for the purpose of income-tax merely because while specifying the individual share of the profits and losses the instrument does not specify the shares *inter se* of the partner firm."

Prior to 31st August 1933 a firm called M. K. Naicker & Sons was supplying labour to the Madras Port Trust under a contract which expired on 31st August 1933 and M. Raju Naicker and R. Govindarajulu Naicker in partnership had a similar contract with the Madras Port Trust which also expired on the same date. The labour under the contract was supplied by the former partnership, M. K. Naicker & Sons, to two godowns belonging to the Madras Port Trust and by the latter partners to two other godowns also belonging to the Madras Port Trust. Until 1933-34 the family represented by M. K. Naicker & Sons which was an undivided family and the firm consisting of M. Raju Naicker and R. Govindarajulu Naicker were separately assessed. The managing member of the former firm had for many years been supplying labour to the Madras Port Trust under similar contracts. When the before mentioned contracts were about to expire, the Port Trust, contrary to their previous practice, decided to call for tenders for the supply of labour for a period of five years from September 1933, the previous practice having been to grant contracts without calling for tenders. M. K. Naicker & Sons and the other partnership decided to tender jointly for this contract in pursuance of an informal agreement entered into between them on 3rd July 1933, in which it was agreed that if the tender should be accepted by the Port Trust, 50% of the profits and losses would be allotted to M. K. Naicker & Sons, 25% to Raju Naicker and 25% to Govindarajulu Naicker, and that on acceptance of the tender a detailed partnership agreement would be executed and registered. These persons succeeded in getting the contract and accordingly jointly supplied the labour to the four godowns of the Madras Port Trust which they had previously done individually and on the 21st December 1934 executed a deed of partnership in respect of a firm styled M. K. Naicker & Co., the present petitioner M. K. Naicker & Sons, consisting of four partners, being called the partners of the first part and Raju Naicker and Govindarajulu Naicker partners of the second and third part respectively, and their shares in the profits and losses are specified as follows : M. K. Naicker & Sons 7 annas in the rupee ; Raju Naicker 5 annas in the rupee and Govindarajulu Naicker 4 annas in the rupee. Under the document the partners who are described as three in number agreed to carry on the labour supply to the Madras Port Trust in pursuance of an agreement made by M. K. Naicker & Co., with the latter dated 5th September 1933. Subsequently M. K. Naicker & Co., applied to the Income-tax Officer for the registration of the firm under S. 26-A of the Act filing the instrument of partnership already referred to dated 21st December 1934. This application was refused on the ground that the instrument of partnership did not specify the shares of the partners in the partnership. This point will be dealt with when we come to consider question (b); and with regards to question (a) some further facts must be stated and they are that for the assessment of the year 1934-35, M. K. Naicker & Sons filed a return showing the income of the labour supply business carried on by them during the period 1st January 1933 to 31st August 1933, the

date on which their independent contract with the Port Trust expired, contending that the labour supply business carried on by them had been discontinued on 31st August 1933 and, therefore, claiming the relief provided by S. 25 (3) of the Act. Raju Naicker and Govindarajulu Naicker made a similar return and claim. The Income-tax Officer held that there was no discontinuance of the business within the meaning of S. 25 (3) of the Act, but that there was a 'succession' within the meaning of S. 26 (2) of the Act and held that the firm of M. K. Naicker & Co., (the assessees here) was liable to be taxed in respect of the profits earned by M. K. Naicker & Sons and the partnership of Raju Naicker and Govindarajulu Naicker. He accordingly required M. K. Naicker & Co., to make a return of its income for the tax year 1934-35. The firm filed a return declaring a loss amounting to Rupees 6,475-13-7. Since the assessee firm's contract with the Port Trust commenced only in September 1933 they required 'September to August' to be treated as their 'previous' year for the purpose of the assessment. This claim was allowed but the Income-tax Officer held that for the tax year 1934-35, M. K. Naicker & Co., was liable to be assessed on the profits of M. K. Naicker & Sons and the partnership of Raju Naicker and Govidarajulu Naicker for the period January 1933 to 31st August 1933 and he determined the profits of this period to be Rs. 23,064.

The facts have been found by the Income-tax Commissioner as follows: (a) The individual partners were separately carrying on the business of supplying labour to the Madras Port Trust until 31st August 1933; (b) when the Port Trust invited tenders for the supply of labour from 1st September 1933, the partners of the firm tendered jointly and secured the contract; (c) from 1st September 1933 the parties continued to carry on the same business (supply of labour to the Port Trust) jointly in accordance with the agreement dated 5th September 1933; (d) most of the employees of the old business and the goodwill of the individual partners as suppliers of labour are now used for the joint business of the three partners in the same line. From 1st September 1933 the individual partners have not been carrying on the business of supplying labour separately either to the Port Trust or to any other person. The Commissioner is of the opinion that the facts before stated by him establish that the business carried on by M. K. Naicker & Co. is identical with the business carried on by M. K. Naicker & Sons and Raju Naicker and Govindarajulu Naicker individually, that it is in continuation of the individual business of the partners, that the effect of the joint contract of the partners with the Port Trust is that their separate businesses became amalgamated into one business, that prior to 1st September 1933 the business of supplying labour to the Port Trust consisted of two units, one owned by M. K. Naicker & Sons and the other by Raju Naicker and Govindarajulu Naicker, that after 1st September both these units are owned by M. K. Naicker & Co., no one having any exclusive ownership of any one unit, that there is thus a transfer of ownership of the separate businesses from the partners concerned to the firm and that this amounts to 'succession' within the meaning of S. 26 (2) of the Act; and in support of this opinion he relies upon 6 I T C 92.[1] Taking question (a) first, the relevant section is S. 26 (2) of the Act, which reads as follows:

> Where at the time of making an assessment under S. 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year.

The requisites of that sub-section, therefore, are that there must be a business in existence prior to the date of an assessment being made and that on the date of the making of the assessment it must be carried on by a different person to the person who carried it on prior to the date of the assessment, that is to say, the business must be the same but the person carrying it on must be different. For the Commissioner of Income-tax, 5 Tax Cas 1,[2] was relied upon. The question there was whether the respondent Bank which acquired by the purchase the business of the county of Stafford Bank succeeded to the business of the latter Bank within the

1. Messrs. Best & Co. v. Commissioner of Income-tax, Madras, A I R 1932 Mad 434=138 I C 485 =55 Mad 832=63 M L J 15=6 I T C 92(SB).
2. Bell v. National Provincial Bank of England Ltd., (1904) 1 K B 149=73 L J K B 142=52 W R 406=68 J P 107=5 Tax Cas 1=20 T L R 97=90 L T 2.

meaning of R. 4 of first and second Cases of Sch. D, S. 100, Income-tax Act of 1842, the material part of which is similar to the sub-section in question here. On p. 10 the Master of the Rolls says :

> It seems to me that the words of R. 4 are plain, and that if the National Provincial Bank had not existed, but some new Company had been formed to take over for the first time the business of the Stafford Bank, there would have been a case directly falling in terms within the words of R. 4, 'if any person shall have succeeded to any trade, manufacture, adventure or concern'.
>
> In the case I put of a new Company formed for the first time and acquiring the Stafford Bank, that would clearly be a case of a person succeeding to a concern. What difference does it make that that person who succeeds to the concern should himself already have an existing business? Does he the less succeed to the new business because he had the old one? It seems to me certainly not. He had the old one before. He has the old one still and the new one in addition and to that new one, it seems to me, he has succeeded.

It was accordingly held that there had been a succession within the meaning of the fourth rule. There, there was a definite existing business, namely the respondent Bank. There was also a definite and distinct business, the Stafford Bank. The former Bank became the owners by purchase of the latter. Therefore, the business of the latter was at the date of the assessment being carried on by a different body, namely the respondent Bank and as the Master of the Rolls put it, it had clearly succeeded to that business. The present case, in our opinion, is distinguishable from 5 Tax Cas 1,[2] for the following reasons, namely that at the time of the purchase of the Stafford Bank it was an existing business which could and probably would have been continued under the same ownership for years. Here, the facts are entirely different and for this purpose the nature of the businesses which were going on prior to the date of the assessment in question here must be examined. Those businesses were to supply cooly labour to certain godowns belonging to the Madras Port Trust and were being conducted under contracts of specified durations.

There is nothing to show that on the termination of any contract the next contract was bound to go to either of the firms carrying on these businesses which it is important to note existed solely for the purposes of those contracts, because it is not suggested that either of the partnerships carried on any other businesses in connexion with the supply of labour except that M. K. Naicker & Sons had a small contract business. In our view, these businesses must be held to have terminated on the dates of the expiry of each contract, that is to say, the business of M. K. Naicker & Sons terminated on 31st August 1933 and that of Raju Naicker and Govindarajulu Naicker on the same date. Reference was made by the Commissioner of Income-tax to the goodwill of these firms but we were unable to get from Mr. Patanjali Sastri any helpful reply in answer to question put by us as to what could possibly be the goodwill attaching to such businesses. Unlike the case of the Stafford Bank, there was nothing which either of these partnerships could sell to any one, for example, in August 1933 or to take an earlier date July when these two entities informally agreed to make a joint tender for the contract in question. They had no contract lasting beyond 31st August 1933 to sell even supposing the Madras Port Trust would permit them to do so. It is conceded also that M. K. Naicker & Co., did not take over any of the assets or liabilities of the businesses carried on by M. K. Naicker & Sons and Raju Naicker and Govindarajulu Naicker; whereas in 5 Tax Cas 1,[2] the latter took over the Stafford Bank's existing business and its clients and also its premises. The Income-tax Officer's main reason for the assessment is that these persons had for several years possessed the monopoly of supplying labour to the Port Trust and finding that their monopoly was about to come to an end owing to the adoption by the Port Trust of the policy of inviting tenders and in order to secure continuity for their business they entered into a partnership and put in their tender for the contract and as they were successful they found themselves in a position to continue the business without a break.

It is quite correct that they continued to supply labour to the godowns of the Madras Port Trust as before and that what they did after 31st August 1933 was business of the same nature as before. But in our view what the section requires is that it should be the same business and not business of the same nature and we think that this is the mistake which has been made by the Commissioner of Income-tax when he finds that "the partners continued to carry on the same busi-

ness (supply of labour to the Port Trust)". This is not a case like 6 I T C 92.[1] There Best & Co. were carrying on a number of businesses in their own name and as proprietors of concerns under different names. Amongst the latter was the Eagle Rolling Mills. This business they sold to a new company floated for acquiring it as a going concern and it was held that the new company had succeeded Best & Co., within the meaing of S. 26 (2) of the Act. That was a plain case of an existing company being purchased by another as in 5 Tax Cas 1.[2] In our view, the two businesses of M. K. Naicker & Sons and Raju Naicker and Govindarajulu Naicker came to an end on 31st August 1933 and thereafter a new partnership (M. K. Naicker & Co.,) was started to carry on a business of a similar nature. There was therefore no "succession" to a business as is required by S. 26 (2) of the Act. There remains question (b) to be considered. The procedure relating to registration of firms is laid down in S. 26-A of the Act, which is as follows :

(1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax; (2) the application shall be made by such person or persons and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed.

It is the former sub-section that is in question here. The application was refused on the ground that the individual shares of the partners were not specified in the instrument of partnership. The instrument of partnership as has already been stated treats the partnership of M. K. Naicker & Sons which was made up of four partners as one of the three partners in the firm of M. K. Naicker & Co., and to this partnership a 7 annas share in the rupee in the profits and losses is given. The contention of the income-tax authorities is that as M. K. Naicker & Sons consists of four partners, the shares of each of them should have been set out in the partnership deed (Ex. C). The shares of the partners in M. K. Naicker & Sons were each Re. 0-1-9 totalling 7 annas and as that partnership had previously been registered, a reference to the instrument relating to it, a copy of which was filed with the income-tax authorities, would show this. Not only would the income-tax authorities be aware of what the shares of the partners were—and it is conceded that they did know—but the application for registration itself set out the individual shares of the partners of M. K. Naicker & Sons. Notwithstanding this knowledge the Income-tax Officer—and his action has been upheld by the Commissioner—presumably took the view that he was rigidly bound by the words of the section and that as in the instrument of partnership these individual shares were not given, registration must be refused. The object in requiring this information is in order that the income-tax authorities may determine what the profit received by each of the partners from the partnership profits is and in order to prevent the profits from being distributed to the partners otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under the Act and to prevent any partner returning his income below its real amount. We think that this is a hard case in view of the fact that the income-tax authorities were really aware of the shares of the partners; but the words of the sub-section do not seem to us to permit of any elasticity of construction. S. 28 (2) also points to the same conclusion. The individual shares of the partners must be specified in the instrument of partnership. They were not. That being so, the Income-tax Officer could refuse registration on that ground. The answer to this question therefore, must be in the negative.

As regards costs, as the main contention has been upon question (a) and the assessees have succeeded, in our opinion they are entitled to the costs which was fixed at Rs. 250. The Rs. 100 deposited by the assessees is ordered to be refunded to them.

C.R.K./W.D. *Reference answered.*

A. I. R. 1937 Madras 321

PANDRANG ROW, J.

In re *Govindu Subbaramayya* and *another*—Appellants.

Criminal Appeals Nos. 412 and 509 of 1936, Decided on 12th November 1936, against order of Sess. Judge, Nellore, in Case No. 11 of 1936.

(a) Penal Code (1860), S. 326—Mere knowledge that grievous hurt is likely to be caused is not enough—Grievous hurt must be actually caused.

Unless grievous hurt is actually caused the offence of grievous hurt is not established. Mere knowledge that grievous hurt is likely to be caused is not enough if grievous hurt is not actually caused. [P 322 C 1]

(b) Madras Criminal Rules of Practice, R. 85—Confession — Confession of accused recorded without previous warning to accused required under R. 85—Rule in practice for nearly 50 years—Retraction of confession by accused at first opportunity as he was not made approver as held out to him—Prosecution mainly depending on such confession—Omission to give such warning taken with other circumstances amounts to fairly strong probability that confession is due to inducement.

A confession of the accused was recorded without warning him as required under R. 85 of Madras Criminal Rules of Practice that it was not intended to make him an approver and that anything he said might be used against him. The accused subsequently at the very first opportunity retracted the confession saying that he was held out with the hope that he would be made an approver if he made confession and that he made the confession under that hope. This allegation was found to be supported by the fact that there was some effort to make him an approver. The case for the prosecution mainly depended upon such a confession :

Held : that the rule of recording confession having been in practice for more than 50 years, it being obviously a rule of justice and reason, the non-observance of it amounted to serious defect and affected the value of the confession. The omission to give such a warning as required by the rule raised so strong a suspicion, especially when the prosecution story depended on such confession, that when taken in connection with other circumstances it amounted to a fairly strong probability that the confession was the result of the inducement held out to the effect that the accused might be taken as an approver. [P 324 C 1, 2]

(c) Criminal Trial — Confession — Two accused charged of same offence (murder)—One making confession but not in respect of offence charged — Confessor assigning to himself minor part in assisting co-accused to dispose of dead body—Such confession cannot be used to base conviction of co-accused upon it.

Where two accused were jointly tried for murder and one of the accused made a confession as to his having taken part in disposing of the dead body, thereby not implicating himself in anything that preceded the murder :

Held : that the confession, inasmuch as it assigned the cause of death to the co-accused and assigned to the maker himself the minor part in assisting to dispose of the dead body, could not be used against the co-accused and conviction against him could not be based upon such confession. [P 324 C 2]

K. S. Jayarama Ayyar, *G. Gopalaswami* and *C. K. Venkatanarasimham*—for Appellants.

K. Venkataraghavachari (for Public Prosecutor)—for the Crown.

Judgment.—This is an appeal from the judgment of the Sessions Judge of Nellore dated 13th July 1936 in Sessions Case No. 11 of 1936 in which the two appellants were charged with murder but were convicted as follows : Appellant 1 under S. 326, I. P. C., and appellant 2 under S. 201, I. P. C. Appellant 1 was sentenced to rigorous imprisonment for ten years, and appellant 2 to rigorous imprisonment for three years. The charges relate to the killing of one Subbi described by the learned Judge as "a buxom wench of 22 years", who though married and living with her husband, was said to have been kept by appellant 1, Subbaramayya for some years prior to the occurrence. The learned Sessions Judge observes that appellant 2 also was one of those to whom the deceased was distributing her favours but there does not seem to be sufficient evidence to support this view. It is, however, established that appellant 2 and appellant 1 are friends and used to move together. The dead body of Subbi was found in a well in the compound of the Board Elementary School, Kavali, sometime in the morning of 15th February 1936. The peon of the school saw a bundle of clothes near the well and he reported the matter to the Head Master, P. W. 15, and, as he suspected that there was somethig like a dead body in the well, a report was sent by the Head Master to the Village Munsif, and the Village Munsif who had been given information to the effect that the deceased was missing by the deceased's father, went to the school compound and got the dead body taken out of the well. The Village Munsif does not appear at least to have sent for or informed the police though the police station is in the same town, not only till after the dead body was taken out but even after he examined one of the witnesses who turns out to be the principal witness in the case, P. W. 7, who said that he had seen appellants 1 and 2 and the deceased

near the well the previous night at about 9 p. m. Appellant 1 was arrested that very night in his house at Kavali. Appellant 2 is said to have left Kavali the next morning by train and he was ultimately arrested on the 18th at Sitaramapuram where he was staying with a relation of his. He was produced before the Stationary Sub-Magistrate of Kavali on the 19th. It is said that because later on appellant 2 expressed a desire to the police to make a confessional statement the Sub-Magistrate of Kavali who was not empowered to record confessions forwarded him on 1st March 1936 to the Stationary Sub-Magistrate of Kovvur who was so empowered. This Sub-Magistrate, P. W. 8, kept appellant 2 in a separate cell in the sub-jail, and after giving him two days' time for reflection recorded a confession from him on 3rd March 1936.

The case for the prosecution is that the two appellants and the deceased went together to the school compound in question sometime in the evening of the 14th of February between 8 and 9 p. m., and were seen talking there. The evidence relating to the previous movements of the deceased and of the appellants is not of very great importance except perhaps that portion of it which relates to the conversation that took place between the deceased and one Polugadu, P. W. 9, a cousin of hers, which was heard or seen by appellant 1. It is necessary to refer to this because the learned Sessions Judge appears to have thought that this conversation, trivial as it was, was the real cause of the tragedy as it led appellant 1 to suspect that Polugadu was one of the newly found lovers of the deceased, and that it was because his jealousy was so aroused that he dogged the steps of the deceased and finally induced her to go with him and the other appellant to the school compound. The evidence of P. W. 7 is to the effect that he saw the two appellants and the deceased near the well talking at about 9 p. m.; what happened thereafter he does not know. As to what happened in the school compound afterwards there is only the confession of appellant 2; and it is on this that the prosecution rests mainly. It is conceded by the Public Prosecutor that if that confession goes it must follow that the prosecution has failed to establish the guilt of either of the appellants. Before dealing with this confession it may be desirable to mention that the case for the prosecution, as shown in the confession, is that the deceased was beaten with a stick by appellant 1, the stick itself being that of appellant 2.

The injuries caused were not very serious so far as appearances go. The medical evidence does not show that there was any serious internal injury, and the principal external injuries were a small incised wound on the centre of the head, a contusion below the right breast, and an irregular contusion on the left side of the abdomen besides a contused swelling on the left side of the neck. According to the Sub-Assistant Surgeon all these injuries, besides the minor injuries noted by him, might have been caused by a blunt instrument. The cause of death is no doubt given by him as shock due to the injuries, but the nature of the injuries does not seem to support fully this conclusion. Unfortunately, the Sub-Assistant Surgeon was not cross-examined as to the cause of death, and in this state of the evidence, however unsatisfactory the position may be, it is difficult to say that the medical opinion as to the cause of death is wrong, though if the point was very material and had to be decided, I should say that the cause of death has not been satisfactorily established. It is, however, unnecessary to go into the question of the cause of death because neither of the appellants has been found guilty either of murder or of culpable homicide. The offence of which appellant 1 has been convicted is one of causing grievous hurt with a dangerous weapon and the offence of which appellant 2 has been convicted is one punishable under S. 201, I. P. C. It may, however, be mentioned that it is very difficult to understand the reasoning of the learned Sessions Judge which led him to think that the stick said to have been employed in inflicting the injuries on the deceased was a weapon of the kind mentioned in S. 326, I. P. C., that is to say, an instrument for shooting, stabbing, or cutting or an instrument which, used as a weapon of offence, is likely to cause death. There is nothing in the evidence so far as I can see to show what the size of the stick was or its weight or its length; the evidence refers to it merely as a stick. It cannot certainly be said that every stick is an instrument of the kind described in S. 326, I. P. C. Finally, the learned Sessions Judge does not clearly

explain why he was of opinion that grievous hurt had been caused in this case. The nature of the injuries themselves does not show that they constitute grievous hurt. His view appears to have been that :

> The offence committed by accused 1 would fall under S. 326, I. P. C., because the accused would have known full well that beating a person on the tender parts of the body forcibly with a stick would cause grievous hurt.

In other words, he seems to have been of opinion that beating a person with the knowledge that such beating would cause grievous hurt would amount to the offence of causing grievous hurt. This is not correct because unless grievous hurt is actually caused the offence of causing grievous hurt is not established. Mere knowledge that grievous hurt is likely to be caused is not enough if grievous hurt is not actually caused. There is no finding by the learned Sessions Judge in this case that grievous hurt had been actually caused to the deceased. I turn now to the all-important question of the admissibility of, and the weight to be given to, the confession made by appellant 2, namely Ex. B series. In the first place that confession was retracted at the very first opportunity, that is to say during the preliminary enquiry before the committing Magistrate, by appellant 2. His case was that he made that confession under the hope held out to him by the police that he would be taken on as an approver; in fact, he mentioned the particular head constable who held out such a hope. It is not as if we have only a vague statement that the confession was induced by the police. The specific allegation made by appellant 2 is to some extent supported by the fact that only three days later, that is to say, on 6th March, the Sub-Inspector of Police, i. e. the officer investigating the case, told the Magistrate who recorded the confession that the question of taking appellant 2 as an approver was under correspondence. It would therefore appear as if there was some idea in the mind of the Police Officer investigating the case of taking appellant 2 as an approver. Whether the idea arose for the first time only after the confession was recorded or even before is difficult to say. It is a remarkable coincidence that the Magistrate who recorded the confession, while he, with meticulous care put a number of other questions to appellant 2 before recording his confession in the very words contained in the rule (R. 85 of the Criminal Rules of Practice), did not give him any warning as required by that rule that it was not intended to make appellant 2 an approver. Indeed, this is one of the imperative directions contained in R. 85 of the Criminal Rules of Practice the first part of which runs as follows :

> No Magistrate shall record any statement or confession made by an accused person under S. 164, Criminal P. C. : (1) until the Magistrate has first recorded in writing his reasons for believing that the accused is prepared to make the statement voluntarily; and (2) until he has explained to the accused that he is under no obligation to answer any question at all and has warned the accused that it is not intended to make him an approver and that anything he says may be used against him.

In the second part of R. 85 certain questions are suggested as questions which may be usefully put by the Magistrate to the accused for the purpose of satisfying himself that the confession is voluntary. All these questions were put in the very words found in the rule by the Magistrate in this case. At the end of the confession, and as a part of the certificate of the Magistrate, it is stated that it had been explained by the Magistrate to appellant 2 that he was not bound to make a confession and that if he did so any confession which he might make might be used against him. It would have been far more satisfactory if this had been done before the confession was recorded than at the end. If the explanation that the accused was not bound to make a confession, and that any confession which he may make may be used against him, had been given only after the confession was recorded, it would not help in deciding whether the confession was voluntary. The certificate itself does not say that this explanation was given to the appellant before the confession was made. The Magistrate who was examined about the confession says that he did not warn appellant 2 that it was not intended to make him an approver. This was in his cross-examination. The prosecution has not elicted the reason why he did not give this warning, whether the omission was deliberate or accidental. Nor did the Court whose duty it was to satisfy itself that the confession had not been brought about as a result of any inducement held out take the precaution of ascertaining why the Magistrate did not give the warning. The importance of this warning cannot be underrated. It may be that the rule prescribing such

warnings to be given, namely R. 85 of the Criminal Rules of Practice, is only a rule of practice and not a rule having the force of law. But that does not conclude the matter. It is a rule which has been in existence for nearly 50 years past. The rule was made as the result of a representation made by the High Court as will be seen from G. O. No. 2883, Judicial, dated 17th December 1887, a reference to which appears to be not out of place. The High Court had called the attention of the Government to the increasing number of cases in which there was reason to believe that :

> Accused persons have been subjected by the Police to ill-treatment or torture in order to extort a confession or that confessions possibly so obtained have been too hastily admitted or relied on by the Criminal Courts.

The Governor-in-Council recognized the great importance of the subject and expressed his fears that the representation of the High Court was not exaggerated. It was also observed that the commonest course employed by the police is to accompany a threat or a moderate degree of ill-treatment with a promise or hint that on confession the accused shall be made an approver.

One of the suggestions made by the High Court and approved by the Government was that village munsifs should be absolutely prohibited from taking the signature of an accused person to any confession or statement whatever, or even reducing such statement to writing. The second suggestion was, and it was also accepted by the Government that:

> No Magistrate should record any confession or statement under S. 164, Criminal P. C., until he has first recorded in writing his reasons for believing that the accused is going to make such statement voluntarily; and until he has explained to the accused that he is under no obligation to answer any question at all, and warned him that it is not intended to make him an approver, and that anything he says will be used against him.

These are the very words of R. 85 (1) of the Criminal Rules of Practice as it stands now. No doubt this rule was issued as an executive order to all Magistrates. But the rule is one which is so obviously a rule of justice and reason that its non-observance must be regarded as a serious defect and must necessarily have a bearing on the question of the admissibility or, at any rate, the value of the confession. This is so all the more in cases like this where practically the case for the prosecution rests on a confession obtained without observing the precautions which have been prescribed as necessary and observed as such as a general rule of practice for nearly 50 years; the question is, not whether the omission to give this warning invalidates the confession as being one not recorded in the manner prescribed by law, but whether the omission to give such a warning does not raise a strong suspicion that the confession was not voluntary, a suspicion so strong that when taken in connection with other circumstances it would amount to a fairly strong probability that the confession was the result of an inducement held out to the effect that the accused would be taken as an approver.

The learned Sessions Judge seems to have thought that this retracted confession could be taken into consideration even as against appellant 1 forgetful of the fact that this was not a case in which the confession of appellant 2 was in respect of the offence of which both of them were charged, namely the offence of murder. The confession is only a confession about taking part in the disposal of the dead body so far as the maker of the confession is concerned. It does not implicate the maker of the confession in anything which preceded the death. It is enough in this connection to refer to the observations of Reilly, J. in 54 Mad 75.[1] This is therefore a case in which the confession even if unretracted could not be taken into consideration as against appellant 1; and the learned Sessions Judge has erred in law in not only taking it into consideration against appellant 1 but in actually basing his finding about the guilt of appellant 1 on such a confession. It is astonishing to find, in view of the actual confession made by appellant 2, the learned Sessions Judge saying:

> This is not a case where the accused 2 wants the hangman's rope to be wound round the neck of the co-accused and assign to himself a minor part.

In fact, this is indeed a case of this kind, for while assigning the cause of death to appellant 1 the maker of the confession assigns to himself the comparatively minor part of assisting the person who killed the woman in disposing of the dead body. In view of the opinion that I have formed about the nature of this confession it is not necessary to deal with the other aspects of the case, for instance

1. *In re* Periyaswami Moopan, A I R 1931 Mad 177=1931 Cr C 281=32 Cr L J 448=54 Mad 75=59 M L J 471=129 I C 645.

the absence of any motive as regards both the appellants. It may be that some feeling of jealousy might have been aroused, but the subsequent conduct in going together to the school compound after appellant 1 had given a few blows with appellant 2's stick to the deceased, and, according to the learned Sessions Judge's view appellant 1 and the deceased thereafter having intercourse just prior to the beating appear to show to an unprejudiced mind that the temporary feeling of jealousy must have ceased to oppress appellant 1's mind. The learned Sessions Judge was of opinion that they went to the school compound after "composing their differences for the time being", and they were chatting together there. The learned Sessions Judge moreover expresses a doubt as to whether appellant 1 "ever intended to give anything more than a good hammering to his concubine for her suspected unfaithfulness".

As I have found already, the confession, on which the finding of the learned Sessions Judge rests almost entirely in the sense that without it the finding cannot stand, was in all probability made because of some inducement held out by the police officers in charge of the case that the maker of the confession would be taken on as an approver. Even as against the maker of the confession it is not admissible and it must certainly be disregarded entirely as regards appellant 1. Whereas in this case the prosecution seeks to rely almost entirely on a confession, it is all the more necessary that every precaution must have been taken to ensure that the procedure prescribed by R. 85 of the Criminal Rules of Practice is observed not merely in the letter but in the spirit. I am of opinion that in this case this rule has not been observed either in the letter or in the spirit. The convictions and sentences of both the appellants are, therefore, set aside and they are acquitted under S. 423, Criminal P. C. Their bail bonds will be cancelled.

C.R.K./W.D. *Appeal allowed.*

A. I. R. 1937 Madras 325

VENKATARAMANA RAO, J.

Sadasivam Pillai — Petitioner.

v.

Varadaraja Odayar—Opposite Party.

Civil Revn. No. 745 of 1936, Decided on 28th October 1936, from order of Sub-Judge, Kumbakonam, D/- 6th March 1936.

(a) Court-fees Act (1870), S. 12—Finality of order—Order of Court regarding court-fees—It has no power to revise valuation subsequently — Subsequent order for payment of additional court-fees if passed is illegal.

Once on an objection taken by the office or by a defendant, a Court applies its mind and gives its considered decision, it is final and its power to revise the valuation is at an end. [P 326 C 1]

Where a Court by an order decides that correct court-fees have been paid but subsequently orders that additional court-fees should be paid, the subsequent order passed is illegal and without jurisdiction : *A I R 1935 Mad 927, Foll.*

[P 325 C 2; P 326 C 1]

(b) Court-fees Act (1870), S. 12—Construction—Subject matter of suit should be before Court of appeal, revision or reference — Question whether proper court-fees have been paid cannot be considered in appeal or revision from orders like those on application for attachment before judgment or injunction.

The condition precedent to the exercise of powers under Cl. (2) of S. 12 is that the subject matter of the suit should be before the Court of appeal, revision or reference. The question whether court-fees paid are proper or not cannot be considered in appeal or revision from interlocutory orders like those on application for attachment before judgment or injunction. [P 326 C 1]

Where the Court by its order decided that correct court-fees were paid but subsequently ordered that additional court-fees should be paid, on application for revision of the subsequent order :

Held : that the powers under Cl. (2) of S. 12 as regards the correctness of the order could not be exercised as the suit was not before the revisional Court. Even assuming that the subsequent order was correct, it could not have been justified in up-holding it as it would be striking at the principle of finality laid down by S. 12, Cl. (1) : *15 Mad 181* and *63 Cal 720, Ref.*

[P 326 C 1, 2]

K. S. Desikan—for Petitioners.

G. Jagadeesa Aiyar — for Opposite Parties.

Order.—This is a petition to revise the order of the learned Subordinate Judge of Kumbakonam dated 6th March 1936 directing defendant 3 to pay an additional court-fee of Rs. 134-15-0 on his memorandum of appeal presented against the judgment and decree of the District Munsif of Kumbakonam in O. S. No. 323 of 1933 on the file of the said Court. This order was in supersession of the prior order passed by the same learned Judge on 20th November 1935 in and by which he had decided that the correct court-fee had been paid. The question is : Has the learned Judge jurisdiction to pass the order under revision ? In a recent case

reported in 42 M L W 354,[1] Venkatasubba Rao, J. in a considered judgment held that once on an objection taken by the Office or by a defendant, a Court applies its mind and gives its considered decision, it is final and its power to revise the valuation is at an end. No other interpretation is possible on the language of S. 12, Cl. 1, Court-fees Act. I respectfully agree with the said decision and set aside the order in question.

But I am invited by Mr. Jagadeesa Aiyar to go into the correctness of the said order and uphold it under S. 12, Cl. 2 of the said Act. Granting that the order is correct, I do not think I should be justified in upholding it on this ground as I would be striking at the principle of finality laid down by Cl. 1 of the section. And I would also be setting up a bad precedent by encouraging parties and Courts to go behind orders once passed and indirectly circumvent what is prohibited by the section. Unless compelled to do so, I should like to avoid a construction of Cl. 2 of the section which would lead to such a result. In my opinion, the condition precedent to the exercise of powers under Cl. 2 is that the suit, i. e., the subject matter of the suit, should be before the Court of appeal, reference or revision. It is unnecessary for me to consider in this case whether it should be the whole subject matter as 15 Mad 181[2] seems to suggest or if part of the subject matter is enough as observed by the learned Judges of the Calcutta High Court in 40 C W N 406,[3] but the suit whether whole or in part, must be before the Court of appeal or revision. Were it otherwise, it may be contended that whenever there is an appeal or revision against an interlocutory order in the suit (for instance, an order upon an application for injunction or attachment before judgment) the Court of appeal or revision can go into the question of court-fee paid in the lower Court if it is brought to its notice that the proper court-fee had not been paid. Such a result would never have been in the contemplation of the Legislature. As the suit is not before me, I do not feel warranted in exercising my powers under Cl. 2 of S. 12 and I express no opinion as to the correctness or otherwise of the order which is set aside. In the result the revision petition is allowed with costs.

C.R.K./K.B. *Application allowed.*

1. Lakshmana Ayyar v. Palaniappa Chettiar, A I R 1935 Mad 927=158 I C 588=69 M L J 479=42 M L W 354.
2. Kerala Varma v. Chadayan Kutti, (1892) 15 Mad 181.
3. Radharanee v. Kshetra Mohan, (1936) 63 Cal 720=40 C W N 406.

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* A. I. R. 1937 Madras 326

VENKATASUBBA RAO AND VENKATARAMANA RAO, JJ.

Trustee of Temple of Sree Venugopalaswamivaru—Appellant.

v.

Vedantam Seetharamanujacharyulu and *others*—Respondents.

Appeal No. 43 of 1936, Decided on 11th November 1936, against decree of Sub-Judge, Masulipatam, in A. S. No. 11 of 1935.

*** Execution — Scheme decree regarding constitution of temple, allowing arrears of pay and paditharam expenses of archakas from date of suit to date of judgment—Such payments cannot form part of scheme and can therefore be recovered by way of execution of decree.**

Where a decree provides for a scheme the proper way of dealing with such decree is to separate scheme part from the rest of the decree and when that is done, no provision in the scheme part is executable, whether it is directory or declaratory : *A I R 1936 Mad 581, Rel. on.* [P 327 C 1]

Where a decree when laying down a scheme for the constitution of a temple allowed the arrears of pay and paditharam expenses of archakas from the date of the suit to the date of the judgment :

***Held* : that such payments did not form part of the scheme and therefore could be recovered by way of execution of the decree. [P 327 C 1]**

***Held further* : that from the date of the decree the archakas became entitled to their salary and the paditharam expenses under the scheme and therefore those amounts becoming due subsequent to the decree could not be recovered by way of execution. [P 327 C 1]**

P. Satyanarayana Rao—for Appellant.

A. Venkatachalam—for Respondents.

Venkatasubba Rao, J. — On a proper construction of the judgment of the High Court, we think that the archakas, i. e., the respondents must be deemed to have been allowed arrears of pay from the date of suit, namely 28th September 1923 to the date of that judgment, namely 13th August 1931, and paditharam expenses likewise for the same period. If this be so, the question arises : Can the amounts claimed for this period be recovered by way of execution of the decree ? The

principle governing this matter has been clearly laid down in 59 Mad 751,[1] a recent decision of a Bench of this Court. As has been observed there :

> The true distinction is, not whether a provision in a scheme decree is directory or declaratory, but whether the provision sought to be executed is or is not in what is really the scheme part of the decree. . . . . the proper way of dealing with the matter is first to separate the scheme part from the rest of the decree and that, when that is done no provision in the scheme part is executable, whether it is directory or declaratory [at p. 754].

In the present case, so far as the past arrears are concerned, they cannot be regarded as having been embodied in the scheme part of the decree, indeed they could not have been so embodied, for the simple reason that payment of past arrears is not a part of the permanent arrangement regulating the constitution of the temple. The respondents are therefore entitled to recover by way of execution the arrears for the period above mentioned. The execution petition, in so far as it relates to the arrears which accrued due previous to the suit (from 1st January 1923 to 28th September 1923), we must hold, is unsustainable. We may mention that from the date of the High Court's decree, the archakas become entitled to their salary and the paditharam expenses under the provisions of the scheme and it follows that these amounts cannot be recovered by way of execution. It has been urged on behalf of the trustee, the appellant, that the archakas came into possession of some rents and other sums, which should be directed to be set-off against the arrears now claimed. The Subordinate Judge has in the judgment delivered in the suit held that the archakas were not bound to render an account; that in our opinion must be limited to the period before the suit. If it can be shown that since the suit the archakas came into possession of any moneys belonging to the temple, their claim should to that extent be reduced ; but that is a matter which must be gone into by the executing Court. In the result the appeal is dismissed with costs.

Further order. — Mr. Venkatachalam orally applies under S. 47, Civil P. C., that his application, in so far as it relates to the arrears due from 13th August 1931 to 30th September 1932, may be allowed to be converted into a suit. We think this request may be granted and we direct that on his paying the necessary court-fee, the application to this extent may be treated as a suit and disposed of by the lower Court. Time for payment of court-fee will be one month from the date of the receipt of this order by the lower Court.

C.R.K./P.R. *Appeal dismissed.*

1. Vaithilinga Mudaliar v. Board of Control, Sri Thayagarajaswami Devasthanam, Thiruvarur, A I R 1936 Mad 581=165 I C 820=71 M L J 87=59 Mad 751.

A. I. R. 1937 Madras 327

VARADACHARIAR AND BURN, JJ.

C. Sendilvelu Mudaliar—Appellant.

v.

A. Venkatasubbu Mudaliar and *others*—Respondents.

C. C. C. Appeal No. 14 of 1935, Decided on 23rd November 1936, against decree of City Civil Judge, Madras, D/- 9th October 1934.

(a) Madras Hindu Religious Endowments Act (20 of 1863), S. 7—Committee can do all acts reasonably necessary for due preservation of property — But undue interference with existing management is not allowed—Committee constituted under Act 20 of 1863 have all powers of superintendence conferred on Revenue Board by Regn. 7 of 1817.

It is open to the Madras Hindu Devasthanam Committee constituted by notification under S. 7, Act 20 of 1863, to take all steps which may seem to them reasonably necessary for the due preservation of the properties of the temple and the only limitation to be imposed upon their powers is that they should not unnecessarily interfere with anything that may be described as the existing management. The management of the temple is prima facie in the Dharmakarthas and the committee ought not to exercise their powers arbitrarily nor reduce them to the position of servants nor interfere with the internal affairs of the temple : *A I R 1915 Mad 38, Ref.* [P 329 C 1, 2]

A committee constituted under Act, 20 of 1863, have all the powers which the Revenue Board had under Regn. 7 of 1817 and in general terms their powers can be described as powers of superintendence. [P 329 C 2]

(b) Madras Hindu Religious Endowments Act (20 of 1863), S. 7—Powers of Committee — Committee appointing Overseer and defining his powers by separate resolution—Office of Overseer pre-existing—'Overseer' claiming joint possession with trustees of temple properties and keys—Trustees opposing claim of Overseer and challenging legality of resolution passed by Committee—Resolution, held was within committee's powers and binding on trustees—Directions given to Overseer were valid and binding.

A trustee of a temple, filed a suit asking for an injunction restraining the 'Overseer' appointed in 1931 by the Madras Hindu Devasthanam Committee in exercise of their powers under Act 20 of

1863, from claiming joint possession and custody of the temple jewels, gold and silver articles and other moveables of the temple along with the trustees and from demanding delivery of the keys of the temple safes. The temple was one falling under S. 3, Madras Hindu Religious Endowments Act, 20 of 1863. In August 1933 the committee passed a resolution defining the rights and duties of the Overseers and the said resolution referred to the rights which the trustee sought to restrain the Overseers from doing. In evidence it was found that the office of the Overseers was in existence since about 1800 with some periods during which it was vacant and that always he had the powers specified in the resolution. It was also contended that the action of the committee would be practically compelling a breach of trust by the trustees :

Held : that the resolution passed was within the powers of the committee and legal and binding on the trustees and that the contention of the trustees rested partly upon a misapprehension of the position of a dharmakartha identifying him for all purposes with a 'trustee' in the English sense. [P 331 C 1]

Held also : that apart from that, if a statutory body like the Devasthanam Committee acting within their powers under the statute should give a direction to that effect it could not be contended, basing an argument upon the law of trusts and trustees, that the statutory body was not justified in giving these directions; and that there could be very little doubt in the case that the direction was one given or conceived to be in the interests of the preservation of the property of the temple. The Overseer was as much an officer appointed by the Devasthanam Committee under its statutory powers as the trustees and if the proper authority laid down certain functions as the proper functions of each office holder, there was no legal objection to its so doing. It was within the powers of the committee even to appoint additional trustees, without bringing any charges against the existing trustees. [P 331 C 1, 2]

K. Rajah Ayyar and *T. R. Srinivasa Ayyar*—for Appellant.

T. M. Krishnaswami Iyer, *V. Ganapathi Ayyar* and *M. Ramchandra Punth*—for Respondents.

V. V. Srinivasa Ayyangar and *V. V. Ramadurai*—for Committee.

Varadachariar, J.—The suit out of which this appeal arises was instituted by the plaintiff, who was then one of the trustees of Sri Kapaleeswarar temple, Mylapore, asking for an injunction restraining defendant 1 from claiming joint possession and custody of the temple jewels, gold and silver articles and other moveables of the temple along with the trustees and from demanding delivery of the keys of the temple safes. The temple is admittedly one falling under S. 3, Madras Hindu Religious Endowments Act 20 of 1863, which still remains in force so far as the City of Madras is concerned. Defendant 1 holds what is known as the office of Overseer in the said temple, having been appointed thereto by the Madras Hindu Devasthanam Committee in 1931.

The documentary evidence shows that from time to time there have been differences between the trustees and the Overseer as to the relative scope of their functions. Though the plaint does not in terms refer to a resolution passed by the Devasthanam Committee in August 1933, it is clear from para. 6 of the plaint that it is the arrangement brought about by that resolution that led to the institution of the suit. The point for decision practically reduces itself to this : whether the Devasthanam Committee in the exercise of their powers under Act 20 of 1863, were justified in defining the duties of defendant 1's office in the terms mentioned in the said resolution. The learned City Civil Judge was of opinion that the committee were not justified in so declaring the functions of defendant 1, that in effect the resolution of the committee amounts to a limitation of the powers of the trustees or the promotion of defendant 1 to the position of a trustee jointly with the existing trustees and that the committee were wrong in coming to the conclusion that the Overseer was entitled to a third key. He accordingly granted an injunction in the terms prayed for. Hence this appeal by defendant 1. We may observe at the outset that instead of restricting the trial to the narrow question as above suggested, the learned City Civil Judge, apparently in view of certain incidental statements in the plaint and in the written statement, raised the first part of the first issue in very wide terms and, in various portions of his judgment, he has dealt with the suit as if he had been called upon to decide whether defendant 1 was entitled to joint management of the temple and its properties with the trustees. It would have been better if he had restricted himself to the second part of the first issue. We prefer to restrict our judgment to that question, because there is no denying the fact that this temple has been under a kind of management not altogether common in this presidency, the institution of an overseer being peculiar to this temple. No useful purpose will be served by attempting to determine the exact status of defendant 1 relatively to the trustees or by using language importing any idea of superiority or inferiority.

In the Court below, a point was raised by way of an objection to the maintainability of the suit, that as the suit was practically directed against the resolution of the committee of August 1933, the committee should have been impleaded as a party to the suit. Whether the omission is fatal to the maintainability of the suit or not, there can be very little doubt that it would be very unsatisfactory to decide the question raised in the suit in the absence of the committee from the record. We accordingly directed that the committee might be impleaded as a party to this appeal and that has been done. Mr. V. V. Srinivasa Ayyangar who appeared before us on behalf of the committee sought to raise some larger issues with reference to the scope of the powers of the committee, in view of the terms of S. 12 of Act 20 of 1863. In particular, he contended that on the true construction of S. 12 of Act 20 of 1863 the members of the committee themselves should be regarded as managers of the institution and that the dharmakarthas, though they are ordinarily referred to as trustees, are really persons who are to carry out the directions of the committee. Mr. T. M. Krishnaswami Ayyar who appeared for the respondents insisted that this argument is opposed to a long course of decisions in this Court. We do not think it necessary for the purpose of this case to deal with this aspect of the question either and we prefer to refrain from saying anything on it, particularly for the reasons that we have been told that there is a suit pending in which this question may arise for decision.

Mr. Krishnaswami Ayyar drew our attention to certain cases which have recognized that the management of temples is prima facie in the dharmakarthas and that the committee ought not to reduce them to the position of servants nor interfere with the management of the internal affairs of the temple. There are also observations in some of the cases to the effect that the committee are not entitled to exercise their powers arbitrarily. But on the other hand it has also been recognized that it is open to the committee to take all steps which may seem to them reasonably necessary for the due preservation of the properties of the institution and that in this respect the only limitation to be imposed upon their powers is that they should not unnecessarily interfere with anything that may be described as the existing scheme of management: *see* 28 M L J 209.[1] We will only add that all the decisions of this Court recognize that a committee constituted under Act 20 of 1863 have all the powers which the Revenue Board had under Regn. 7 of 1817 and that in general terms their powers can be described as powers of superintendence.

Coming to the history of the management of the Mylapore temple, the earliest available information is that furnished by Ex. 26, dated 7th November 1800. (Their Lordships then traced the history of the management of the temple since 1800 under the superintendence of the Board of Revenue through the Collector of Madras by appointing 'Church Warden' and two "Overseers" by Ex. 26. Later the term "Dharmakarthas" took the place of "Church Warden", but the word "Overseer" continued to remain. In due course as the word "Dharmakartha" came to be used synonymously with the word 'Trustee' further confusion was caused by reading into the words "Dharmakarthas" all the connotations of the English Law of Trust. The one provision in Ex. 26 was that the jewels, papers, and cadjan documents of the pagoda be made over to these three persons already mentioned to be kept in an iron chest under their keys and that the key of the Conicopilly to the pagoda.

There was constant trouble between the Trustees on the one side and the Overseer on the other and there were periods during which the appointment of the trustee was left vacant and the trustees were in sole charge. After such elapse in 1859 an overseer was again nominated. Their Lordships continued.) The upshot of it all was that an Overseer again came to be appointed, but in view of the controversy which had then started, the Board again wished to make it clear that while in the exercise of their powers under Regn. 7 of 1817 they authorized the nomination of an Overseer to that office, it would be better, before making the appointment, to make such arrangement as to the duties and powers of the Overseer as would prevent future disputes between him and the trustees. Once again on an examination of the previous records the Board found their letter to the Government dated 11th March 1829, to which we have already referred, and in Ex. D a memorandum

1. Thiruvengadatha Ayyangar v. Ponnappa Ayyangar, A I R 1915 Mad 38=25 I C 965=38 Mad 1176=28 M L J 209.

dated 20th April 1860, they set out the contents of that letter and added that the Overseer

> is not to interfere except on the permission of the two trustees with the management of the affairs of the pagoda appointing and dismissing servants, conducting festivals, etc.

It is on this document that the learned City Civil Judge has relied in particular and Mr. Krishnaswami Ayyar on behalf of the plaintiff also strongly relied upon it. The City Civil Judge went to the length of saying that we might well ignore the question what the practice was prior to Ex. D. Mr. Krishnaswami Ayyar did not take up that extreme position. He contended that the information as to the previous practice was so very scanty that it could not be said that there was anything like an established usage and that Ex. D must therefore be taken as defining the duties of the Overseer's office. When we put it to him whether in view of the provisions of Act 20 of 1863, there is anything to suggest that the Board's action must necessarily limit the discretion of the committee in so far as the committee acted within their powers under Act 20 of 1863, he agreed that as the committee had the same powers as the Board, there is no question of the Board's action fettering the powers of the committee so long as they acted within the limits of their jurisdiction. It is not right to regard Ex. D as if it related to the creation of a new office; nor does it appear to us right to treat Ex. D as exhaustively defining the duties of the office. As we have already endeavoured to show, Ex. D merely quotes from the letter of 11th March 1829 and that letter was intended to settle the particular controversy which had then assumed prominence. We are not satisfied that the question of the joint custody of the keys or of the valuable properties belonging to the temple was ever in controversy in the sense that a pronouncement upon it became necessary. Seeing the very clear provisions made in the earlier documents to which we have referred, we are not prepared to assume that there must have been any such controversy and unless there is anything in the later documents definitely negativing the continuance of the practice indicated in the earlier documents, we must take it that the provisions of the earlier documents relating to the joint custody had not ceased to be operative. It is noteworthy that when the appointments of trustees and overseer to this temple came before the High Court on the original side in a proceeding of 1876, the Court's decree directed the Receiver to hand over custody of the temple properties and monies jointly to the two trustees and to the overseer.

The Devasthanam Committee seems to have been constituted by a notification under S. 7 of Act 20 of 1863 in the year 1866. Though the proceedings books of the Committee for nearly the whole subsequent period have been filed, our attention has been drawn only to certain proceedings here and there according as the parties thought that they had some bearing upon the question at issue. It is regrettable that different opinions should have obtained at different times as to the scope of the relative functions of the dharmakarthas and the Overseer, but it is perhaps not very difficult to account for that divergence. (Their Lordships then discussed the evidence as to how the attempt of the Overseer to encroach upon the powers of the Dharmakartha was resisted by the several Dharmakarthas during their period of office, and continued.) It is true that at the time he (the first defendant) was appointed, the Committee reproduced the language of the Board's resolution of 1860 which had been communicated to the previous appointees, but the first defendant insisted upon a fuller examination of the matter and the result was a resolution passed by the Committee in 1933 which had led to this suit. Confining ourselves to the question of the custody of the keys and the joint custody of the temple properties, we wish to point out that even those proceedings of the temple Committee which have been marked as exhibits in the case refer to the fact that the safe of the temple had three keys, two of which were in the custody of the two trustees and the third was in the custody of the Overseer. On two occasions, when the old Overseer died or resigned, reference is made in the Committee's proceedings to the key in his possession being handed over to the Committee for being given over to the successor. In a resolution dated the 11th March 1888 there is a specific direction that the room containing treasury, jewels and documents should be locked as usual with three keys and each of them should remain in the hands of the two dharmakarthas and of the Overseer. This resolu-

tion of 1888 seems to us of special significance because the practice there stated is said to be the usual practice; and reading the resolution in the light of the directions contained in the High Court's judgment of 1876, it rather suggests that during such time as there was an Overseer holding office, nobody thought it improper or contrary to the usage of the institution that one of the keys of the temple treasury and jewels' safe should be in charge of the Overseer.

Mr. Krishnaswami Ayyar suggested that probably about this time the members of the Committee were trying to reduce the dharmakarthas to a position of subordination and relied upon some observation of Sadasiva Ayyar, J. in certain cases referring to the same tendency obtaining in some places. But the papers before us do not afford any warrant for the suggestion that this Committee was making any such improper attempt. Mr. Krishnaswami Ayyar placed great reliance upon the evidence of P. W. 1 as to the practice that obtained during his tenure of office between 1899 and 1924. As we have already pointed out, for a considerable portion of that period no Overseer had been appointed at all and during occasions when an Overseer was in office, P. W. 1 frankly admits that the Overseer did attempt to assert his rights but the attempts did not avail. The failure is no doubt a circumstance in favour of the plaintiff's case, but having regard to the other evidence in the case, we do not feel justified in drawing an inference against the existence of the practice merely from the fact that during this particular period the Overseer was not able to exercise those powers. A further contention was advanced before us on behalf of the plaintiff that it would be practically compelling a breach of trust by the trustees if the dharmakarthas should be asked to share responsibility for the safe custody of the temple properties with another officer like defendant 1. This contention rests partly upon a misapprehension of the position of a dharmakartha, identifying him for all purposes with a trustee in the English sense. Apart from that, if a statutory body like the Devasthanam Committee acting within their powers under the Statute should give a direction to that effect, we do not think that merely on a general argument based upon the law of trusts and trustees we should hold that the statutory body was not justified in giving these directions; and there can be very little doubt in this case that the direction was one given or conceived to be in the interests of the preservation of the property of the temple.

The case in 39 E R 376[2] is not by any means analogous. There, a person who wanted to become a Receiver attempted to find sureties for securing this appointment and for that purpose he agreed with them that he would submit to all monies being invested in the names of himself and the sureties. The Court pointed out that the sureties were not persons who were responsible to the Court for the safe custody of the money and that the Receiver would not be excused from the due discharge of his duties merely because he had no time to get the concurrence of the sureties before drawing the monies from a bank when it was about to fail. Here the Overseer is as much an officer appointed by the Devasthanam Committee under its statutory powers as the trustees, and if the proper authority lays down certain functions as the proper functions of each office-holder, we see no legal objection to its so doing. On the other hand, the principle of the decision in 28 M L J 209[1] to which we have already referred indicates the contrary because the learned Judges there lay down that it is within the powers of the Committee even to appoint additional trustees, without bringing any charges against the existing trustees. We have already stated what we consider to be the true interpretation of Ex. D. But, even assuming for sake of argument that Ex. D exhaustively specified what the Board thought to be the functions of the office, we see no reason to hold that it is not within the competence of the Committee which has succeeded to the powers of the Board to lay down what it considers to be the proper duties of the office, in view of the information gatherable from the records. The learned City Civil Judge has used somewhat strong language in more places than one in dealing with the conduct of the Committee. We do not find anything to warrant such characterisation. The result is that the appeal is allowed and the suit dismissed with costs of defendant 1 both here and in the Court below

2. Salway v. Salway, (1831) 39 E R 376=2 Russ & M 215.

payable by the plaintiff. So far as the Committee are concerned they have been impleaded at our suggestion as parties to the appeal as we thought it proper that they should be before us. We therefore direct that the costs incurred by them in appearing before us will be paid to them out of the temple funds. As regards costs, if any, incurred by the Receivers in connection with this appeal, we prefer not to say anything, because we consider the Receivers to be only pro forma parties and have not heard any separate argument on their behalf. The Court which appointed the Receivers will decide what the proper course will be in relation to the expenses incurred by them in this connection.

C.R.K./B.D. *Appeal allowed.*

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* * A. I. R. 1937 Madras 332

VARADACHARIAR, J.

Boodapati Ankamma—Appellant.

v.

Boodapati Bamanappa—Respondent.

Second Appeal No. 1011 of 1932, Decided on 6th November 1936 against decree of District Court, Nellore, in A. S. No. 186 of 1931.

*** * (a) Hindu Law—Marriage—Validity—Hindu marriage is a sacrament and not a civil contract—All principles of law of contract are not applicable to it—Principles like that of freedom of consent by some responsible person if not by spouses themselves ought not to be ignored—Husband never willing for marriage, forced to go through it as automaton—Marriage is invalid.**

A Hindu marriage is a sacrament and not a civil contract and it is not permissible to apply to Hindu marriages all the principles of the Law of Contract. But it is too much to say from this that even fundamental principles like freedom of consent by some responsible person, if not by the spouses themselves, ought to be ignored. [P 334 C 1]

Where according to the plaintiff's (the husband's) case he was never a willing party to the marriage and on evidence it was found that he never wanted to be a party to the marriage and somebody else caught hold of his hand and made him tie a thali round the defendant's neck:

Held: that as the plaintiff did not intend to go through the form of marriage which he was forced to go thrqugh as a kind of automaton, he could not be held to have gone through the marriage and the marriage was invalid: *11 Bom 247*; *12 Cal 140* and *14 Mad 316*, *Ref.* [P 334 C 1, 2]

*** (b) Hindu Law—Marriage — Validity — Marriage brought about in spite of husband's unwillingness—If after marriage, parties live as husband and wife for sometime, husband's reluctance for marriage is lost by his subsequent conduct — Marriage becomes valid** (*Obiter*).

Obiter.—When marriage is brought about inspite of the unwillingness of the husband, he being forced to go through the form of marriage as a mere automaton, and the parties live as man and wife for sometime, the marriage would have to be upheld because any *locus pœnitentiæ* that he would have been entitled to on the footing of his being a reluctant party to the ceremony of marriage should be deemed to have been lost by reason of his subsequent conduct. [P 333 C 2; P 334 C 1]

Ch. Raghava Rao—for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastry*—for Respondent.

Judgment.—Much as I pity the lot of the unfortunate appellant who has been made a pawn in a discreditable game played by some of her misguided relatives, I do not find any ground on which I can interfere with the decision of the lower appellate Court. The plaintiff sued for a declaration that the defendant was not his legally wedded wife, and the allegations in the plaint imply either that there was no marriage in fact or in any event, it did not amount to a valid marriage. It is common ground that the marriage, if any, took place under abnormal circumstances. The plaintiff was undoubtedly a young man—it makes very little difference whether he was 18 or 20 at the time—and the defendant's witnesses agree that the plaintiff's parents who were well to do people were not likely to agree to his marrying the defendant. It is accordingly the defendant's story that the marriage took place one evening in a stranger's house at a village four or five miles away from the village of the parties. D. W. 1 was the man who brought about the transaction. The defendant and her brother D. W. 5, were the only persons who on the bride's side went to that village in advance. The plaintiff admittedly came to that village in the company of D. W. 1, after the defendant and her brother had reached there, and it is then said that certain rites were gone through. It is also the defendant's story that after nightfall the plaintiff and the defendant returned to their own village, but instead of going to the plaintiff's parents' house, the party returned to the defendant's house where the plaintiff and the defendant lived as man and wife for three days. The suggestion of the defendant is that this suit which was instituted within 15 days after the events above referred to was instigated by the plaintiff's parents.

On the other hand, it is the plaintiff's story that not merely his parents but he

himself was never a willing party to this alliance, that the proposal was never mentioned to him till he actually found himself in the house in the neighbouring village that evening, that he was decoyed to that village by D. W. 1, on a representation that he was merely going in search of a lost cow, that when he found himself in that house in the evening he was surrounded by people who had been got ready there beforehand, that it was only then that he was asked to go through a marriage form to which he objected, that he was compelled by some of the people assembled there to sit on the plank, that his hand was seized by D. W. 1, and made to tie the thali round the defendant's neck. He denies that he returned to the bride's house that evening or lived with her as man and wife for three days as alleged. But for the tragic consequences, one may enjoy the humour of the story related by D. W. 1. I cannot help observing that on their own showing D. W. 1 and D. W. 5 have no right to complain if any Court refused to believe that evidence. The District Munsif came to the conclusion that the marriage was a deliberately planned affair by the plaintiff himself with the help of D. W. 1, and that the plaintiff went through the marriage of his own free will. On that finding there can be little doubt that the marriage will be valid, whatever defects of ceremonial there might have been and notwithstanding the objection of the plaintiff's parents to any such alliance. On appeal however the learned District Judge came to a different conclusion.

There are portions of the appellate judgment which are open to criticism. If the matter rested merely upon the question of defect of ceremonies, or the omission to go through the round of ceremonies which according to the description in Thurston's book it is usual to observe in Kamma marriages, I should not have been prepared to hold that the marriage is legally invalid. I am also free to confess that the statement in para. 15 of the lower appellate Court's judgment that circumstances like secrecy, haste, absence of festivities, etc., are invalidating circumstances, is putting the matter too high. At best, they can only be described as suspicious circumstances having an important bearing on the question of fact. But in para. 6, the lower appellate Court has found that the plaintiff could not have with his free will and consent entered into relationship of marriage with the defendant and that, if at all, there was only a farce of a marriage brought about by fraud or force on the part of D. W. 1, and his partisans. Here again, there is some room for the criticism that the expression 'fraud' or 'force' has been used by the learned Judge, without any clear indication of the elements which in his opinion constituted them, apparently because that expression is found in some of the reported cases bearing upon the question of the invalidity of the marriage. 'Fraud' in the sense defined by the Contract Act is difficult to find in the case. Fraud perhaps in a wider sense may be applied to this transaction if the plaintiff's story is true.

Dealing first with the question of fact, I do not feel that it is open to me to consider whether the version of the plaintiff is more likely or the version given by the defendant's witnesses is more likely. The case is according to both sides abnormal and the departure from the customary form of ceremonies will accordingly afford no criterion for decision. It is obvious that the learned District Judge intended to accept the plaintiff's testimony and I cannot say that he ought not to have accepted it. In substance, the story, as accepted by the learned Judge, seems to me to amount to this (in the words of the summary of the plaint given in para. 1 of the first Court's judgment, namely) that, on some pretext, the plaintiff was taken to the neighbouring village by D. W. 1, that D. W. 1 and D. W. 5 had without the plaintiff's knowledge made arrangements there beforehand for some of the formalities of the marriage ceremony, that when the plaintiff found himself in that house he was asked to marry the defendant to which he did not agree and that while this conversation was going on the plaintiff was asked to tie the thali to the defendant which he refused to do, that thereupon D. W. 1 held the plaintiff's hand and made him tie the thali to the defendant, that the plaintiff thereafter ran away from the place to his parents' house. If this is to be taken to be the true version, I am not able to say that the learned Judge was wrong in holding that there was no legal relationship of husband and wife created between the parties by whatever ceremonial gone through at the time. If I were satisfied as to the truth of the

defendant's story that after the events of the evening, the plaintiff and defendant did in fact live as man and wife for a period of three days, I should have unhesitatingly upheld the marriage because, at best the plaintiff would have only been a reluctant party to the ceremony and any *locus pœnitentiæ* that he might have been entitled to on that footing, he must be held to have lost by having chosen to live with the lady as husband for a time. Even the learned District Munsif does not seem to have accepted that version and the District Judge clearly rejects it. So far it is open to me to look into the evidence, I have examined it carefully and I am not satisfied that that part of the story is wholly reliable. The three days' period seems to me to have been suggested by the fact that three days after this incident, the plaintiff joined his father in the execution of certain gift deeds in favour of his sisters. D. W. 1 admits, though D. W. 5 denies, that that very evening the plaintiff's parents were on the track with a view to prevent the marriage if possible. D. W. 1 would have it that the parents came to the defendant's house in the night and rebuked them though D. W. 5 would deny even that. Having regard to the plaintiff's subsequent conduct and the position of the plaintiff's family and the proximity of their house, I find it difficult to accept the defendant's version that the plaintiff was allowed to remain in the defendant's house for three days.

Mr. Raghava Rao asked me to say that the plaintiff's evidence at best only shows that he reluctantly submitted to a proposal put before him by D. W. 1 and D. W. 5. I do not think that is a correct statement of the effect of the evidence. The plaintiff's evidence, if true, implies that his hand was merely moved by D. W. 1 and that the plaintiff by himself had no voluntary part in the matter. Mr. Raghava Rao next contended that even if this should be taken to be the finding of the lower appellate Court on the evidence, the Court is not justified in applying to a Hindu marriage the principles of the Law of Contract and holding the marriage to be inoperative or void. I agree that the Hindu marriage is a sacrament and not a civil contract and that it will not be permissible to apply to a Hindu marriage all the principles of the Law of Contract, at least for the reason that in most marriages sanctioned by the Hindu law the infant spouses have no contracting capacity. It seems to me, however, too much to argue from this that even fundamental principles like freedom of consent by some responsible person, if not by the spouses themselves, ought to be ignored. I am not for a moment saying that the absence of the parents' consent will always invalidate marriage. According to the plaintiff's case, the plaintiff was never a willing party to the marriage; and if on the evidence the Court holds that he never wanted to be a party to the marriage, the mere fact that somebody else caught hold of his hand and made him tie a thali round the lady's neck ought not, it seems to me, to be held to constitute a marriage, because it will be making a travesty of the so-called sacrament.

The reported decisions no doubt happen to be instances of objections raised from the point of view of the bride, such as absence of consent by her father and so on, and they have therefore laid stress upon the necessity for the gift of the girl by some competent person. But there is no reason to hold that that is the only possible kind of invalidation. In cases like 11 Bom 247,[1] 12 Cal 140,[2] 14 Mad 316,[3] and in the observations of Sir Gurudas Banerji (on pp. 56 and 57, Edn. 5 of his book on Marriage) a reservation has been made in respect of a ceremonial brought about by fraud or force. There is no scope here for the application of the principle of *factum valet*, because this is not a case of a mere violation of some 'directory' text.

Mr. Raghava Rao suggested that if one is to apply the principles of the law of contract, fraud or coercion must have been exercised by the other party to the contract, and that is not the case here. As I am not proceeding on the theory that the law of contract as such is applicable to the present case, I do not feel pressed by this contention. It seems to me that whoever may be responsible for it, if the husband never intended to go through the form which he is compelled to go through as a kind of automaton, he cannot be

1. Khushalchand Lalchand v. Bai Mani, (1887) 11 Bom 247.
2. Brindaban Chandra Kurmokar v. Chundra Kurmokar, (1886) 12 Cal 140.
3. Venkatacharyulu v. Rangacharyulu, (1891) 14 Mad 316=1 M L J 85.

held to have gone through the marriage at all. In this view I must hold that the lower appellate Court was right in decreeing the plaintiff's suit. The second appeal falls and must be dismissed with costs. I willingly grant leave in the hope that during the pendency of the appeal the parties will have the good sense to come to some honourable settlement or at least that the appellate Court may find some way of helping the appellant.

C.R.K./W.D. *Appeal dismissed.*

A. I. R. 1937 Madras 335

VENKATASUBBA RAO AND VENKATARAMANA RAO, JJ.

Manikkam Chetti—Appellant.

v.

Kamalam—Respondent.

Appeal No. 70 of 1934, Decided on 22nd October 1936, against decree of Sub-Judge, Kumbakonam, in O. S. No. 33 of 1931.

(a) Hindu Law—Partition— Some part of undivided property may be partitioned, rest remaining joint — Question is one of construction of partition deed and intention of parties.

In a partition of the joint family property, the character of undivided property may be taken away from some part of the estate, while, as regards the rest the members may retain their joint status. The question is therefore essentially one of intention of the parties and the construction of the partition deed executed between them: *11 M I A 75 (P C)* and *A I R 1922 P C 201, Rel. on.* [P 336 C 1]

(b) Evidence Act (1872), S. 91—Admissibility of extrinsic evidence—No ambiguity in instrument—Such evidence is inadmissible.

Where an instrument is plain and unequivocal and there is no ambiguity in it, extrinsic evidence cannot be admitted to construe it: *A I R 1928 Mad 1064* and *A I R 1934 P C 138, Foll.* [P 336 C 2]

(c) Hindu Law — Partition — Evidence — Intention to divide being manifest—Subsequent conduct of parties susceptible of two interpretations — Court ought to prefer that which accords with such intention.

Where the intention to divide is manifest, even if the subsequent conduct of the parties is susceptible of two interpretations, the Court ought to prefer that which accords with such intention. [P 337 C 2]

Where the facts proved are consistent either with a state of division or non-division, the Court ought not to lightly infer from equivocal facts that the parties intended to revoke the partition which has been entered into. [P 337 C 2]

(d) Hindu Law — Partition — Re-union — Re-union requires strict proof.

Re-union being of very rare occurrence, when after partition it is alleged amongst the co-parceners, it must be strictly proved: *A I R 1925 P C 49, Rel. on.* [P 337 C 2]

(e) Hindu Law—Joint family — Business — Presumption—When co-parcenary funds are employed, business will be presumed to belong to entire co-parcenary in absence of evidence to contrary.

When co-parcenary funds are employed in a joint family business, there may be one of two intentions, either that the concern belongs to an individual member, his share being debited with the sums employed or what is more natural that the concern is carried on for the joint benefit. In the absence of evidence to the contrary, the business will be presumed to belong to the entire co-parcenary. [P 338 C 1]

S. Srinivasa Ayyangar and *N. R. Govindachari*—for Appellant.

T. R. Venkatarama Sastry, A. Ganesa Ayyar, M. S. Venkatarama Iyer and *T. V. Rajagopalan*—for Respondent.

Venkatasubba Rao, J.—This suit has been brought on the allegation that the plaintiff's deceased husband and defendant 1 became divided and that the plaintiff is therefore entitled to her husband's share. It is also alleged that subsequent to the division the two brothers carried on business in partnership and the plaintiff on that footing claims an account of the partnership business. These mainly are the reliefs that the plaintiff has prayed for and the learned Subordinate Judge has found on these two points that the plaintiff's claim has been made out.

The facts may be briefly stated. There were three brothers: Annamalai, Arunachala, the plaintiff's husband and Manicka, defendant 1. They entered into a partition arrangement embodied in Ex. A, which covers forty pages in print. That is a very elaborate document and the items allotted to each of the three individuals have been set out in great detail. Hence, lands, outstandings, jewels and all descriptions of property have been partitioned and adjustments have been made to equalise shares. The point, however, that has given rise to some controversy is, that so far as certain outstandings amounting to Rs. 80,000 odd were concerned they were jointly allotted to Arunachala and Manicka; as regards the other assets of the family, there has been in the main a separate allotment made to each of the three individual sharers. Subsequent to the partition, Arunachala and Manicka carried on a joint trade (to use a neutral expression), treating the outstandings jointly allotted to them as pertaining to it.

It may be mentioned that the partition to which we have adverted commenced on 13th January 1926 and was completed on 25th February 1928; nevertheless, the main items having been partitioned in the early part of 1926, the parties regarded themselves thenceforward as having become severed. The joint trade carried on by Arunachala and Manicka after the partition continued till the death of the former on 16th February 1929. The present action was commenced on 5th April 1929, i. e., within a few weeks after his death. In the lower Court it was contended that the intention was merely to separate Annamalai from the family and that with a view to effect his separation, the shares of the three brothers were defined and elaborate calculations were made. This contention is opposed to the very clear and unambiguous recitals of Ex. A and does not require serious notice.

The argument pressed upon us here is that although as between Arunachala and Manicka there was a separation in respect of the other assets of the family, they must be treated as having retained their joint status in regard to the outstandings jointly allotted to them. That such a result can be brought about, there can be no question; but the point to decide is, is that the effect of the document? In A I R 1922 P C 201,[1] their Lordships of the Judicial Committee, after referring to 11 M I A 75,[2] point out that the character of undivided property may be taken away from some part of the estate, whilst as regards the rest the members may retain their joint status : *see* the case as reported in A I R 1922 P C 201[1] at p. 205. The question is therefore essentially one of construction of Ex. A. Does it lend any support to the contention that the outstandings allotted to Arunachala and Manicka jointly, were intended to retain the character of undivided property? As already stated, in other respects the division was complete and thorough. In regard to the houses, lands, jewellery and other moveables, there was a separate allotment to each of the three individual sharers. Some outstandings were allotted separately to Annamalai. Then as regards the outstandings jointly allotted to Arunachala and Manicka, there is a clear recital that they were to be divided in equal shares between them. This recital is very important and shows that the contention put forward cannot prevail. It will be convenient to set out here the result of a certain arrangement made between the parties. So far as the items exclusive of the outstandings were concerned, those allotted to the share of Annamalai were of the value of about Rs. 44,000; similarly, the total value of those allotted separately to the other two brothers was about Rs. 26,000, the difference between the two figures being about Rs. 18,000. To equalise the shares, Annamalai was directed to pay Rs. 10,920 odd to Arunachala and Rs. 7,200 odd to Manicka, these two sums aggregating to the Rs. 18,000 odd mentioned above. Passing here for a moment, what does this arrangement show? The sums to be paid were unequal and were determined with reference to the other allotments made. This, far from showing that Arunachala and Manicka intended to remain joint, shows quite the opposite. Then follows the recital already adverted to which clinches the matter. Referring to the Rs. 80,000 odd outstandings, the document goes on to say (as mentioned above) that they shall be collected and divided between the two brothers. In the face of this, it is difficult to follow the contention that the outstandings jointly allotted, were to remain in joint enjoyment and retain the character of undivided property. Moreover, the unambiguous declaration at the end of the document, that the three brothers divided the entire estate including the outstandings, is inconsistent with the theory put forward. It is unnecessary to pursue the matter further, as the learned Subordinate Judge has dealt with the question very fully and with his conclusion we are in entire agreement.

Mr. S. Srinivasa Ayyangar for the appellant contends that Ex. A is ambiguous and should be construed in the light of the acts of Arunachala and Manicka, both contemporaneous and subsequent. But in our opinion the instrument is plain and unequivocal and it is well settled that where there is no ambiguity, extrinsic evidence cannot be received. We may in this connexion refer to 55 M L J 132[3]

1. Ramalinga v. Narayana, A I R 1922 P C 201 =68 I C 451=49 I A 168=45 Mad 489 (P C).
2. Appovier v. Rama Subba Aiyan, (1866) 11 M I A 75=1 Suther 657=2 Sar 218=8 W R 1 (P C).
3. Babu v. Gokuldoss Govardhandoss, A I R 1928 Mad 1064=112 I C 184=55 M L J 132.

where the question has been fully considered: *see also* 57 Mad 931[4] where this case has been approved. We have just mentioned that the learned Subordinate Judge has found that subsequent to the partition the two brothers transacted business in copartnership. But defendant 1 contends that it was in their character as members of a Hindu coparcenary that they carried on the dealings. The outstandings having been jointly allotted to them, they were brought into the common business. The rents from the immoveable properties, to whomsoever they had been allotted, were indifferently credited in the common accounts, that is to say, the credits were not made individually in the name of Arunachala or Manicka; it was the tenants that were credited with the amounts paid. From these, we were asked to infer that the partition evidenced by Ex. A was not given effect to so far as these two brothers were concerned. But there is other evidence which shows that each brother was treated as having his own individual dealings. Arunachala purchased a property and the sale deed was taken in his name; the amounts paid as the sale price were debited against him separately. As regards the household expenses, the matter stands thus: Arunachala was at Kumbakonam and the expenses incurred there were carried to a separate page; similarly, the expenses incurred by Manicka at Aduthurai, where he was living, were separately entered. Within a few days of the death of Arunachala, Manicka had to file some suits for the recovery of certain amounts due to the joint business and in the plaints (Exs. R and S) he averred most distinctly, that he and his deceased brother were partners and the amounts became due to the partnership. The crediting of the rents in the account books without indicating to which of the two brothers they belonged, does not possess much significance. No one could tell what adjustments might have been made, had the partition accounts been settled, but the partnership was of a short duration as it came to an end by Arunachala's death.

The learned Judge has rightly held that from this and similar conduct no adverse inference can be drawn. There is a hevy burden which Manicka had to discharge, as his attempt was to show that the partition so complete in its details was not intended to be acted upon. In such a case what is the rule of evidence to be applied? Supposing the facts proved are consistent either with a state of division or non-division, no Court ought to lightly infer from equivocal facts that the parties intended to revoke, as it were, the partition which had been solemnly entered into; in other words, the intention to divide being manifest, even if the subsequent conduct is susceptible of two interpretations, no Court ought to hesitate to prefer that which accords with that intention. The alternative theory put forward that the divided brothers should be regarded as having become reunited is equally untenable. Re-union, being of "very rare occurrence" requires, when alleged, strict proof, 52 I A 83[5] at p. 86, and from what has been said, it will be apparent that there is not a shred of evidence in support of the alleged re-union. It has been suggested that Ex. A requires registration, as the immoveable properties have been divided by metes and bounds. That would depend upon the nature and effect of Ex. A, i. e., was it intended to be the operative deed by which the partition was brought about or to serve merely as a record of an already completed partition? It is unnecessary to go into this matter for in any event the document, as has been conceded, can be received in evidence to prove that there was a division in status and the question is of no importance, as the appellant, as his learned counsel has stated, has no desire to impugn the mode of division adopted at the partition that has been entered into.

Then we pass to the pledge business, regarding which there has been a good deal of argument. The first question that arises is was it a joint family concern before the partition. There is no doubt that the business had been carried on with the aid of joint family funds, and that circumstance would prima facie make it a joint family concern. When coparcenary funds are employed, there may be one of two intentions, either that the concern belongs to an individual member, his share being debited with the sums

4. Babu v. Official Assignee, A I R 1934 P C 138=150 I C 1=61 I A 257=57 Mad 931 (P C).

5. Palani Ammal v. Muthuvenkatachala Moniagar, A I R 1925 P C 49=87 I C 333=52 I A 83=48 Mad 254 (P C).

employed, or, what is more natural, that the concern was carried on for the joint benefit. However as stated above, in the absence of evidence to the contrary, the business will be presumed to belong to the entire coparcenary; but here the facts furnish positive evidence which shows that the pledge dealings were not treated as a joint family business. The brothers divided at the partition not the business itself but the sums left outstanding in it. It is difficult to say that there was one business or two businesses, but that is immaterial; the point to note is, that there was a distinct recognition at the partition by the brothers that the business in question was not a coparcenary concern and that it was on that footing they excluded it from the division. If this be borne in mind, the evidence adduced in the case presents no difficulty. There are two sums at p. 222 of the printed books Rs. 5,100 odd standing against the name of Arunachala and Rs. 2,300 odd against the name of Manicka. These are significant entries, and coupled with the admission of Manicka at p. 495 they lead to the inference that the pledge business at Kumbakonam belongs to Arunachala and that at Aduthurai to Manicka. This matter has been fully gone into by the Subordinate Judge and no reason has been shown why we should dissent from his conclusion. So far as the oral evidence of defendant 1 is concerned, no Court will be disposed to treat it as worthy of belief, as his conduct has been utterly dishonest as shown by the learned Judge in paras. 35 and 40 of his judgment.

Lastly remains the question of mesne profits: it was argued that the prayer in the plaint was confined to the profits of certain properties alone and that the judgment awarded much more than what was prayed for. But this contention was shown to have proceeded upon a misapprehension, and was later given up. We understand that the injunction granted by Cl. 4 of the decree has since been dissolved and that defendant 1 has received his share of the amount from the Union Bank. We are asked to record this fact and to say that the plaintiff shall likewise be at liberty to draw her own share, and we do so accordingly. In the result, the appeal is dismissed with costs.

C.R.K./W.D. *Appeal dismissed.*

A. I. R. 1937 Madras 338

STODART, J.

Ranganayaki Ammal—Petitioner.

v.

Janaki Ammal—Opposite Party.

Civil Revn. No. 36 of 1936, Decided on 7th December 1936, from order of Dist. Munsif, Villupuram, D/- 23rd December 1935.

(a) Parties—Proper party—*A* attaching joint family property of two minors in execution of money decree—Suit by grandmother of minors for maintenance claiming charge on same property—Pending suit, sale by guardian of minors of some property to *A* for avoiding Court sale—Application by *A* to be joined as party to maintenance suit—*A* held to be proper party to suit.

A attached all the joint family property of two minors in execution of his money decree. Subsequently a maintenance suit was brought by the grandmother of the minors claiming charge on the same property. The guardian of minors conveyed some property to *A* to avoid the court sale. *A* therefore applied to be joined as a party to the maintenance suit. The application was rejected by the Court on ground that the sale to *A* was *pendente lite*. On revision:

Held: that *A* was a proper party to the suit since at the time the suit was filed the property which the grandmother sought to be made the subject of the charge in her suit was under attachment at the instance of *A* and it was obviously just and convenient to decide in her suit whether the grandmother's right could override that of *A's*. [P 339 C 1]

(b) Civil P. C. (1908), S. 115—Addition of parties—Non-joinder of party—Court failing to exercise discretion vested in it under O. 1, R. 10 due to error—Revision lies.

An order under O. 1, R. 10 can be revised under S. 115, Civil P. C., when the Court fails to exercise a discretion vested in it and when its failure is due to error: *A I R 1926 Mad 135, Dissent.* [P 339 C 1]

Order.—Petitioner sought to be impleaded in a suit and against the order refusing her prayer she now files this petition. Petitioner had a money decree against a joint Hindu family represented by two minors. In execution she attached all the property of the family and was proceeding to bring it to sale, when the grandmother of the said minors filed the present suit for maintenance of Rs. 10 per mensem and Rs. 300 arrears. As usual she claimed a charge on all the family property, which as I have said at the date of suit had been attached, by this petitioner and was about to be brought to sale. The guardian of the minors averted the Court sale by conveying to the petitioner six items of the property. Peti-

tioner then applied to be brought on the record in the present suit in order to defend the said property which she had purchased from the anticipated charge claimed by the plaintiff. The lower Court rejected her petition on the ground that the sale to the petitioner was *pendente lite*. Against that order the petitioner has filed this revision petition. I think this petition must succeed. I think the petitioner was a proper party to the suit since at the time the suit was filed the property which the plaintiff in the suit sought to be made the subject of a charge was under attachment at the instance of this petitioner and it is obviously just and convenient to decide in this suit whether the plaintiff's rights shall override this petitioner's rights.

It is argued that S. 115, Civil P. C., cannot be invoked to revise an order refusing to add a party and the ruling in A I R 1926 Mad 135[1] is invoked in aid of that argument. That case was decided on the ground that the addition of a party under O. 1, R. 10 is ordinarily a matter within the discretion of the Court trying the suit and an erroneous exercise of discretion in a matter of procedure should not be regarded as something done illegally in the exercise of the Court's jurisdiction. This is a case where the trial Court thought that the present petitioner was an unnecessary party and with all respect to the learned Judge who decided the case just cited, I think that an order under O. 1, R. 10 can be revised when the Court fails to exercise a discretion vested in it and when its failure was due to error. Here the error is the omission to take into account the fact that the attachment of the property by this petitioner subsisted when the suit was filed. The petition is allowed with costs both here and in the lower Court.

C.R.K./K.B. *Petition allowed.*

1. Murugappa Chettiar v. L. K. S. S. Firm, A I R 1926 Mad 135=90 I C 721.

A. I. R. 1937 Madras 339

BURN, J.

Kannathazha Pakran and *others*—Appellants.

v.

Puthalath Amina Umma and *another*—Respondents.

Second Appeal No. 1184 of 1932, Decided on 20th October 1936.

(a) Malabar Tenancy Act (14 of 1930), S. 3 (L)—Kanam — Transferee permitted to enjoy property after termination of original period—Renewal fee calculated according to provisions of Act amounting to nothing—Liability to pay renewal fees still exists and kanam is still kanam.

In a transfer described as kanam the transferee was permitted to enjoy the property for a further period after the termination of the original period. The renewal fee calculated according to the provisions of the Act amounted to nothing. The transferee contended that he was not liable to pay any renewal fee at all and consequently there was no kanam :

Held : that the contention was wrong. It confused the question of the liability of the transferee to pay renewal fee with the question of the amount of renewal fee. The liability to pay the renewal fee was still there and the kanam was still the kanam. [P 340 C 1]

(b) Malabar Law—Kanam—Suit for eviction on ground of expiry of period of kanam—Kanamdar is entitled to apply for execution of renewal deed even after twelve years since expiry of period of kanam.

The Act does not prescribe any period after the expiry of the kanam within which the landlord must sue for eviction. But it does provide that when a suit is filed for eviction on the ground that the period of the kanam has expired, the kanamdar shall be entitled to apply for execution of the renewal deed. The kanamdar does not lose his privilege merely by reason of the fact that more than 12 years have expired since the period of the first kanam deed came to an end. [P 340 C 1]

(c) Malabar Tenancy Act (14 of 1930), S. 22—Kanamdar is entitled to apply for renewal even before prescribing of renewal fee.

It cannot have been the intention of the Legislature to deprive the kanamdar of the right to make an application for renewal during the period which must necessarily elapse after the passing of the Act and before prescribing the renewal fee. [P 340 C 1]

Judgment.—There is little that I can find to add to the judgment of the learned District Munsif and the judgment of the District Judge in this case. The points taken on behalf of the appellant are the same as were taken by him in both the lower Courts. The third point depends upon the definition of 'Kanam' in S. 3 (L), Malabar Tenancy Act. In that definition it is stated that the fifth incident of the transfer described as kanam is the liability of the transferee to pay the renewal fee to the transferor if the transferee is permitted to enjoy the said property for a further period after the termination of the original period. In the present case the renewal fee calculated according to the provisions of the Act comes to less than nothing, and the contention is therefore that the transferee is not liable to

pay any renewal fee at all and consequently there is no kanam. This is not a contention which I can accept. It would make the document a kanam at one time and no kanam at another time according to the varying prices of produce. It confuses the question of the liability of the transferee to pay the renewal fee with the question of the amount of renewal fee which he is liable to pay. There is no doubt in this case about the liability to pay a renewal fee; the very argument advanced on behalf of the appellant can only be developed by assuming that the transferee is liable to pay a renewal fee and then proceeding to calculate the amount of it under the Act. I agree with the learned District Munsif and the learned District Judge that there is no substance in this contention.

The second point depends upon the fact that the kanam in this case expired on the 13th July 1905 and the kanamdar has been holding over ever since. The Act does not prescribe any period after the expiry of the kanam within which the landlord must sue for eviction. But it does provide that when a suit is filed for eviction on the ground that the period of the kanam has expired, the kanamdar shall be entitled to apply for execution of the renewal deed. I agree with the learned District Munsif and the learned District Judge that the kanamdar has not lost his privilege merely by reason of the fact that more than 12 years have expired since the period of the first kanam deed came to an end. The first point that was taken has, in my opinion, even less substance. S. 22 provides that the kanamholder shall be entitled to apply to the Court in the form prescribed for the execution of a renewal deed. At the time this application was made no form was prescribed and the contention is that no application could therefore be made. This contention is in my opinion quite untenable. It cannot have been the intention of the Legislature to deprive the kanamdar of the right to make an application for renewal during the period which must necessarily elapse after the passing of the Act and before prescribing the renewal fee. For these reasons I agree with the learned District Munsif and the learned District Judge and dismiss this second appeal with costs.

C.R.K./S.C. *Appeal dismissed.*

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* A. I. R. 1937 Madras 340

VENKATARAMANA RAO, J.

Balath Kunhi Raman and *another*—Petitioners.

v.

Varayali Govindan and *another*—Opposite Parties.

Civil Revn. No. 772 of 1935, Decided on 14th December 1936, from decision of Principal District Munsif, Tellicherry, D/- 27th February 1935.

*** Limitation Act (1908), Arts. 7 and 102—Applicability—Words 'household servant' in Art. 7 mean servant belonging to household i. e., family or domestic establishment—Place of employment and not nature of service is determining factor—Hotel cook is not household servant—Suit by hotel cook for arrears of salary—Art. 102 and not Art. 7 applies.**

The expression 'household servant' in Art. 7 means a servant belonging to a household i. e., a family or a domestic establishment and it is not the nature of the service rendered by the servant but the place of employment that is the determining factor. A hotel cannot be said to be a household within the meaning of Art. 7 though hotel may be a household in the sense that it may board and lodge people but the essential feature of a household i. e., a family, is wanting. It is also a place of business where for consideration food and drink are sold and persons are housed and lodged.

In a suit therefore, brought by a hotel cook for arrears of salary, the proper article applicable is Art. 102 and not Art. 7 of the Act: *7 Mad 99, Rel. on.* [P 341 C 1]

K. N. Kumaran—for Petitioners.

K. Kuttikrishna Menon—for Opposite Parties.

Order.—This Civil Revision Petition arises out of a suit to recover a sum of Rs. 57-0-7 as and for arrears of salary due to the petitioners. She was employed as a cook on a monthly salary of Rs. 4 per mensem in a hotel which defendant 1, was running at Tirur. The case for the plaintiffs is that at the instance of defendant 2 she entered employment under defendant 1 as a cook and both promised to pay her the salary agreed. The suit was instituted on 21st November 1934 for the arrears due in respect of the period of her service, namely 9th November 1931 to 8th September 1933. The learned District Munsif of Tellicherry dismissed it on the ground that it was barred by limitation under Art. 7, Limitation Act. It is contended on behalf of the petitioner that the proper Article applicable is Art. 102. Art. 7 runs thus:

For the wages of a household servant, artisan or labourer not provided for by this schedule, Art. 4.	One year.	When the wages accrue due.

The question is, is the petitioner a 'household servant' within the meaning of the Article? If not, Art. 102 applies. It seems to me that the expression 'household servant' in Art. 7 means a servant belonging to a household, i. e., a family or a domestic establishment and it is not the nature of the service rendered by the servant but the place of employment that is the determining factor. A hotel cannot be said to be a 'household' within the meaning of the said Article though hotel may be a household in the sense that it may board and lodge people but the essential feature of a household, i. e., a family is wanting. It is also a place of business where for consideration food and drink are sold and persons are housed and lodged. In 7 Mad 99,[1] a person whose duties are to sweep and clean a temple was held not to be a household servant because the temple is not a household though the same servant for doing similar service in a household will be a household servant. This case indicates that the emphasis has to be placed on the term household in the Article and not on the nature of the service rendered by the servant. I am therefore of the opinion that Art. 102 will apply to the case and the suit is not barred by limitation. I therefore reverse the decree of the lower Court and allow the Civil Revision Petition by giving a decree in favour of the plaintiff for the amount claimed with interest at 6 per cent. from the date of the decree with costs both here and the Court below.

C.R.K./K.B. *Application allowed.*

1. Bhavathradan v. Rama, (1884) 7 Mad 99.

A. I. R. 1937 Madras 341

PANDRANG ROW, J.

In re *N. V. L. Narasimha Rao* and *others*—Petitioners.

Criminal Revn. Cases Nos. 345 to 349 and 351 to 355 and Petns. Nos. 318 to 322 and 324 to 328 of 1936, Decided on 11th December 1936, from order of Sub-Divisional Magistrate, Guntur, D/- 20th April 1936.

(a) Companies Act (1913), Ss. 131 and 134—Same persons cannot be charged in respect of same years with offences under Ss. 131 and 134.

The same persons cannot be charged in respect of the same years with offences punishable both under Ss. 131 and 134, Companies Act because S. 134 clearly contemplates the sending of a copy of the balance-sheet only after it has been placed before the Company at a general meeting under S. 131. Where in a case there is no such placing of the balance-sheet before the Company at a general meeting, the offence under S. 134 cannot be committed. [P 341 C 2]

(b) Companies Act (1913), S. 131—Persons neither directors nor officers, nor even shareholders at time of default are not liable in respect of offence under S. 131.

Persons who were never directors or officers of the Company or even share holders, when default occurred in preparing a balance-sheet and placing it before a general meeting of the Company cannot be held liable in respect of offence under S. 131: *A I R 1916 Lah 397, Disting.* [P 342 C 1]

B. Jagannadha Das and *J. Krishnamurthi*—for Petitioners.

K. Venkataraghavachariar for *Public Prosecutor*—for the Crown.

Order.—These revision petitions arise out of ten connected cases tried by the Sub-Divisional Magistrate of Guntur in respect of offences punishable under Ss. 131 (4) and 134 (4), Companies Act, 1913. Cases Nos. 345 to 349 are in respect of offences punishable under S. 134 and the others are in respect of offences punishable under S. 131 and they relate to the five years, 1921 to 1925. S. 134 relates to the non-sending of a copy of the balance-sheet after it had been laid before a general meeting of the company. S. 131 relates to the auditing of the balance-sheet of the accounts of the company and placing the same before a general meeting of the company. It is obvious to my mind that in respect of the same years the same persons cannot be charged with offences punishable both under Ss. 131 and 134 because S. 134 clearly contemplates the sending of a copy of the balance-sheet only after it has been placed or laid before the company at a general meeting, and where, as in this case as is seen from the prosecutions under S. 131, there was no such placing of the balance-sheet before the company at a general meeting the offence under S. 134 cannot possibly have been committed. I am therefore of opinion that the convictions under S. 134 (4), Companies Act in these cases, that is to say, the convictions concerned in Criminal Revision Cases Nos. 345 to 349 are wrong and must be set aside.

The convictions and sentences in these cases are accordingly set aside and the petitioners in these cases are acquitted of the offences charged against them in these

cases and the fines, if any, paid by them must be refunded. As regards the other set of cases under S. 131 of the Act, I am of opinion that so far as the petitioners 2 and 3 are concerned, they cannot be held liable in respect of the default made in preparing a balance-sheet or placing it before a general meeting of the company which took place long before they ever became directors or officers of the company, and indeed before they were even share-holders. The view to the contrary entertained by the learned Magistrate is really not supported by the decision to which he referred, namely 34 I C 962,[1] which relates to a continuing offence. The convictions and sentences so far as the petitioners 2 and 3 are concerned must therefore be set aside and the fines if any, paid by them must be refunded. So far as the convictions of petitioner 1 in these five cases 351 to 355 are concerned, they appear to be right and the sentences do not appear to be unduly severe. So far as therefore he is concerned, these five revision petitions are dismissed.

C.R.K./S.C. *Order accordingly.*

1. Tota Ram v. Emperor, A I R 1916 Lah 397=34 I C 962=17 Cr L J 242=14 P R 1916 Cr.

A. I. R. 1937 Madras 342

VENKATARAMANA RAO, J.

Pallipurayil Asan Kutti—Petitioner.

v.

Mukkolakkal Koyaman Kutti—Opposite Party.

Civil Revn. No. 1186 of 1934, Decided on 18th November 1936, from order of Dist. Court, North Malabar, D/- 17th November 1933.

(a) Civil P C. (1908), S. 153 — Proceeding—Meaning of.

Word 'proceeding' with reference to S. 153 means 'any application to a Court of justice however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object': *A I R 1935 Mad 232*, *Rel. on.* [P 343 C 2]

(b) Civil P. C. (1908), S. 153—Setting aside sale—Application for challan and application for deposit not containing express prayer for setting aside sale—Amendment by addition of necessary prayer should be allowed.

A person with a view to set aside a Court sale put in an application for the issue of a challan mentioning therein the purchase money, poundage fees, etc. On the challan being issued money was deposited and receipt was filed in Court along with another application. However, both these applications did not contain any express prayer for setting aside the sale. Hence a third application was filed with a prayer to set aside the sale. This application being beyond time, petitioner sought to amend his two previous applications by the addition of a prayer therein for setting aside the sale:

Held: that an application for issue of challan or an application with a memo of deposit and its receipt were proceeding within the meaning of S. 153, Civil P. C., and amendment thereof should have been allowed: *A I R 1917 Mad 225*; *A I R 1922 Mad 83* and *A I R 1926 Mad 620*, *Rel. on.* [P 343 C 2]

C. S. Krishnamurthy Ayyar—for Petitioner.

M. C. Sridharan—for Opposite Party.

Order. — This civil revision petition arises out of an application made to set aside a sale of immoveable property under O. 21, R. 89, Civil P. C. The sale was held on 29th November 1932. The property belonged to defendant 1, who made no application to set aside the sale. It was purchased by the assignee decree-holder. Defendant 3 in the suit who is a mortgagee put in an application *I. A. No. 616 of 1932* on 16th December 1932 praying that a challan may be issued for depositing in the taluk treasury the amount mentioned in the said application. In the application the purpose for which the challan was applied, the amount of the decree, poundage fee, the percentage of purchase required for setting aside the sale under O. 21, R. 89, the name of the purchaser and the fact of sale are all mentioned. The challan was accordingly issued, money was deposited and a receipt obtained from the treasury. The said receipt was filed in Court on 21st December 1932 with an application on behalf of defendant 3 by his pleader. The application which was styled a memorandum ran thus:

The receipt obtained in the matter of the deposit into Kurumbranadi taluk treasury, the sum of Rs. 385-14-6 comprising the decree amount in the above suit, poundage fee and percentage of purchase money (auction profit).

But there was no formal prayer to set aside the sale or any independent application made to do so. On 4th January 1933 an application was made to set aside the sale. In the affidavit he alleged the fact of his applying for the challan and also the application filed by him along with the receipt into Court. Paras. 7 and 8 of the said petition are important and they are as follows:

7. The application for challan on 16th December 1932, the memorandum filed on 21st along

with the receipt for the deposit of the money, are only for the purpose of getting the sale set aside. The above application should be also taken for an application to set aside the sale.

8. If the Court should consider for any reason that it could not grant relief as per the application filed herewith for setting aside the sale, the sale should be set aside on the strength of the application for challan and the memorandum and I am prepared to pay the necessary court-fee therefor.

It will thus be seen that apart from his independent prayer to set aside the sale he requested the Court to treat the application for challan and the memorandum filed on 21st December 1933 as applications to set aside the sale. On objection taken by the decree-holder that the application was barred by limitation, he filed an application to amend the memorandum filed by him on 21st December 1933 with the receipt for the money deposited by adding a prayer thus: 'It is prayed that the sale in the above suit may be set aside.' This amendment was allowed by the learned District Munsif and he set aside the sale. On appeal the learned Subordinate Judge of North Malabar reversed the order of the Distict Munsif holding that a memo cannot be called a proceeding within the meaning of S. 153, Civil P. C., and it was not capable of amendment and there was no proper application under O. 21, R. 89, Civil P. C. It is against this order the present civil revision petition has been filed. There is a conflict of view in this Court whether an application for challan or an application accompanying the receipt for the money deposited could by itself be treated as application for setting aside the sale. In an unreported decision *C. R. P. No. 106 of 1912*, Sankara Nair, J. was of opinion that an application for deposit of money may be treated as an application to set aside a sale. In 15 M L W 450[1] Krishnan, J. took a different view. He says that a lodgment schedule filed in Court along with the money as required by R. 3 of the Civil Rules of Practice cannot be treated as equivalent to an application required by O. 21, R. 89, Civil P. C. In 23 M L W 757[2] Waller, J. took the same view. In 32 I C 45,[3] when the question arose under circumstances exactly as in the present case Kumaraswami Sastri, J. was inclined to the view that it would have been open to the Court to amend the memorandum filed as in this case and he observed:

In the present case it appears that a petition was put in by the petitioner on 6th June 1911 stating that he had paid the money into the treasury and though the petition contains no formal prayer to set aside the sale there can be little doubt that this was the object of the petitioner. This petition if it had contained a formal prayer would have been in time if it was filed on the 6th June as the petitioner had the benefit of the summer vacation intervening. There is nothing to prevent the Court from allowing the petitioner to amend the petition by adding a formal prayer. This course was adopted by Sadasivier and Napier, JJ. in A. A. A. O. 66 of 1913 in an analogous case.

I may observe that the view taken in Calcutta and Allahabad is that an application for a challan or an application for deposit accompanying the receipt as in this case can be treated as application to set aside the sale on the ground that the very object of the application was to set aside the sale and O. 21, R. 89 does not require an application in writing: *vide* 25 Cal 216[4] and 63 I C 140.[5] Whether this view can be accepted or not, the view of the lower Court that the memo is not a proceeding and not capable of amendment is unsound. In 58 Mad 781[6] at p. 786, Venkatasubba Rao, J. adopted the definition of 'proceeding' given by Black in his Law Dictionary for interpreting the term 'proceeding' in S. 17 (2), Cl. 6, Registration Act, viz.:

Any application to a Court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object.

I would accept the same interpretation for the term 'proceeding' in S. 153, Civil P. C. The application for challan or the memo of 21st December 1932 would be a proceeding within the meaning of S. 153, Civil P. C. There is nothing in 15 M L W 450[1] or 23 M L W 757,[2] which is against this view. It was therefore competent to the learned District Munsif to allow the petitioner to amend the application as he did. The learned District Judge in my opinion was wrong in interfering with the exercise of discretion on the erroneous view that the memorandum filed on the 21st December is not a proceeding.

1. Venkatasubba Rao v. Narayana Rao, A I R 1922 Mad 83=66 I C 44=15 M L W 450.
2. Chakrapani Padhi v. Krushno Naiko, A I R 1926 Mad 620=95 I C 128=23 M L W 757.
3. Parat Veetil Seethi v. Ambalath Veetil Kolathur, A I R 1917 Mad 225=32 I C 45.
4. Abdool Latif Moonshi v. Jadub Chandra Mitter, (1898) 25 Cal 216.
5. Ramraj Singh v. Rabi Prasad, (1921) 63 I C 140.
6. Govindaswami Mudaliar v. Rasu Mudaliar, A I R 1935 Mad 232=156 I C 791=58 Mad 781=68 M L J 41.

I therefore reverse the order of the learned District Judge and restore that of the District Munsif. But I direct the petitioner to pay the respondent his costs in all the Courts including the costs of the revision petition. I further direct that respondent will not be accountable for any mesne profits upto date of delivery but the same will be taken as set-off against the interest payable on the amount of his purchase money.

C.R.K./B.D. *Order accordingly.*

A. I. R. 1937 Madras 344

HORWILL, J.

Muthusami Servai and *another*—Petitioners.

v.

N. K. Mytheen Pichai Rowther and *another*—Opposite Parties.

Civil Revn. Petn. No. 303 of 1936, Decided on 27th November 1936, from decree of Dist. Munsif, Sivaganga, D/- 20th January 1936.

(a) Contract—Money advanced for illegal purpose cannot be recovered—Exception in case of kuri fund—Sons of stakeholder in kuri are not however liable.

Ordinarily, a person who has paid money for the furthering of an illegel object cannot recover that money in a civil Court but the exception is made where a contract has been made illegal for the protection of a certain class of persons for example kuri funds. In such a case a member of that class is considered not to be in *pari delicto* with the organiser of the illegal organisation and on that ground is allowed to sue. A subscriber is a party to an illegal contract while the sons of a stakeholder are innocent persons and they are not liable for their father's debts: *A I R 1936 Mad 225, Rel. on.* [P 344 C 2]

(b) Hindu Law — Debts—Father—Liability of son for father's debts—Tests determining liability explained.

The principles to be applied to test the liability of sons for their father's debts are: If the debt is at its inception not immoral, subsequent dishonesty of the father does not exempt the son. It is not every impropriety or every lapse from right conduct that stamps the debt as immoral. The son can claim immunity, only when the father's conduct is utterly repugnant to good morals, or is grossly unjust, or flagrantly dishonest: *A I R 1925 Mad 841, Foll.; A I R 1914 Mad 654, Expl.; A I R 1919 Mad 943, Rel. on.* [P 345 C 1]

S. V. Venugopalachariar—for Petitioners.

Order.—Defendant 1 and the father of defendants 2 and 3 received subscriptions from the plaintiff for the conducting of a lottery, presumably advertised and conducted in the usual way. There can be no doubt, after 59 Mad 562,[1] that the father of defendants 2 and 3 would have been liable to refund to the plaintiff his subscriptions. The only question that arises in this petition is whether defendants 2 and 3 are liable for this sum, out of the joint family property that has come into their hands. The District Munsif of Sivaganga has held that they are. Hence this Civil Revision Petition by defendants 2 and 3. The argument of the learned Munsif is, in brief, that the plaintiff's claim has no reference to an illegal contract and that as the father of defendants 2 and 3 was under a civil liability to return the money to the plaintiff, defendants 2 and 3 are also liable for that debt. It seems to me that both these statements of law are wrong. The contract between the plaintiff and the father of defendants 2 and 3 was an illegal one and it was in pursuance of that illegal contract that the father of defendants 2 and 3 came into possession of the money. It is true that the return of the money would not be in furtherance of the illegal contract; but that is not the point. The criterion is whether the money was taken for an illegal purpose. Clearly it was. Ordinarily, a person who has paid money for the furthering of an illegal object cannot recover that money in a civil Court but an exception is made where a contract has been made illegal for the protection of a certain class of persons. In such a case a member of that class is considered not to be in *pari delicto* with the organiser of the illegal organisation and on that ground is allowed to sue. A subscriber to a kuri has not however that advantage as against the sons of a stakeholder. On the contrary, the subscriber is a party to an illegal contract while the sons of a stakeholder are innocent persons. Even on this ground, therefore, the plaintiff would have to fail.

Some support to the learned Munsif's finding that the test of the son's liability is whether the father would be civilly liable for the debt is given by 37 Mad 458.[2] It is clearly wrong however. Supposing the father commits theft, he would undoubtedly be liable in a civil Court for

1. Sesha Ayyar v. Krishna Ayyar, A I R 1936 Mad 225=162 I C 68=59 Mad 562=70 M L J 36 (F B).
2. Venugopal Naidu v. Ramanadhan Chetty, A I R 1914 Mad 654=14 I C 705=23 M L J 61=37 Mad 458.

the stolen goods; but the son would not be liable because the property was received illegally and the debt incurred was an illegal one. The passages in 37 Mad 458[2] which give rise to this too broad statement of the law are expressly disapproved of in another case quoted by the learned Munsif: 35 M L J 661.[3] The other cases cited in the lower Court lend no support to the argument approved by the learned Munsif. Both in 37 Mad 458[2] and 23 M L W 714[4] sons were held liable for such sums as their fathers had received as trustees and not properly accounted for. The two principles to be applied to test the liability of sons are correctly set out by Venkatasubba Rao, J. in 21 M L W 606.[5] They are: (1) If the debt is at its inception not immoral subsequent dishonesty of the father does not exempt the son; (2) it is not every impropriety or every lapse from right conduct that stamps the debt as immoral. The son can claim immunity, only when the father's conduct is utterly repugnant to good morals, or is grossly unjust, or flagrantly dishonest. Defendants 2 and 3 are not therefore liable for their father's debt to the plaintiff from out of the joint family property that came into their hands upon their father's death. This petition is therefore allowed and the decree of the lower Court modified. Under the circumstances there will be no order as to costs in this Court. In the trial Court defendants 2 and 3 will bear their own costs; but will not be liable for the costs of the plaintiff.

C.R.K./B.D. *Petition allowed.*

3. Sanyasayya v. Muthamma, A I R 1919 Mad 948=48 I C 740=35 M L J 661.
4. Venkatakrishnayya v. Kundurthi Byragi, A I R 1926 Mad 535=94 I C 634=23 M L W 714=50 M L J 353.
5. Ramasubramania Pillai v. Sivakami Ammal, A I R 1925 Mad 841=90 I C 165=21 M L W 606.

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* A. I. R. 1937 Madras 345

VENKATASUBBA RAO, OFFG. C. J. AND HORWILL, J.

Ramanathan Chettiar — Appellant.

v.

S. R. M. M. C. T. M. Firm — Respondent.

O. S. Appeal No. 27 of 1935, Decided on 16th September 1936, from judgment and decree of Lakshmana Rao, J., D/-30-7-1935.

(a) Hindu Law — Alienation — Manager — Suit against — Representation — Entire interest of joint family mortgaged by manager — Mortgagee claiming to recover debt out of whole mortgaged property in suit — Manager alone even if sued represents all members in joint family, and thay are bound by decree in suit.

Where the mortgage by the manager of a joint Hindu family extends to the entire interest of the family and is not confined to the share of any particular member, and in a suit by the mortgagee the mortgagee claims not only to recover against the individual mortgagor the amount of the mortgage but asks that the debt may be satisfied out of the whole mortgaged property although the manager alone is impleaded, he effectively represents all members who therefore become bound by the decree in the suit: *15 Cal 70 (P C)*; *A I R 1914 P C 136*; *AIR 1924 Mad 550* and *50 M L J 172, Foll.* [P 346 C 1, 2]

*** (b) Hindu Law — Debts — Son's liability — Distinction between alienations and debts — In joint Hindu family, nephew is liable for uncle's debts, incurred before his birth and for purposes recognized by Hindu law — But subsequently born or adopted person cannot question alienations before his birth or adoption whether for justifiable purposes or not.**

There is a distinction between alienations and debts. In the case of alienations whether they are for justifiable purposes or not, the person subsequently born or adopted cannot question them, but in the case of debts the character of the debt when incurred becomes the decisive element. Therefore a nephew, in a joint Hindu family, is liable for his uncle's debt incurred before his birth for purposes recognized by Hindu law as proper. [P 347 C 1]

*** (c) Hindu Law — Debts — Sole surviving co-parcener — Sole surviving co-parcener while contracting debts must be deemed to be acting on behalf of potential joint family.**

Although when the debts are incurred, the family consists of a single male member, he must be deemed in contracting debts to be acting on behalf of a potential joint family, which is capable by expansion of comprising more than one member. Viewed in this light the act of contracting debt by the last single survivor must be deemed as that done in a representative capacity, i. e., as representing a potential joint family. [P 347 C 2]

B. Sitarama Rao, K. Rajah Aiyar and *V. Ramaswami Aiyar* — for Appellant.

S. Doraiswami Aiyar and *K. S. Rajagopala Aiyangar* — for Respondent.

Venkatasubba Rao, Offg. C. J. — This suit has been brought by the plaintiff for a declaration that he is not bound by the decree obtained in the High Court by defendant 1 against defendant 2 in C. S. No. 448 of 1932. The facts may be briefly stated. Chidambara, the undivided brother of defendant 2 (Vairavan) died in 1907. The plaintiff who was born in 1922 is the

natural born son of defendant 2 but was adopted in 1924 to the deceased Chidambara by his widow Valliammal. A mortgage by the deposit of title deeds was granted on 30th May 1927 by defendant 2 to defendant 1, to secure a debt of Rupees 50,000 and on that mortgage defendant 1 brought the suit above mentioned and obtained a decree. It is this decree that the plaintiff impeaches and seeks to get rid of. The learned trial Judge on the Original Side has found first, that Chidambara and Vairavan, who were members of a Nattukottai Chetty Hindu family, inherited a banking concern, which till Chidambara's death they both conducted and which thereafter defendant 2 continued; secondly, that the plaintiff's family, while carrying on business as bankers, had dealings with defendant 1, and the mortgage in question was granted in respect of a debt that had become due in the course of such dealings. Holding on these findings that the mortgage is binding upon the plaintiff and that he is bound by the decree, the learned Judge dismissed the suit.

The first contention urged by Mr. Sitarama Rao is that his client (the plaintiff) is not bound by the decree, as he was not made a party to the mortgage suit and defendant 2 was not sued in a representative capacity, that is, as representing the family of which he was the manager. There is some evidence to show that R. M. M. S. T. Vairavan Chetty, impleaded as the defendant in the mortgage suit, is not the individual Vairavan but the family firm of which he was the manager. Granting, however, that the initials, R. M. M. S. T. do not convey this meaning and that defendant 2 alone was individually impleaded, there can be no question on the authorities that he effectively represented in the suit the entire family, which has therefore become bound by the decree. In 15 Cal 70,[1] the leading case on the point, their Lordships point out that where the mortgage extends to the entire interest of the family and is not confined to the share of any particular member and where in the plaint the mortgagee claims not only to recover against the individual mortgagor the amount of the mortgage but asks that the debt may be satisfied out of the mortgaged property, where these conditions are fulfilled, although the manager alone is impleaded, he effectively represents all the members, who therefore become bound by the decree: *see also* 36 All 383;[2] 47 Mad 462[3] and 50 M L J 172.[4] This contention of Mr. Sitarama Rao therefore fails. Mr. Sitarama Rao next contends that if any part of the sum of Rs. 50,000 had been utilised in paying off a debt incurred before the plaintiff's adoption, for that portion of the debt, the plaintiff would not be liable. Whether this as a proposition of law is correct or not we shall examine presently; but the contention receives no support from the evidence on the record. The questions put to defendant 1's agent and his answers on this point may be here produced:

Q.—So far as you know, you do not know what for he (Vairavan) borrowed this money?

A.—I know; for paying bank dues; for lending to others.

Q.—So the debts he borrowed were for discharging his old liabilities?

A.—I do not know all these details. He was taking all these things for his banking purposes.

This evidence remains uncontradicted and there is nothing to show that any portion of the amount borrowed was utilised for the payment of the debts incurred before the plaintiff's adoption. Here I must point out that the finding of the trial Judge that the debt was incurred for a legitimate purpose in the course of the carrying on of a family concern, has not been attacked. The evidence extracted above shows that the amount was borrowed "for paying bank dues, for lending to others," these being the natural incidents of a banking concern. Mr. Sitarama Rao's contention therefore is opposed to the facts proved and cannot be accepted.

Granting for a moment that a portion of the debt was incurred before the plaintiff's adoption, does that circumstance make any difference? Mr. Sitarama Rao has had to assume for his contention that the debts were incurred not only before the plaintiff's adoption but also before his birth. Before dealing with this contention we may usefully refer to certain principles which may be regarded fundamental and have not been and cannot be controverted.

1. Doulat Ram v. Mehr Chand, (1888) 15 Cal 70 =14 I A 187=1 P R 1888=5 Sar 84 (P C).

2. Sheo Shankar Ram v. Mt. Jaddu Kunwar, A I R 1914 P C 136=24 I C 504=41 I A 216 =36 All 383 (P C).

3. Sankaranarayana Pillai v. Rajamani, A I R 1924 Mad 550=83 I C 196=47 Mad 462=46 M L J 314.

4. Unnamalai Ammal v. Abboy Chetti, (1926) 50 M L J 172=92 I C 524.

The doctrine that a son is liable to pay his father's debts not incurred for immoral or illegal purposes, applies as much to debts incurred previous to as after his birth. Similarly a nephew subsequently born is liable for the debts incurred by his uncle for purposes recognized by the Hindu law as proper. This principle is incontestable and has been tacitly assumed or acted upon in several decisions: 3 Mad 370;[5] at the bottom of p. 378: 6 Mad 1[6] on appeal from 3 Mad 370,[5] 20 Mad 354[7] at p. 356 and 35 Mad 108,[8] and Mr. Sitarama Rao, as already stated, far from disputing it, affirms its correctness. There is a distinction in this respect between alienations and debts. In the case of alienations, whether they are for justifiable purposes or not, the person subsequently born or adopted cannot question them, 20 Mad 354[7] at p. 356 and 52 Mad 398,[9] but in the case of debts, as already pointed out, the character of the debt when incurred becomes the decisive element. Mr. Sitarama Rao, acceding to these propositions, puts his argument thus: From 52 Mad 398[9] it follows that defendant 2 as the sole survivor of the family (this argument implies that the plaintiff had not even been born at the material time, that is, when a portion of the debts was incurred) was the absolute owner of the business assets. If that be so, the learned counsel proceeds to argue, defendant 2, when contracting those debts, acted on his own behalf and not as representing any Hindu coparcenary, which may be likened to a corporation.

The next step in the argument is, that as defendant 2 never purported to act on behalf of a coparcenary, the debts incurred by him cannot be binding upon the plaintiff, who having been subsequently born became by adoption his nephew. This position, which is said to be a logical deduction from 52 Mad 398,[9] is untenable and we cannot accept it as sound. That case related to an alienation and not to a debt. There, it was argued that so long as any widow remained in the family possessing an unexercised power of adoption, no alienation by way of gift made by the last surviving male member could be binding upon the son subsequently brought into the family by adoption. This contention was repelled as being opposed to the basic principles of Hindu law. In the judgments delivered in that case, the theory that the last survivor is no more than a provisional heir, based upon the fiction of relation back in the case of such adoptions, was repudiated. The effect of the decision is no doubt that for the purpose of alienations the sole survivor is regarded as the absolute owner, but we agree with Mr. Doraiswami Ayyar that it would be wrong to apply the principle to the case of debts by extending the analogy. The property in the hands of the sole survivor is separate property, which however must not be confused with self-acquired property; what is separate property becomes, on the introduction of a fresh member into the family, ancestral property with all its incidents. Similarly, although when the debts are incurred, the family consists of a single male member, he must be deemed in contracting debts to be acting on behalf of a potential joint family, which is capable by expansion of comprising more than one member. Viewed in that light the act of the last single survivor must be deemed as that done in a representative capacity, that is to say, as representing a potential joint family. Mr. Sitarama Rao had been driven to concede, that if at the time a debt is incurred there happen to be two or more members instead of a single surviving member, the foundation on which his contention rests, disappears. That is the reason why he has had to confine his argument to the period not before the plaintiff's adoption which was in 1924 but before his birth which was in 1922. It would be a strange thing to hold in a matter of this sort, that where there are two or more survivors, a different legal consequence would follow them from where there is a single survivor. Indeed to accept Mr. Sitarama Rao's contention would lead to grave anomalies and leave this branch of the Hindu law in a most confused state. Nothing that has been shown compels us to take such a view. In the result the appeal fails and is dismissed with costs.

C.R.K./W.D. *Appeal dismissed.*

5. Muttayan Chetti v. Sivagiri Zemindar, (1881) 3 Mad 370.
6. Muttayan v. Zemindar of Sivagiri, (1883) 6 Mad 1=9 I A 128 (P C).
7. Ponnambala Pillai v. Sundarappayyar, (1897) 20 Mad 354=7 M L J 240.
8. Maharaja of Bobbili v. Kaminayani Banguru, (1912) 35 Mad 108=8 I C 860=21 M L J 593.
9. Veeranna v. Sayamma, A I R 1929 Mad 296=118 I C 821=52 Mad 398=56 M L J 401.

* A. I. R. 1937 Madras 348

VARADACHARIAR, J.

Khaji Dodda Khaji Saib and *others*— Appellants.

v.

Chigamalla Nanjappa and *others* — Respondents.

Second Appeal No. 1194 of 1932, Decided on 2nd November 1936, against decree of Dist. Court, Bellary, in A. S. No. 13 of 1931.

*** Tort—Nuisance—Erection of mosque for first time in Hindu locality—Order of injunction restraining its use as mosque is proper.**

The principle underlying the maxim *sic uteri tuo ut alienum non laedas* is one essential to peace, order and well-being of the community and its application has to be determined with reference to the circumstances of each case and not on mere abstract considerations. [P 348 C 2]

Where there was an erection of a mosque for the first time in Hindu locality and Court passed an order of injunction restraining the use of building as mosque after considering the general consequences and interference with rights of Hindus :

Held: that the order of injunction was proper : *Case law discussed.* [P 349 C 1]

V. S. Narasimhachar—for Appellants.

K. Umamaheswaran—for Respondents.

Judgment.—The second appeal arises out of a suit brought on behalf of the Hindu residents of a village in the Bellary District for an injunction restraining the defendants from constructing a Jumma Masjid which they proposed to erect on a plot shown in the plan attached to the plaint and also for a declaration of the rights of the Hindus to carry certain processions, etc., along the routes indicated in the plan. When the matter was pending before the Court of first instance, the District Munsif refused to grant a temporary injunction restraining the completion of the building and when the matter came on for final disposal before him, he limited the injunction to one restraining the defendants from declaring that building to be a mosque. He also granted a declaration in respect of the plaintiffs' rights as regards processions, etc. The learned District Judge has confirmed the decree of the District Munsif. Hence this appeal by the defendants.

The second appeal has been pressed only in respect of the injunction restraining the use of the building as a mosque. On behalf of the appellants, Mr. Narasimhachar drew my attention to the proposition laid down as early as in 2 N W P 182[1] and 2 Mad 143[2] that parties are at liberty to build what structure they please upon their own land and use them for religious worship as they choose. The statement of the rule in 2 Mad 143[2] is qualified by the addition, "provided that, in the performance of their worship, they do not cause material annoyance to their neighbours". In 5 Mad 304[3] this view was affirmed, with the further addition to the proviso that "no public nuisance is caused". I am unable to accede to the suggestion made on behalf of the respondents that the use of the building as a mosque will *ipso facto* be a nuisance or amount to an obnoxious user having regard to the character of the neighbourhood; but I am not satisfied that it is only on the ground of nuisance that the Court can impose limitations in a case of this kind.

The decisions above referred to are only illustrations of the well-known maxim quoted by the learned District Judge *sic uteri tuo ut alienum non laedas*. As observed in Broom's Legal Maxims (9th Edition) at p. 260 the principle is one essential to the peace, order and well-being of the community, and its application has to be determined with reference to the circumstances of each case and not on mere abstract considerations. I quite agree with the principle recognized in A I R 1931 All 674[4] that a civil Court is not concerned with mere matters of sentiment or even with danger to the public peace which it is for the magesterial authority to provide against. But it seems to me that in the proper application of the maxim above referred to, these considerations are not wholly out of place. In the decision in A I R 1926 Mad 336,[5] to which the appellants' learned counsel drew my attention, the learned Judges pointed out that in the absence of evidence to the contrary they were not prepared to make any presumption that the proposed structure will be improperly used. It must also be remembered that in that case the

1. Kasim Ali Khan v. Birj Kishore, (1870) 2 N W P 182.
2. Seshayyangar v. Seshayyangar, (1878) 2 Mad 143.
3. Parthasaradi v. Chinna Krishnan, (1882) 5 Mad 304.
4. Janki Prasad v Karamat Hussain, A I R 1931 All 674=137 I C 587=53 All 836=1931 A L J 624.
5. Muhammad Hussain v. Baba Sah, A I R 1926 Mad 336=91 I C 595.

Hindu temple complained of was already in existence and all that was proposed was the addition of a mantapam. In 71 M L J 611,[6] Horwill, J. laid some stress upon the fact that in the case before him there was nothing in the evidence to indicate that it would be impossible for both parties to enjoy their respective rights. I wish that in the present case it had been possible for me to come to the same conclusion. Both the Courts below have referred not merely to what is known as the general consequence of the erection of a mosque for the first time in a Hindu locality but to the indications afforded by the evidence in the case as to the attitude taken up by the defendants in respect of rights which the Hindus of the locality had theretofore been accustomed to enjoy. In the face of the findings based upon such considerations, I do not feel I will be justified in interfering with the decision of the lower Court merely upon abstract theories of legal rights. The second appeal therefore fails and is dismissed with costs. Leave to appeal granted.

C.R.K./P.R. *Appeal dismissed.*

6. Pitchai Rowther v Devaji Rao, A I R 1937 Mad 21=166 I C 777=71 M L J 611.

A. I. R. 1937 Madras 349

VARADACHARIAR, J.

Elavarthi Venkatanarasimharaju — Appellant.

v.

M. Siddiah Chetti and *others*—Respondents.

Second Appeal No. 680 of 1933, Decided on 27th October 1936, against decree of Dist. Court, Chittoor, in A. S. No. 217 of 1931.

(a) Landlord and Tenant — Suit for rent — Landlord bona fide believing one person having undivided share in holding to be legally in possession of it as heir — Other undivided shareholders standing by, with knowledge of landlord's conduct cannot treat proceedings against such person as nullity against them.

In a suit for rent if the landlord finding a person in possession bona fide believed that person to be legally in possession as heir and that person further happens to be entitled to an undivided share in the holding it will be scarcely fair to permit other persons entitled to the remaining undivided shares to treat the proceedings taken against the registered holder as a nullity so far as they are concerned, when with the knowledge of the landlord's conduct they have chosen to stand by : *33 Mad 6* and *A I R 1919 Mad 16, Rel. on.* [P 351 C 1]

(b) Madras Estates Land Act (1 of 1908), S. 147 — Transfer of holding — Rent decree against holding—Vendees put on notice of liability of property for payment of past and future rent—Vendees not getting themselves registered as Pattadars — Landlord ignorant of transfer—Landlord's rent decree obtained against vendor will be binding on vendee.

Where reference in a deed of conveyance, to old decrees for rent put the vendees of ryoti land on notice of the liability of the property purchased by them for payment of rent both past and future, and if still for several years after this purchase these vendees do not take steps under S. 147 to get themselves registered as pattadars, there is no justification for punishing the landlord for his ignorance of the transfer and decree obtained by him against the vendor is binding against such vendees. [P 351 C 2]

(c) Madras Estates Land Act (1 of 1908), S. 125—Mortgage A by registered land-holder —Mortgage C of same property by heir to same mortgagee—Decree obtained on mortgage C — Mortgage C taking into account mortgage A — Later mortgage need not be taken to extinguish earlier one — Landlord can bring property to sale subject to charge to extent of amount due under mortgage A.

A registered landholder mortgaged his land by Ex. A and later on his heirs mortgaged the same property to the same person by Ex. C which took into account the earlier mortgage, Ex A, and on which a decree was obtained. The question was if the landlord could bring the property for sale for arrears of rent subject to the charge of mortgage, Ex. A :

Held : a decree on the mortgage was to be as much an encumbrance within the meaning of S 125 as the original mortgage itself. The Court was not compelled to treat Ex. C as extinguishing Ex. A to the detriment of the mortgagee ; nor did it make any difference that a decree had been passed on foot of Ex. C. And hence the landlord could bring the properties to sale only subject to the charge to the extent of the amount due under Ex. A : *A I R 1928 Mad 360* ; *A I R 1918 Mad 1327* and *A I R 1924 Mad 619, Rel. on.* [P 352 C 1]

(d) Madras Estates Land Act (1 of 1908), S. 125—Charge in favour of land-holder in respect of rent is not analogous to mortgage —In suit by mortgagee whose mortgage would be saved by S. 125, landholder need not be impleaded as party.

The charge created in favour of the landholder by the Estates Land Act in respect of rent is not in the nature of a mortgage and there is no justification for insisting that in a suit by a mortgagee whose mortgage would be saved by S. 125, the landholder should be impleaded as a party : *A I R 1924 Mad 619, Approved.* [P 352 C 1]

V. Ramadoss and *T. Kumaraswamiah* —for Appellant.

K. Raja Aiyar—for Respondents.

Judgment. — A number of questions, some of them by no means free from doubt or difficulty, have been raised in the course of the arguments in this second

appeal. I propose to refer to most of them but it seems to me sufficient for the purpose of the decision of this second appeal to express a final opinion upon only some of them. The other questions I prefer to leave open, because the scheme of the Estates Land Act in relation to claims preferred on the analogy of O. 21, R. 58, Civil P. C., is very obscure.

The properties in suit are ryoti lands situate in a proprietary village, and in 1904, the tenancy right in them belonged to one Raghaviah and his son Muthuswami Iyah. These two persons had executed a mortgage, Ex. A, in favour of the first plaintiff's father on the security of these lands. Muthuswamy Iyah died in 1911 leaving a widow Guruvamma. Raghaviah died in 1914 and this case has proceeded on the footing that all the lands passed by survivorship to Raghaviah on Muthuswami Iyah's death. It is stated that Raghaviah left a will whereby he bequeathed the suit properties to his daughter Subbamma but that will has not been produced. We however find that in about a month after Raghaviah's death, there was an arrangement between Guruvamma and Subbamma (by Exs. D and E) whereby Guruvamma was given 10½ guntas of land and the rest was taken by Subbamma. It is not clear whether this was only a notional division or whether there was a physical separation of the properties taken by them respectively. The evidence however shows that in the village accounts the whole land had been recorded as in the possession of Guruvamma and the lower appellate Court has accepted the suggestion made on behalf of the defendants that the patta for the whole land stood in Guruvamma's name.

It is clear from Ex. H that the proprietor knew that Subbamma was the legal representative of Raghaviah. Whether he knew his alleged will or not, it is not clear. I therefore see no reason to think that in the matter of the registry of the lands in Guruvamma's name the landlord must have acted in ignorance of Subbamma's right ; nor do I see any reason to suspect any fraudulent intention on his part. For all that appears in the evidence, Subbamma and Guruvamma and one Nageswara Ayyah, a brother of Guruvamma, seem to have lived together and lived so amicably down to the end that at her death Subbama bequeathed all her properties to this Nageswar Ayyah. The probabilities therefore are that Nageswara Ayyah was looking after the properties on behalf of both Guruvamma and Subbamma and that as for some reason the properties had been entered in Guruvamma's name in the village registers, nobody had any objection to its so continuing. It is significant that even after Nageswara Ayyah got the properties under Subbamma's will, he took no steps to obtain the registry of that portion of the property in his name. On the other hand, when about a year after Subbamma's death, both Guruvamma and Nageswara Ayyah joined in selling all the properties under Ex. K they accepted their liability for the decree passed under Ex. II and also for the arrears of rent which afterwards came to be covered by the decree Ex. II-A. I have therefore come to the conclusion that the lands must have been entered in Guruvamma's name and patta issued in her name in respect of the whole extent that belonged to Raghaviah with the knowledge and in all probability with the consent of Subbamma and Nageswara Ayyah.

Between 1915 and 1928, the proprietor obtained six decrees for rent, (Ex. II series). To only one of these suits did he make Subbamma also a party (Ex. II). Even in that suit, she died during the pendency of the suit and it does not appear that any legal representative was brought on record. The amendment of the rule which enables a Court to dispense with the legal representative of an ex parte defendant had not then been introduced and it is therefore difficult to accept the suggestion of the learned District Judge that the mere fact of Subbamma having been impleaded in that litigation will give to that decree a validity which it otherwise will not have, when admittedly she died during the pendency of the litigation and no legal representative of hers was brought on the record. But I do not think it necessary to canvass this position at greater length, because for reasons already given I am of the opinion that in all the above circumstances the landholder was justified in treating Guruvamma as sufficiently representing the estate for the purpose of the suits.

It is true that prior to the Estates Land Act it was the duty of the landholder to find out the person really entitled to the ryoti interest and that under S. 147, Estates Land Act of 1908, the landholder

was relieved in respect of this duty only in cases of transfers but not in respect of succession. The amendment recently introduced so as to cover cases of succession also has no application to the circumstances of this case. But in determining whether the landlord has properly discharged his duty in finding out the person whom he must treat as a tenant for the purpose of issuing pattas and instituting suits for rent, the principle recognized in 33 Mad 6[1] and 36 M L J 106[2] may well be taken into account. The result is that if the landlord finding a person in possession bona fide believed that person to be legally in possession as heir and that person further happens to be entitled to an undivided share in the holding it will be scarcely fair to permit other persons entitled to the remaining undivided shares to treat the proceedings taken against the registered holder as a nullity so far as they are concerned, when with the knowledge of the landlord's conduct they have chosen to stand by. I would uphold the learned Judge's view in respect of Exs. II and II-A on the ground above stated and not on the ground adopted by the learned Judge.

The above point of view will make a material difference in the test to be applied in respect of the decrees Exs. II-B, II-C and II-D. The learned Judge has held that these three decrees are nullities because they were obtained only against Guruvamma after the properties had been sold away under Ex. K and Guruvamma had presumably ceased to be in possession. I have grave doubts as to whether the question of the validity of the decrees sought to be executed can at all be raised in these proceedings if they are to be regarded as analogous to claim proceedings. But as it is possible to regard the present suit as a mere declaratory suit independent of the provisions of O. 21, R. 63, Civil P. C., I do not wish to base my decision on this narrow ground. If I am right in the opinion that prior to the date of Ex. K, Guruvamma must be treated as a registered pattadar in respect of the whole extent of the holding and not merely of her 10½ guntas, it will follow that the transferees who took the property under Ex. K will be governed by the provisions of S. 147, Estates Land Act. Mr. Ramaswami Ayyar who appeared for the respondent, argued that if proceedings had been taken against Nageswara Ayyah in respect of his share of the holding, the principle of S. 147 would be applicable but it will not avail in respect of proceedings taken against Guruvamma. This argument ignores the fact that for at least a year after Subbamma's death Nageswara Ayyah who had become entitled to Subbamma's share as legatee had not taken any steps to bring his rights to the notice of the landlord though as Guruvamma's brother living with her and looking after her affairs, he must undoubtedly have been aware that the landlord was treating Guruvamma as the registered pattadar in respect of the whole extent of the holding.

I am therefore not prepared to draw a distinction between so much of the holding as belonged to Guruvamma which formed the subject matter of the conveyance under Ex. K and the rest of the holding which belonged to Nageswara Ayyah, which also formed the subject matter of the conveyance under Ex. K. The reference in Ex. K to the decree in Suit No. 1163 of 1915 and to the arrears due for the three faslis which presumably formed the subject matter of the decree in Suit No. 1470 of 1917 undoubtedly put the vendees on notice of the liability of the property purchased by them for payment of rent both past and future. If for several years after this purchase these vendees did not take steps under S. 147 to get themselves registered as pattadars, I do not see any justification for punishing the landlord for his ignorance of the transfer. It is obvious that when it came to his knowledge he had no objection to implead these transferees as well in his suit as he did in Ex. II-E. I am accordingly of opinion that the second appeal must be allowed to the extent of declaring that the appellant is entitled to execute not only the decrees, Exs. II, II-A and II-E, but also the decrees, Exs. II-B, II-C and II-D. As the memorandum of objections has not been pressed I need not say more than to point out that the above reasoning will itself suffice to justify the dismissal of the memorandum of objections even if it had been pressed.

The other point raised in the second appeal is whether the learned Judge was

1. Ramaswami Chettiar v. Oppilamani Chetti, (1909) 33 Mad 6=4 I C 1059=19 M L J 671.
2. Bachu Soorayya Toomuloori Chinna v. Anjaneyalu, A I R 1919 Mad 16=52 I C 509=36 M L J 106.

right in holding that the appellant can bring the properties to sale only subject to the charge in plaintiff's favour to the extent of the amount due under Ex. A. On this point, I am of the opinion that the learned Judge's conclusion is justified by S. 125, Estates Land Act. It is true that the mortgage Ex. A has been taken into account in Ex. C, a later mortgage executed by Subbamma in 1914 and Ex. C is more than a mere renewal of Ex. A. But on the principle recognized in 32 M L J 263[3] and 46 M L J 380,[4] it seems to me proper to recognize in favour of the plaintiffs the benefit intended to be conferred by S. 125 to the extent of Ex. A. I do not feel compelled to treat Ex. C as extinguishing Ex. A to the detriment of the mortgagee ; nor does it seem to me to make any difference that a decree had been passed on foot of Ex. C. It was recognized in 51 Mad 774[5] that a decree on the mortgage will be as much an encumbrance within the meaning of S. 125 as the original mortgage itself.

Mr. Ramdoss pointed out that at the present date no suit can be maintained on Ex. A and he contended that on the principle of the decision in 39 Cal 527[6] all rights under Ex. A must be deemed to have come to an end. This position does not appear to me to be tenable. Ex. A had undoubtedly been acknowledged in Ex. C and the suit brought by the plaintiffs on Ex. C had ripened into a decree. No question therefore arises of the plaintiffs being obliged to bring a suit on Ex. A again. The case is not analogous to that of a puisne mortgagee having been left out from a suit instituted by the prior mortgagee against his mortgagor. It has often been pointed out that the charge created in favour of the landholder by the Estates Land Act in respect of rent is not in the nature of a mortgage and there is no justification for insisting that in a suit by a mortgagee whose mortgage would be saved by S. 125, Estates Land Act, the landholder should be impleaded as a party. I am of opinion that the decision of Krishnan, J. in 46 M L J 380[4] lays down the correct principle, if I may say so. I understand that during the pendency of this litigation, the mortgagee had brought the properties to sale in execution of his mortgage decree and the landholder has brought the properties to sale in execution of his rent decrees. It does not seem to me desirable to leave this litigation merely with a declaration of the rights of the parties as they stood at the date of the institution of the suit, because it is bound to lead to further litigation. This is just one of the class of cases where the Court will be justified in taking notice of the events that have happened during the pendency of the suit. It therefore seems to me best in the circumstances to modify the lower appellate Court's decree to the extent above indicated, but at the same time send the case back to the Court of the first instance for the rights of parties to be worked out in accordance with the principles laid down in 46 M L J 380.[4]

In the circumstances I am not disposed to make any order as to costs either in the appeal or in the memorandum of objections. I only wish to make a passing reference to some of the other questions raised by Mr. Ramdoss, though as I have already indicated, I do not propose to express any final opinion upon them. It has no doubt been held in 51 Mad 774[5] and A I R 1932 Mad 716[7] that there is nothing in the Estates Land Act to exclude the applicability of the claim procedure contained in Rr. 58 to 63, O. 21, Civil P. C. It is however noticeable that while S. 89, Estates Land Act, specifically provides for claims by third parties in cases of distraint of moveable property, there is no provision in the body of the Act or in the schedule to applications corresponding to those under O. 21, R 58, Civil P. C. Mr. Ramdoss raised the question whether assuming the procedure by way of claim petition is to be recognized in connexion with the execution of rent decrees it could have been the intention of the Legislature that the civil Court should in a suit under O. 21, R. 63 have power to set aside the order passed by a revenue Court on a claim petition. It is however clear that a suit of the kind contemplated by O. 21, R. 63, Civil P. C., cannot be

3. Velayuda Reddi v. Narasimha Reddi, A I R 1918 Mad 1327=38 I C 240=32 M L J 263.
4. Sreekanta Sundaramiah v. Venkatasubbiah, A I R 1924 Mad 619=84 I C 788=46 M L J 380.
5. Venkatarayudu v. Maharaja of Pithapuram, A I R 1928 Mad 360=106 I C 663=51 Mad 774=54 M L J 138.
6. Mohammad Ibrahim Hussain Khan v. Ambica Prasad Singh, (1912)39 Cal 527=14 I C 496=39 I A 68 (P C).
7. Suryanarayana v. Ramchendrudu, A I R 1932 Mad 716=139 I C 452.

instituted in a revenue Court because no such suit is referred to in Sch. B, Estates Land Act. Mr. Ramdoss conceded that, though not exactly as a suit under O. 21, R. 63, a suit for a similar relief may lie in a civil Court as one for ordinary declaratory relief; but the particular basis on which the suit is to be maintained, will have a material bearing upon the question of period of limitation applicable thereto, namely, whether the one year's rule of limitation is applicable to such suits or not. It will perhaps be more satisfactory if some of these questions are specifically dealt with by the Legislature, but as I have already said, it is not necessary for the purposes of the disposal of the appeal to express any final opinion upon them. Leave refused.

C.R.K./B.D. *Case remanded.*

A. I. R. 1937 Madras 353

VARADACHARIAR, J.

M. Ratna Mudaliar and *others* — Appellants.

v.

Krishna Mudaliar and *another* — Respondents.

Second Appeal No. 1332 of 1932, Decided on 24th November 1936, against decree of Dist. Court, Salem, in A. S. No. 7 of 1924.

(a) Hindu Law—Succession—Dancing girls—Legitimate descendants of two sons of same mother and of unknown paternity—Paternal aunt's son of propositus is preferable heir to grand-uncle of propositus in other line.

Where the paternal aunt's son in the same line as of the propositus and the paternal granduncle of the propositus but in the other line are respectively the legitimate descendants of two sons of the same mother but whose paternity is not known and claim to succeed to a certain estate left by the last male holder in one such line, the paternal aunt's son being in the same line of the propositus is an atma-bandhu of the propositus and is a preferable heir to paternal granduncle of the propositus in the other line as the paternal granduncle is not a sagotra sapinda of the propositus since the paternal granduncle and the propositus cannot claim to descend from a common male ancestor, their paternity not being known : *A I R 1926 Mad 289, Discussed and disting.* [P 354 C 2 ; P 355 C 1]

(b) Hindu Law—Succession—Dancing girls—Male members of such family marrying and living ordinary life — Customary law of succession of dancing girls does not apply to such persons—So too it does not apply to legitimate issues of sons of a woman neither married nor in the keeping of any person.

The rules of Customary law applied in cases relating to succession of property as between dancing girls come into operation only when the Court has to deal with succession to property belonging to a dancing woman. It is not the law that male members of that community, who have entered into a marriage relationship and lived like ordinary house-holders are governed by the rules of that Customary law. [P 355 C 1]

Where the question of succession arises in two branches of the legitimate issues of two sons of a woman who is neither married nor in the permanent keeping of any person, the succession amongst them is not governed by the Customary law of succession applicable to dancing girls : *A I R 1927 Bom 456, Disting.* [P 355 C 1]

(c) Hindu Law — Reversioner — Remote reversioner — Declaratory suit by remote reversioner for setting aside alienation by limited owner — Nearer reversioner though not impleaded, materials must be placed before Court by suing reversioner, to lead to reasonable inference that nearer reversioner is colluding or has precluded himself from suing — In absence of such materials on record, declaratory decree even if passed, cannot be maintained for benefit of reversion in general.

In a suit for a declaration brought by a remote reversioner that the alienation made by the limited owner is not binding on the estate the nearer reversioner, though not impleaded as a party to the suit, the suing remote reversioner must place before the Court sufficient materials that can reasonably lead to an inference that the nearer reversioners are colluding or have precluded themselves from suing. The mere fact that the nearest reversioner had assented to the alienation or was supporting the alienation, and was helping the alienee, cannot lead to an inference that his conduct is improper. Where such materials are not placed on record, the declaratory decree, even if passed in such suit, cannot be maintained for the benefit of the reversioners generally : *6 Cal 764, Rel. on ; 28 Mad 57, Ref.* [P 355 C 2]

S. Ranganatha Ayyar—for Appellants.

S. S. Ramachandra Ayyar and *S. Ramanathan*—for Respondents.

Judgment. — This second appeal raises an important question of Hindu law. The plaintiff, claiming to be the reversioner to the estate of one Shanmuga, filed a suit for a declaration that an alienation made by defendant 1, the mother of Shanmuga, in favour of defendant 2, was not binding on the reversion. Issue 1 in the case raises the question whether the plaintiff is the nearest reversioner entitled to succeed after the death of defendant 1. The decision of this question turns upon the following facts :

Shanmuga, the last male owner, was the son of one Palaniyandi, whose father Kunjan was in turn the son of another Palaniyandi who may be referred to as Palaniyandi the senior. Palaniyandi the

senior had a brother Muthu who was the plaintiff's father. The case has proceeded on the footing that the plaintiff is a legitimate son of Muthu and that the descendants of Palaniyandi the senior were also his legitimate descendants. But, as between Muthu and Palaniyandi the senior, the finding is that they were the sons of the same mother Valliammal but that their paternity is not known, as Valliammal was not a married woman nor the permanent concubine of any known person. It was alleged by the defendants and not disputed that Kunjan had two daughters one of whom has left one or more sons who are alive. On these facts two questions are comprised in issue 1, namely (1) whether the plaintiff can at all claim to be an heir to Shanmuga and (2) whether he is the nearest presumptive heir, i. e., one entitled to succeed in preference to the son or sons of Kunjan's daughter. The District Munsif in para. 7 of his judgment expressed himself in a way which does not make it quite clear whether he thought that the plaintiff was not an heir at all or he thought that the plaintiff must in any event be postponed to Kunjan's daughter's sons. On appeal, the learned District Judge has held that the decision in 48 Mad 944[1] has decided that the plaintiff is an heir and also in effect that he is a preferable heir to anyone who can only claim to be only a bandhu. He understood that decision to lay down that the legitimate descendants of the two brothers can claim all the adjuncts of heritability which in the Hindu law applied to persons who are the legitimate descendants of two legitimate brothers, that is brothers born of a lawful marriage. In second appeal the question for determination is whether the decision in 48 Mad 944[1] lays down both the above propositions.

I confine myself for the moment to the second of the above questions, namely, whether assuming that Muthuswami and Palaniyandi the senior could claim to be heirs to each other and assuming further that the plaintiff could claim to be an heir to the legitimate male descendants of Palaniyandi the senior, the plaintiff can also claim to succeed in preference to Kunjan's daughter's sons. The language employed by the learned Judges in 48 Mad 944[1] is no doubt very general and I have therefore examined the papers in that case to see whether any question of preference was raised and argued in that case. The parties in that case were not agreed as to the genealogy. The defendants no doubt pleaded that Murugesa who was the last male holder had a grand aunt by name Sivabagiam and that Sivabagiam had a son who was alive who according to them would be a reversioner. But neither in the judgments of the Courts below nor in the judgment of this Court am I able to find any reference to this aspect of the case and all that I can infer is that the alleged existence of a reversioner nearer than the plaintiff in that case was not established, by proving the relationship alleged in the written statement and that therefore no further notice was taken of that point. The judgment of the trial Court merely discussed the question whether the plaintiff was an heir at all and the appellate Court took the question of the plaintiff's right to maintain the suit to have been finally decided, once it determined that the plaintiff could claim to be an heir. It was the order of remand based on this view that was confirmed by the learned Judges in this Court. The existence of Kunjan's daughter's son or sons not being disputed in this case, the position here is different. I quite agree that in deference to the decision in 48 Mad 944,[1] I must hold that the plaintiff can claim to be an heir to the deceased Shanmuga. If I were free to deal with that question, I should have something to say in respect of certain parts of the reasoning in that judgment as for instance, the extension of the principle of 'representation' to obstructed heritage; but as it is not necessary for the purpose of this case to deal with that question, I am content to assume that that decision is correct and confine myself to the question whether the plaintiff can claim to be a preferential heir even as against Kunjan's daughter's son.

It will be noticed that Kunjan's daughter's son will be in the position of a paternal aunt's son to Shanmuga the propositus. That means he is an *atmabandhu* about whose heirship in general there can be no question. It is no doubt the law that *bandhus* can succeed only after *sagotra sapindas*. The point for determination therefore is whether the plaintiff can claim to be not merely a *sapinda* of Shanmuga but also a *gotraja*

1. Viswanatha Mudali v. Doraiswami Mudali, A I R 1926 Mad 289=91 I C 193=48 Mad 944=49 M L J 684.

or *sagotra sapinda*. Here again, I shall assume for the purpose of the argument that even *sagotra* relationship is capable of being postulated outside the marriage relationship. But the least that is required to constitute *sagotra sapindashi*p is descent in an unbroken male line from a common male ancestor. In this respect the conception corresponds to the notion of agnatic relationship. I am unable to see how such a connexion can be postulated as between two persons of whom we cannot predicate whether they were born of the same father or of different fathers. As shown by the enumeration in placitum 5 of S. 5, Ch. 2 of the Mitakshara, we have to start with the great-grandfather or the great-great-grandfather and then bring in his descendants in the male line. It being impossible in the present case to say that the plaintiff and Shanmuga were descendants of a common male ancestor, I must hold that the only possible ground on which the plaintiff can succeed in preference to Shanmuga's paternal aunt's sons has not been made out. The decision in 51 Bom 784[2] cannot help the respondent. The learned Judges had not to consider any question of preference in that case. They only hold that the sister of a prostitute has sufficient *sapinda* relationship or blood relationship to the prostitute to be able to defeat an escheat of the prostitute's property to the Crown. I must add that no analogy can be drawn in the present case from decisions relating to the succession of property as between dancing girls. The rules of customary law applied in that connexion come into operation when the Court has to deal with succession to property belonging to a dancing woman. It is not the law that male members of that community, who have entered into marriage relationship and lived like ordinary house-holders, are governed by the rules of that customary law. I must accordingly hold that the plaintiff is not the nearest presumptive reversionary heir.

It was next argued on behalf of the plaintiff that even if he is not the nearest reversionary heir, the declaratory decree granted by the lower appellate Court must be maintained for the benefit of the reversion generally, and reliance was placed in this connexion on the decision in 28 Mad 57.[3] It is not disputed that the general principle is that laid down by the Judicial Committee in 6 Cal 764.[4] If allegations had been made in the plaint as to the circumstances under which the nearer reversioners had precluded themselves from maintaining the suit, it might have been possible to consider these allegations on their merits. In 28 Mad 57[3] it happened that the nearer reversioners had in fact been made party defendants and proper allegations made against them. Without going so far as to say that the nearer reversioners should be impleaded in a suit brought by the distant reversioner for the benefit of the reversion, I may say it is at least clear that materials must be placed before the Court that can reasonably lead to the inference that the nearer reversioners are colluding or have precluded themselves from suing.

The mere fact that the lower appellate Court had granted a declaratory decree is not by itself a ground for maintaining it, when this aspect of the matter was not present to its mind at all. Further, in view of the decisions of the Judicial Committee dealing with the effect of the consent of the nearer reversioner to a widow's transactions, the mere fact that the nearest reversioner had consented to the alienation or was supporting the alienation cannot by itself prove that his conduct was improper. This is an additional reason for insisting upon allegations in the plaint against the presumptive reversioner. The Court will then have an opportunity to consider the effect of the reversioner's consent upon the validity of the alienation itself. The learned counsel for the respondent drew my attention to the fact that a note has been made by the trial Court that one of the paternal aunt's sons was present in Court helping defendant 2 and his counsel. For reasons above stated, I am not prepared to draw an inference therefrom that his conduct was improper in the sense contemplated by the Privy Council in 6 Cal 764.[4] The result is that the decree of the lower appellate Court must be set aside and that of the trial Court restored with costs here and in the lower appellate Court payable

2. Narayan Pundalik v. Laxman Daji, A I R 1927 Bom 456=106 I C 87=51 Bom 784=29 Bom L R 930.

3. Govinda Pillai v. Thayammal, (1905) 28 Mad 57=14 M L J 209.

4. Rani Anand Kunwar v. Court of Wards, (1881) 6 Cal 764=8 I A 14=4 Sar 195 (P C).

by the plaintiff to defendant 2. Leave to appeal is granted.

C.R.K./K.B. *Decree set aside.*

A. I. R. 1937 Madras 356

PANDRANG ROW, J.

In re *Maruthapali Goundar* — Petitioner.

Criminal Revn. case No. 333 and Petn. No 307 of 1936, Decided on 2nd December 1936, from judgment of Sess. Judge, Madras, in C. A. No. 4 of 1936.

Criminal P. C. (1898), S. 107—Purpose of S. 107 is to guard against apprehended breach of peace—General past conduct is not sufficient to order security — Preliminary order should mention particular acts or omissions likely to cause breach of peace in near future.

The object of S. 107 is to guard against apprehended breaches of the peace or wrongful acts which might probably lead to a breach of the peace. The act of which information is given and in respect of which security is required must be an act which is shown to be in contemplation at the time of the information given and not merely one a repetition of which may be expected or apprehended from past misconduct of the kind without anything further. Preliminary order passed under S. 107 must mention that the Magistrate apprehends any particular act or omission that would cause breach of the peace in the near future: *5 Mad 380, foll.*; *A I R 1920 Pat 550* ; *7 C W N 32* and *A I R 1931 Lah 191, Rel. on.* [P 356 C 2; P 357 C 1]

A. Narasimha Iyer and *M. Rajagopalachari*—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner in this case is the Village Munsif of Kallanai and he was ordered by the Joint Magistrate, Dindigul, to furnish security for keeping the peace for one year by executing a bond for Rs. 2,000 with two sureties each for a like sum. That order was confirmed in appeal by the Sessions Judge of Madura. So far as the evidence in the case goes the findings of the Magistrate have not been seriously attacked in the course of the hearing of this petition, but it has been contended that the preliminary order itself was without jurisdiction and that this is not really a case to which the provisions of S. 107, Criminal P. C., apply. The preliminary order which was passed on the 29th March 1935, gives details of the information received by the Magistrate and in substance runs as follows :

Whereas from information laid before me it appears to me that you have been committing and will continue to commit breaches of peace and wrongful acts likely to lead to breaches of the peace or disturbance of public tranquillity unless you are restrained from doing so, you are hereby directed to show cause, etc.

It will thus be found that the preliminary order does not mention that the counterpetitioner was likely to commit any particular or definite wrongful act or breach of the peace. It is a general charge that he has been committing such acts and breaches of the peace and will continue to do so, a charge akin to the charge in proceedings for taking security for good behaviour. It does not appear that there was any information before the Magistrate to show that the counterpetitioner was likely to commit any particular breach of the peace or that he was likely to commit any particular wrongful act which was likely to lead to a breach of the peace. The information was entirely confined to the past acts of the counterpetitioner and there was nothing to show that he was contemplating doing anything in particular which would involve a breach of the peace. The object of S. 107 is to guard against apprehended breaches of the peace or wrongful acts which might probably lead to a breach of the peace. The view taken of this section so early as 1876 by this High Court is to be found in 2 Weir 49;[1] there the Magistrate called upon certain persons to show cause why they should not be bound over to keep the peace because complaints had been made against them that they were constantly creating disturbance in certain bazaars, and they were required to enter into bonds for keeping the peace. The High Court expressed the opinion that the act of which information is given and in respect of which security is required must be an act which is shown to be in contemplation at the time of the information given and not merely one a repetition of which may be expected or apprehended from past misconduct of the kind without anything further. This ruling is directly applicable to the present case, and no subsequent case in which it was departed from or modified has been brought to my notice by the learned Public Prosecutor.

On the other hand from the decisions quoted on the side of the petitioner, viz.

1. Queen v. Kader Khan, (1882) 5 Mad 380=2 Weir 49.

21 Cr L J 453,[2] 7 C W N 32[3] and 12 Lah 457,[4] it would appear that, so far as proceedings under S. 107, Criminal P. C. are concerned, information regarding past acts alone would not be enough to justify an order requiring a person to show cause why he should not be directed to furnish security for keeping the peace and that something more is necessary, viz. the likelihood of the commission in the near future of a particular breach of the peace or a wrongful act likely to lead to a breach of the peace. In this case there was no information before the Magistrate and no evidence before him to show that the counterpetitioner was about to do any such thing in future. Both the Magistrate and the Sessions Judge have proceeded on the basis that if a man has been doing various acts involving a breach of the peace in the past that by itself is sufficient to justify an order directing the man to furnish security for keeping the peace. The preliminary order itself is one which cannot be justified in view of the provisions of S. 107, Criminal P. C., and the order directing the petitioner in the High Court to furnish security for keeping the peace must therefore be regarded as having been passed without jurisdiction. That order is accordingly annulled and the bond executed by the petitioner will also be annulled.

C.R.K./B.D. *Order accordingly.*

2. Pir Ali v. Emperor, A I R 1920 Pat 550=56 I C 437=21 Cr L J 453.
3. Sheikh Jinuat Chowdry v. Sheikh Husen, (1903) 7 C W N 32.
4. Shadi Lal v. Emperor, A I R 1931 Lah 191=1931 Cr C 311=134 I C 585=12 Lah 457=32 Cr L J 1207=32 P L R 138.

A. I. R. 1937 Madras 357

VARADACHARIAR AND MOCKETT, JJ.

Sri Rajah Tyada Pusapati Simhadriraju Dakshinakavata Dugarajulum Garu and *another*—Appellants.

v.

Unlimited Aryan Bank, Vizagapatam and *others*—Respondents.

Appeal No. 289 of 1926, Decided on 6th August 1936, against decree of Agency Addl. Dist. Judge, Waltair, in O. S. No. 95 of 1323.

Limitation Act (1908), S. 14—Scope—Principle of S. 14 applies equally to steps taken after decree as to steps taken prior to decree—Suit on mortgage — Decree-holder taking steps for sale in wrong Court but bona fide believing it to be competent—Steps taken can be held to be steps taken in another Court civil proceeding.

The principle of S. 14, Limitation Act, is that if and so long as a person has been *bona fide* and with due diligence seeking the relief that he was entitled to in a Court which he believed to be a Court competent to grant him that relief, he ought not to be penalized for having instituted that action in the wrong Court. The reason of the rule equally applies to the steps taken by him after the decree as to the steps taken by him prior to the decree. The fact that for processual purposes the Code makes a distinction between steps prior to the decree and steps subsequent to the decree does not affect the underlying principle of S. 14. A party is seeking the relief that he was entitled to as much in the execution stage as during the pre-decree stage; and in a mortgage suit, the relief that he is entitled to is the sale of the property and till that has been carried out, all steps taken by him, provided they were taken with due diligence and in a Court which he *bona fide* believed to be the Court competent to grant him that relief, may legitimately be held to be steps taken in another Court civil 'proceeding' within the meaning of S. 14. That is the reason why in the earlier part of Cl. (1) of S. 14 the Legislature has advisedly used the expression 'civil proceeding' and does not use the word 'suit'. The section specifically refers to the possibility of proceedings being taken in the Court of first instance or in the Court of appeal; this obviously rests on the theory that an appeal is merely a continuation of the proceedings in the first Court. [P 359 C 1, 2]

D. Ramaswamy Iyengar and *C. S. Venkatachariar*—for Appellants.

Y. Suryanarayana — for Respondents.

Varadachariar, J.—This is an appeal against the decree in a mortgage suit filed in the Court of the Agency District Judge of Vizagapatam and the only point pressed before us is one of limitation. This suit became necessary by reason of the rule laid down by the Privy Council in 42 Mad 813,[1] that where a mortgage comprises property situate within the jurisdiction of the ordinary civil Courts in British India and also property situate in the Agency Tracts which are subject to the special jurisdiction of the Agent under Madras Act 24 of 1839, the ordinary civil Courts have no jurisdiction to take cognizance of the suit so far as it relates to the property situate within the Agency Tracts. In the present case the two mortgages executed in November 1895 and May 1897 respectively

1. Raja Setrucharlu Ramabhadra Raju Bahadur v. Maharajah of Jeypore, A I R 1919 P C 150=51 I C 185=46 I A 151=42 Mad 813 (P C).

comprised properties partly situate in the Vizagapatam District proper and partly in the Vizagapatam Agency. The date fixed for payment was 29th November 1901; and within six years of that date, an action was commenced in the Subordinate Judge's Court of Vizagapatam for relief in respect of both sets of properties. A decree nisi followed in due course and also a final decree.

Between February 1911 and July 1918, several applications for the execution of the decree were presented to and entertained by the Subordinate Judge of Vizagapatam but these attempts at realization of the decree proved infructuous either for want of bidders or for other reasons not attributable to the default of the decree-holder. In July 1918 the Subordinate Judge of Vizagapatam passed an order proclaiming for sale the properties situate within his jurisdiction and proposing to transfer the matter to the Agent so far as the properties within the jurisdiction of the Agent had to be sold. On the next application, however, which was made after the judgment of the Privy Council in 42 Mad 813[1] had been reported, he held that this part of the decree was futile and there was accordingly nothing to transfer to the Agent. It appears from the record that the properties situate in the regular jurisdiction were actually sold only some time in January 1923; and as the amount then realized fell far short of the amount due on foot of the mortgage decrees, this suit was instituted in the Agency Court in October 1923.

On the facts above stated, the question arises whether the plaintiffs are by reason of S. 14, Limitation Act, entitled to deduct the period during which the decree obtained by them in the Subordinate Judge's Court of Vizagapatam was sought to be executed and if so on what basis the period of such deduction is to be calculated. No question has been raised as to their right to deduct the period between the institution of the suit and the date of the decree. The learned Agency District Judge has held that the plaintiffs are entitled to deduction of the whole period from 17th August 1907 (the date when the first suit was instituted) to January 1920 when he thought the plaintiffs must be deemed to have become aware of the pronouncement of their Lordships of the Judicial Committee. It has not been contended before us that if during this period the plaintiffs could be held to have been prosecuting another civil proceeding within the meaning of S. 14, Limitation Act,' they are nevertheless disentitled to the benefit of that section by reason of any lack of the *bona fides* or due diligence on their part. It has been argued only as a point of law, first, that proceedings in execution of the decree in one suit are not within the contemplation of S. 14 when calculating the period of limitation for the institution of another suit and, secondly, that if the period occupied by the proceedings in execution could be deducted at all, it must be calculated only with reference to the time during which each execution application presented by the plaintiffs was pending and not by taking into account the interval between the dismissal of one execution application and the presentation of another. The answer to both these arguments seems to us to depend upon the true interpretation of the expression "prosecuting another civil proceeding.".

The Legislature has not, for purposes of computation, drawn any distinction in Cl. (1) of S. 14 between the suit stage and later stages in execution, though for purposes of initiation of proceedings, a distinction has been made between a suit dealt with by Cl. (1), S. 14 and an application provided for in Cl. (2). This latter distinction relates to the suit or application in respect of which the question of limitation arises and not to the prior proceeding in respect of which deduction is claimed. The concluding words of Cl. (1), S. 14 no doubt provide that the previous proceeding should be founded upon the same cause of action as the later. And it is also true that so far as proceedings in execution following upon a decree are concerned, there is no question of their being founded upon a particular "cause of action"; it is the suit in which the decree was passed that must be looked to for determining the identity of the causes of action between the two suits. It seems to us that if the two suits are founded on the same cause of action, the fact that no "cause of action" can be predicated in respect of proceedings in execution is no reason for holding that the time bona fide but infructuously taken in executing the prior decree should not be deducted under S. 14. In determining the true scope of the indulgence allowed by S. 14 (1), Lim. Act, we think the Court may well bear in

mind the principle applied in cases arising under S. 52, T. P. Act, especially as the wording of that section (prior to its recent amendment) was practically identical with the language employed in S. 14, Lim. Act. Till 1929, its language was that :

> During the active prosecution of a contentious suit or proceeding in which any right to immoveable property is in question the property cannot be transferred by any party to the suit so as to affect the rights of any other party to the suit under the decree made in the suit.

The question was frequently raised whether, for the purpose of S. 52, the *lis* continued only up to the date of the decree in a mortgage suit or up to the realization of the mortgage decree by proceedings in execution ; and the preponderance of authority was certainly in favour of the view that the *lis* continued up to the realization of the mortgage decree by proceedings in execution : *cf.* 2 C L J 288[2] at p. 300, 10 Pat 234,[3] 31 M L J 839[4] and 130 I C 666.[5] This principle has now received legislative recognition in the explanation added to S. 52 by the amending Act of 1929. It has been suggested that S. 52, T. P. Act, is not a provision in *pari materia* with S. 14, Lim. Act, and the analogy therefore is not true. The purport of the two provisions is no doubt different but the underlying policy seems to us to be the same in both cases. The principle of S. 14, Lim. Act, is that if and so long as a person has been bona fide and with due diligence seeking the relief that he was entitled to in a Court which he believed to be a Court competent to grant him that relief, he ought not to be penalized for having instituted that action in the wrong Court.

The reason of the rule seems to us equally to apply to the steps taken by him after the decree as to the steps taken by him prior to the decree. The fact that for processual purposes the Code makes a distinction between steps prior to the decree and steps subsequent to the decree does not affect the underlying principle of S. 14, Lim. Act. A party is seeking the relief that he was entitled to as much in the execution stage as during the pre-decree stage ; and in a mortgage suit, the relief that he is entitled to is the sale of the property and till that has been carried out, all steps taken by him, provided they were taken with due diligence and in a Court which he bona fide believed to be the Court competent to grant him that relief, may legitimately be held to be steps taken in another Court civil "proceeding" within the meaning of S. 14. That is the reason why in the earlier part of Cl. 1, S. 14, the Legislature has advisedly used the expression "civil proceeding" and does not use the word "suit". The section specifically refers to the possibility of proceedings being taken in the Court of first instance or in the Court of appeal ; this obviously rests on the theory that an appeal is merely a continuation of the proceedings in the first Court. No express reference has been made to proceedings in execution, apparently because under the law proceedings in execution have to be taken in the Court of first instance. We are accordingly of opinion that both the points urged on behalf of the appellants must be held to be untenable. In this view, it is unnecessary to examine another possible line of argument that notwithstanding the formal existence of several execution petitions in this case, they must all be regarded as a single proceeding in execution and the so-called "dismissals" must only be regarded as disposals for statistical purposes because the earlier petitions did not prove effective and their dismissal was not attributable to any default on the plaintiff's part. It is sufficient to say that on this line of reasoning, the question of intervals between the dismissal of one petition and the presentation of another will not arise.

Reliance was placed by Mr. Ramaswami Iyengar (on behalf of the appellants) on an unreported judgment of Jackson, J., in C. M. S. A. No. 76 of 1923, and another judgment of the same learned Judge in 110 I C 47.[6] The judgment in the former case was reversed in Letters Patent appeal on another point. We do not therefore have the opinion of the appellate Court on the point under S. 14, Lim. Act. The question arose before Jackson, J. with reference to the successive stages in execution of the same decree ; some intervening

2. Surjiram Marwari v. Barhamdeo Pershad, (1905) 2 C L J 288.
3. Ghanashyam Das v. Ragho Singh, A I R 1931 Pat 64=130 I C 257=10 Pat 234=11 P L T 898.
4. Ramaswami Ayyangar v. Govinda Iyer, A I R 1917 Mad 128=38 I C 1=31 M L J 839.
5. Abdul Muhammad Rowther v. Seethalakshmi Ammal, A I R 1931 Mad 120=130 I C 666.
6. Veerayya v. Sreesailam, A I R 1928 Mad 555 =110 I C 47.

execution applications had according to the opinion of the learned Judge been presented to the wrong Court and the question he had to consider was on what basis the period of exclusion under S. 14 should be calculated in respect of a later application filed in the proper Court. That question had to be decided with reference to the language of Cl. 2, S. 14. Obviously on the facts of that case the theory that a suit and proceedings in execution of the decree obtained therein altogether constitute a single proceeding when considered in relation to a later suit founded on the same cause of action as the prior suit cannot apply. The learned Judge had to decide a point of limitation with reference to different applications for execution presented in execution in respect of the same decree. In such a case he was of opinion that each execution application should be treated as a proceeding by itself and it was only the period of actual pendency of each of such applications that could be taken into account under S. 14 in determining whether a later application for execution was in time or not.

We do not think it necessary for the purpose of this case to differ from that view (*cf.* 68 M L J 665[7]) because, in a case of that kind the principle on which we have rested our present decision is obviously unavailable. The decision in 110 I C 47[6] throws very little light on the question now under consideration ; if anything, it is at variance with the appellants' contention in so far as it recognizes that even the period between the passing of the decree in a suit and the filing of an appeal therefrom may in certain circumstances be deducted under S. 14, Lim, Act. Such a deduction is inconsistent with the appellants' contention that it is only the actual period between the presentation of a proceeding and the disposal of that particular proceeding that can be allowed under S. 14. Jackson, J. recognized the theory that, provided the suit had been rightly initiated, the appeal is really a continuation thereof, and for reasons we have already given we think the same principle ought to be applied to proceedings taken in the execution department for realization of the decree. A point was suggested by Mr. Ramaswami Iyengar that the Judge should not have taken January 1920 as the date up to which the plaintiffs were entitled to deduction, because the Subordinate Judge's order dated 5th July 1918 differentiated the properties within his jurisdiction from the properties in the Agency jurisdiction and no further proceedings were taken by the plaintiffs after that date for the sale of the properties in the Agency jurisdiction. We do not pause to examine the correctness of this argument, because even if it should be held that the plaintiffs were entitled to deduction of the time only up to 5th July 1918, the present suit would nevertheless be in time if they are entitled to exclude the period from 17th August 1907 to 5th July 1918.

It was brought to our notice that the lower Court has declared that the plaintiffs are entitled to proceed against other family properties of the defendants not comprised in the mortgages. The plaintiffs will be entitled to such a decree only if the suit had been instituted within the time allowed by law for a personal decree. But it is clear from the dates, and it is not disputed on the other side, that the personal remedy on the bond had become barred before the institution of this suit. That portion of the decree which relates to the liability of the other family properties of the defendants must accordingly be omitted. Subject to this variation, the decree of the lower Court is confirmed and the appeal is dismissed with costs. The appellants will pay the court-fee payable on the memorandum of appeal.

C.R.K /S.C. *Decree varied.*

7. Maqbul Ahmad v. Onkar Pratab Narain Singh, A I R 1935 P C 85=155 I C 205=62 I A 80=57 All 242=68 M L J 565 (P C).

A. I. R. 1937 Madras 360

VENKATARAMANA RAO, J.

Hajee Moosa Sait & Brothers — Petitioners.

v.

P. S. P. Abdul Kareem — Opposite Party.

Civil Revn. No. 656 of 1935, Decided on 26th October 1936, from decree of Dist. Munsif, Madura, D/- 12th March 1935.

Surety—Surety bond determining amount which creditor could advance to principal debtor and fixing liability of surety to that extent—Creditor exceeding advances—Surety's liability is not discharged but he is liable to extent mentioned in bond.

Where a surety bond contained a term to the effect "that the creditor should advance to the principal debtor goods to the extent of a particular

sum and that the surety would be liable to the creditor 'to that extent' " and it was found out that the creditor had advanced goods exceeding that amount, the question was whether the terms of the surety bond were changed and could the surety evade his liability :

Held: that the term in the bond did not impose any limit on the creditors advancing any sum but it only imposed a limit on the liability of the surety and as such the surety was not discharged but was liable to the extent mentioned in the bond: *A I R 1935 P C 21* and *Blest* v. *Brown*, *(1862) 4 De G F & J 367, Ref.*; *Parker* v. *Wise, 6 M & S 239*; *William Bonallie Gordon* v. *Sarah Rae, 8 El & Bl 1065* and *Laurie* v. *Scholefield, 4 C P 622, Foll.* [P 362 C 2]

K. Rajah Ayyar, S. Venkatakrishnan and *S. L. Narasimham*—for Petitioners.

V. Meenakshisundaram—for Opposite Party.

Order.—This Civil Revision Petition arises out of a suit instituted by the plaintiff to recover a sum of Rs. 256.1.6 being the amonnt due in respect of goods supplied to defendant 1 between 17th December 1931 and 31st December 1932. Defendant 2 was sought to be made liable as surety in virtue of a letter of guarantee executed by him in plaintiff's favour dated 16th December 1931 which runs thus :

Letter of surety regarding supply of goods.

16-12-1931.

Kandramanickam, P. C. P. Madura.

Haji Musa Sait & Brothers.

1st Margali Prajothpathi year (16-12-1931).

Abdul Karim writes as follows:—

Please supply the bearer of this letter, S. Shamsuddin Sahib Avergal of Tirupattur, goods in current account 'upto the extent of Rs. 250 (Rupees two hundred and fifty) and have debit and credit transactions in his name. 'For the said amount' I shall be surety for a period of one year. Thereafter I shall not be surety. If any amount be due to you within the aforesaid period of one year during which I shall be surety, I shall pay the same and take this letter. After one year I shall not be surety.

With compliments.

Nayan's help.

(Signed) P. C. P. Abdul Karim.

During the period of one year during which the guarantee was to subsist defendant 1 was supplied goods on four occasions and on two of such, goods of the value of more than Rs. 250 were supplied. The plea of defendant 2 is that as the plaintiff exceeded the limit indicated by him in his said letter there was a variation of the terms of the contract entered into with him and he was therefore discharged from all liability thereunder. This plea prevailed in the Court below. The question is whether it is sound. No doubt as pointed out by Lord Atkin in 68 M L J 339[1]:

The surety, like any other contracting party, cannot be held bound to something for which he has not contracted.

And he refers to the observations of Lord Westbury in (1862) 4 De G F and J 367[2] at p. 376 namely :

He (surety) is bound therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say: "The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation therefore is at an end".

The question therefore is, what is the meaning and scope of Ex. C in this case ? On a construction of the document as a whole, the reasonable intendment of the parties seems to be to define the duration and limit of the liability of defendant 2 and not to impose a limit on the supply of goods. The words 'up to the extent of Rs. 250' do not mean that, once the goods of the said value have been supplied, no further goods should be given, because the debit and credit transactions were intended to go on at least so far as defendant 2 was concerned for one year. Therefore the words 'up to the extent of Rs. 250' must be construed in relation to what follows, namely, 'for the said amount I shall be surety for a period of one year' thereby plainly indicating that the extent of defendant 2's liability is limited to the said amount. Ex. 1 is merely a request to the plaintiff by defendant 2 to supply goods to the extent of Rs. 250 without any restraint upon his advancing more but with a condition on his part that he is answerable to that extent only. The case in 6 M & S 239[3] is instructive. In that case *A* had overdrawn his account with his bankers in a sum of £ 4822-15-9 and in order to enable him the better to carry on his business, requested the bankers to allow him to overdraw his account at any time, and from time to time such further sums as he might require so that the same sum together with the said sum

1. Pratapsingh v. Keshavlal, A I R 1935 P C 21 =153 I C 700=68 M L J 339=62 I A 23= 59 Bom 180 (P C).
2. Blest v. Brown, (1862) 4 De G F & J 367=45 E R 1225=10 W R 559=8 Jur (N S) 602= 6 L T 620.
3. Parker v. Wise, (1817) 6 M & S 239=105 E R 1032=18 R R 359.

£4822-15-9 should not exceed as a whole at any time the sum of £5000. The bankers agreed provided they were indemnified by the bond of a surety, and the defendant in that case stood surety as required by the bankers and the condition of the said surety bond was for the payment by *A* and the surety on demand to the bankers of the sum of £4824-4-9 due to them and also such further sum or sums as the bankers may thereafter advance to *A* in the course of his business, not exceeding in the whole £5000. In a suit on the bond the plea raised by the surety was that on diverse days the bankers allowed *A* to overdraw his account to such an amount that the further sums advanced together with the said sum of £4822-15-9 exceeded in the whole at one time £5000 contrary to the said condition and therefore he was discharged from his obligation under the bond. This plea was negatived and Bayley, J. observed :

> If the true construction be that the parties intended to stipulate against any advance beyond £5000, then this advance will have the effect of cutting down the obligation altogether. But the Court ought to see plainly that this was the intention, before they give a construction to the language of this bond which would have the effect of avoiding it, if one shilling beyond the sum named should be advanced..... If the parties had intended to attach a consequence so penal to an advance beyond that sum, can it be supposed that they would have contented themselves with language so equivocal, and would not have introduced express words of condition, as it were by way of caution, that such should be the effect ?

In 8 El & Bl 1065=120 E R 396[4] at p. 405 Crompton, J. followed *Parker* v. *Wise*[3] and explained its scope thus :

> Even if there had been a recital that the agreement had been to give credit for the £1000 and the condition was for securing £1000, it is well established by the judgment of the learned Judges in *Parker* v. *Wise*[3] that unless the bond clearly showed that the parties intended that the restriction was to operate as a condition upon which the whole security was to become void, the advancing to a greater amount would be no defence.

I may also usefully refer to the case in 4 C P 622[5] which is almost on all fours with the present case In that case at the commencement of the dealings a letter of guarantee was given in the following form :

> In consideration of the Union Bank of London agreeing to advance and advancing to the firm of Russell & Co. any sum or sums of money they may require during the next 18 months, not exceeding in the whole the sum of £1000 we hereby jointly and severally guarantee the payment of any such sum as may be owing to the said bank at the expiration of the said period of 18 months, and undertake to pay the same on demand, in the event of Russell & Co. making default in the payment of the same.

The contention in that case was, relying on the words 'not exceeding in the whole the sum of £1000' that the bankers during the period of 18 months specified in the document made advances greatly exceeding in the whole £1000 and therefore the surety was discharged from the liability and guarantee; Montague Smith, J. did not accept this contention and he remarked :

> The words 'not exceeding in the whole £1000' do not amount to a condition. They were intended to express the limit of the defendant's liability and not to prohibit the bank from making any further advances to Russell and Co. If it had been intended that no advances beyond £1000 should be made during the currency of the suretyship, I should have expected more precise words.

Following the principle laid down in the above decisions I hold that there has been no variation of the engagement in Ex. C by reason of the fact that goods of the value of more Rs. 250 were supplied to defendant 1 and defendant 2 is not discharged from his liability thereunder. He is liable under Ex. 1 to pay to the plaintiff the value of the goods supplied to defendant 1 to the extent of Rs. 250 during the year in question. But he is not bound to pay his interest as there is no stipulation in the document to pay any interest, nor has it been established in the case by any evidence that the dealings carried or were intended to carry interest. I therefore reverse the decree of the lower Court and pass a decree for Rs. 188 with interest at 6 per cent. against defendant 2. In the circumstances of the case I direct each party bear his own costs throughout.

C.R.K./B.D. *Decree reversed.*

4. William Bonnallie Gordon v. Sarah Rae, (1858) 8 El & Bl 1065=120 E R 396=27 L J Q B 185=4 Jur (N S) 530.
5. Laurie v. Scholefield, (1869) 4 C P 622=38 L J C P 290=20 L T 852=17 W R 931.

✻ A. I. R. 1937 Madras 362

VENKATARAMANA RAO, J.

Muniappa Mudali — Appellant.

v.

Thangavelu Mudali and *others*—Respondents.

Second Appeal No. 1668 of 1931, Decided on 6th March 1936, against decree of Sub-Judge, Chingleput, in A. S. No. 151 of 1930.

*** Civil P. C. (1908), S. 66 (1)—Benami purchase of house at Court sale — Subsequent contract by benamidar to sell house to person for whom he had purchased benami—Suit to rectify sale deed—S. 66 (1) is no bar.**

Section 66 (1) has to be strictly applied. Its object is to prohibit on grounds of public policy a suit against the certified purchaser on the ground specified in the section. It does not render benami transactions illegal. If the cause of action is not based on the benami purchase but on a contract or title acquired subsequent thereto, S. 66 is not a bar. [P 363 C 2]

Where therefore a person purchased a house benami for the mortgagor at a Court sale and by a subsequent contract sold the same by a sale deed to the mortgagor, and a suit was brought for rectification of the sale deed:

Held : that the cause of action was the title under the conveyance, an event which happened subsequent to the Court sale and the fact that the basis of contract embodied in the sale deed was a prior benami purchase did not affect the title under the conveyance. S. 66 therefore was no bar to the suit : *A I R 1934 All 990*; *A I R 1931 Bom 578* and *A I R 1920 P C 30, Rel. on*; *A I R 1928 P C 75, Disting.* [P 364 C 1]

Judgment.—The suit is for rectification of a sale deed dated 9th March 1926, executed by the defendant in favour of the plaintiffs. Plaintiffs 2, 3 and 4 are the sons of plaintiff 1. The plaintiffs owned in house No. 50, Akkanampalayam Street, Conjeevaram, the front or street portion (50-A) and the back portion (50-C), the middle portion belonging to a dayadhi of theirs. The plaintiffs mortgaged both the portions of the house owned by them to the Pillapalayam Co-operative Society. The Society brought the mortgaged property to sale through Court. The case of the plaintiffs is that plaintiff 1 under an arrangement with the defendant had the property purchased in the defendant's name with funds provided by him, that symbolical delivery was obtained and in spite of such delivery the plaintiffs continued in possession. On 9th March 1926 the defendant conveyed the property to the plaintiffs by a sale deed bearing the said date, but by a mistake the street portion was omitted to be included in the description given in the sale deed of the property and hence the suit was filed by the plaintiffs. The relevant allegations in the plaint are to the following effect :

6. Subsequent to the aforesaid execution proceedings, as the suit property was purchased benami in the name of the defendant in the Court auction, the defendant in pursuance of an arrangement among both parties sold away the property on 9th March 1926 to plaintiff 1.

8. As the suit property consists of two portions one portion has been omitted from the said sale deed either out of fraudulent intention or by mistake. But it was only on the understanding that the property auctioned should be reconveyed in entirety that the sale deed was executed.

The defence was a total denial of the benami purchase and that only the back portion was intended to be sold by a contract subsequent to the sale and there is no mistake or fraud as alleged in the plaint. The only issue framed was "whether the item in question was intended to be included in the sale". The learned District Munsif came to the conclusion that the back portion alone was intended to be sold and not the front portion. The learned Subordinate Judge reversed his decree and held that both the portions were intended to be sold. His findings were that the entire consideration money for the auction purchase was provided by plaintiff 1, that the understanding was that both portions should be conveyed, that in pursuance of the said understanding the sale was effected but by mistake the street portion was omitted and that the property continued in possession of the plaintiffs in spite of the Court sale and delivery. Against this decision the present second appeal has been preferred. It was contended on behalf of the appellant that the suit is barred by S. 66 (1), Civil P. C. S. 66 (1) is in these terms :

No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

The section has to be strictly applied. Its object is to prohibit on grounds of public policy a suit against the certified purchaser on the ground specified in the section. It does not render benami transactions illegal. If the cause of action is not based on the benami purchase but on a contract, or title acquired subsequent thereto, S. 66 is not a bar. In 43 Mad 643,[1] where a contract subsequent to the purchase at the Court sale was upheld though it was in pursuance of an arrangement prior to the sale, the Judicial Committee observed that if the matter stood only on the original arrangement there may be some difficulty created by the section and held:

But whatever doubt might be caused by the character of the original agreement is removed by the events which happened after the sale.

1. Vadivelu Mudaliar v. Peria Manicka Mudaliar, A I R 1920 P C 30=56 I C 395=47 I A 103 =43 Mad 643 (P C).

In this case the case of the plaintiffs is not rested on the fact of the benami purchase or a mere prior agreement by the defendant to convey. It is based on a conveyance subsequent to the Court sale. The cause of action is that the conveyance actually executed does not embody the real intention of the parties and the aid of the Court is sought to rectify the deed to carry it out. The operative portion of Ex-A, the sale deed dated 9th March 1926, is :

I have on this date sold to you the undermentioned property for Rs. 400 and have on this date received the entire amount in cash. Hence you shall from this date take possession of the undermentioned house absolutely.

In the description of the property in the schedule to the deed, the first portion of the said description runs thus :

House comprised in Town Survey No. 1395 in your enjoyment after purchase thereof by me on your behalf on 8th November 1912 in the auction held by the Court.

But the later portion of the description which gives the boundaries and measurements refers only to back portion of the house and not to the front portion thereof. Therefore the case of the plaintiffs is that what was intended to be sold and was sold is the property purchased in Court auction described in the beginning of the description of the property in the deed and by mistake the description of the street portion was not added. Thus the cause of action is the title under the conveyance, an event which happened subsequent to the Court sale. The fact that the basis of the contract embodied in the sale deed is the prior benami purchase does not affect the title obtained under the conveyance : *vide* A I R 1934 All 990[2] at p. 992 and A I R 1931 Bom 578[3] at p. 581. Mr. Bhashyam relied strongly on the decision of the Privy Council in 54 M L J 462.[4] But in that case their Lordships had not to deal with a case of a subsequent conveyance and a title arising therefrom. I am therefore of opinion that S. 66 does not bar the suit. In the result the second appeal fails and is dismissed with costs. Leave refused.

C.R.K./S.C. *Appeal dismissed.*

2. Ram Chandra v. Jaith Mal, A I R 1934 All 990.
3. Allibhai v. Dada, A I R 1931 Bom 578=136 I C 509=33 Bom L R 1296.
4. Balaram v. Naktu, A I R 1928 P C 75=108 I C 11=54 M L J 462=24 N L R 59 (P C).

* A. I. R. 1937 Madras 364

BEASLEY, C. J.

Ramanatha Ayyar (Seshan Pattar's son) — Petitioner.

v.

G. G. Narayanaswami Ayyar—Opposite Party.

Civil Revn. No. 380 of 1935, Decided on 16th November 1936, from decree of Sub-Judge, Palghat, D/- 9th August 1934.

*** (a) Promissory Note — Insufficiently stamped—Pronote cannot be produced in evidence even as acknowledgment for recovery of amount.**

A promissory note which is insufficiently stamped cannot be used even for the purpose of proving an acknowledgment by the maker of it of his indebtedness, or for any other purpose: *A I R 1930 Mad 485* **and** *A I R 1933 Mad 251, Dissent.*; *S. A. No. 124 of 1935, Rel. on.*

[P 365 C 1]

(b) Chit Fund—Promise by subscriber to pay money to stake-holder under rules of chit fund—Promise is not one to lend money to stake-holder—It is in nature of promise to pay money to stake-holder and is enforceable at law (*Obiter*).

Obiter.—A promise by the subscriber to the stake-holder in a chit fund transaction is not a contract to lend (which is not enforceable) where the stake-holder is to be regarded as a borrower and the subscriber as a lender. It is in the nature of a contract on the part of the subscriber to pay a certain sum of money to the stake-holder under the rules of the chit fund and when he has broken his contract there is nothing at all to prevent the stake-holder from suing him for the money which he has contracted to pay.

[P 366 C 1]

P. V. Venugopala Aiyar—for Petitioner.

K. Rajah Aiyar and *N. R. Sesha Aiyar*—for Opposite Party.

Order.—In my view, this Civil Revision Petition must be dismissed with costs although that result is reached by coming to a different decision upon the point of limitation to that reached by the learned Subordinate Judge. It seems to have been conceded in the lower Court that the promissory note, Ex. B, was insufficiently stamped and the suit was not brought upon the promissory note at all. The only use to which it was put at the trial was as an acknowledgment of his debt to remove the bar of limitation which otherwise was obviously in the way of the claim, the amount sued for having been due on 30th November 1929 and the suit filed on 10h March 1934. The learned trial Judge held that although the note should not be used as a promissory note,

it could nevertheless be used as an acknowledgment of the defendant's liability for the debt sued upon and he relied upon the decisions in A I R 1933 Mad 251[1] and A I R 1930 Mad 485.[2]

The learned Subordinate Judge had not got before him the unreported decision of a Bench of this Court to which I myself was a party in S. A. No. 124 of 1930[3] in which judgment was given on 6th September 1934. There the Bench took a view contrary to that expressed in the two decisions of Krishnan Pandalai, J. sitting alone to which I have just made reference. It was held that a promissory note which was insufficiently stamped could not be used for the purpose of proving an acknowledgment by the maker of it of his indebtedness. That decision is not only binding upon me, but I think is a correct one as well. The learned Subordinate Judge has quite rightly taken this to be a document which comes within S. 35, Stamp Act. It is true that it is a promise to pay at a future date instead of on demand, but it is nevertheless a promise to pay and is in my opinion clearly provided for by S. 35, Stamp Act. Therefore the learned Subordinate Judge should have held that the suit was barred by limitation as insufficiently stamped note could not be used in evidence for any purpose and it is not necessary for me to deal with the other questions raised before him. But I think it necessary to say this that the suit was brought by the assignee from the receiver appointed in a partition suit in the stake-holder's family which at the time of the starting of the kuri or chit was an undivided family. This was an auction chit and there were to be 14 auctions.

There were 15 subscribers each of them subscribing Rs. 500 for 15 instalments. Except with regard to the second instalment out of which the suit arose, the same procedure was adopted with regard to the others. The fifteen subscribers subscribed each Rs. 500 making a total of Rs. 7,500. This sum of money was immediately put up in auction and sold to the subsrciber or bidder who was prepared to give the largest discount. He then got the sum of money less the discount offered by himself. This discount at the first auction was divided up amongst all the subscribers except the successful bidder. The second instalment differed considerably from all the others in that the whole of the subscriptions of the fifteen subscribers amounting to Rs. 7,500 went to the stake-holder It was in fact his prize and thereafter at all the other auctions the discount offered by the successful bidder was divided up amongst those subscribers who had not been successful at the previous auctions and excluding the stake-holder. The defendant paid his subscription in respect of the first instalment and also the third and the fourth when my information which I get from Mr. K. Rajah Ayyar is that the chit stopped. The whole of the trouble arises in this case in respect of the second instalment. The defendant did not subscribe his Rs. 500 as he ought to have done. Instead a promissory note payable in three years time was taken from him and, as he did not pay the amount, the suit was filed against him as I have already stated not on the promissory note because it was not sufficiently stamped, but upon the original debt, viz. Rs., 500.

The learned trial Judge having found in favour of the plaintiff on the point of limitation then proceeded to deal with the claim upon the original debt. He dismissed the suit because he held that it was really a suit claiming specific performance of a contract to lend. This means that he regarded the stake-holder as the borrower and the subscriber as the lender and the suit against the latter as being one to enforce a contract entered into by him to lend Rs. 500 to the stake-holder on the date of the second instalment. It is very difficult to see how this can possibly be a contract whereby the subscriber is to lend a certain sum of money to the stake-holder. It has been held in a case of a similar auction chit where it was contended that the chit subscriber was a borrower from the fund that he was not a borrower, but he was merely the purchaser of a sum of money: *vide* 68 M L J 283[4]. In the present case the lower Court reverses the position unsuccessfully put forward in that case and treats the subscriber as the lender and the stake-holder as the borrower. I do

1. Vancheswara v. Narayana, A I R 1933 Mad 251=141 I C 169.
2. Rakkappan v. Suppiah, A I R 1930 Mad 485 =124 I C 53.
3. K. M. Subbayyar & Sons v. P. M. Lakshmana Iyer, Second Appeal No. 124 of 1930.
4. Raghavan Pattar v. Arumugham, A I R 1935 Mad 385=158 I C 1037=68 M L J 283.

not agree as I quite fail to see how it can possibly be said that this is in any sense a contract entered into by a subscriber to lend money to the stake-holder. It seems to me to be more in the nature of a contract on the part of the subscriber to pay a certain sum of money to the stake-holder under the rules of the chit fund and when he has broken his contract there is nothing at all to prevent the stake-holder from suing him for the money which he has contracted to pay. However, I have not heard any argument from Mr. Rajah Ayyar on behalf of the respondent on this point and I therefore do not decide it. I merely express the opinion I have come to without hearing any such argument. The result is that the suit must fail on the question of limitation and this Civil Revision Petition dismissed with costs.

C.R.K./W.D. *Petition dismissed.*

A. I. R. 1937 Madras 366

VARADACHARIAR, J.

Methar Rowther — Appellant.

v.

Sehu Mideen Rowther — Respondent.

Second Appeal No. 488 of 1935, Decided on 4th November 1936, against decree of Court of Sub-Judge, Tinnevelly, in A. S. No. 112 of 1934.

Civil P. C. (1908), O. 21, Rr. 98 and 103—Execution sale—Property purchased by *A*—Resistance to delivery by *B* alleging sale to himself — Order under R. 98 dismissing *B*'s claim—Subsequent suit by *A* for partition of property — *B* resisting on same ground as taken in previous execution case — *B* held barred under R. 103 from raising same plea.

The terms of R. 103 of O. 21, Civil P. C., clearly cover an order under R. 98; and so far as the conclusiveness enacted in the final part of R. 103 is concerned, it can make no difference whether the question is sought to be re-agitated by a person as plaintiff or as defendant. [P 366 C 2; P 367 C 1]

In an execution of a decree on a pro-note the property was purchased by *A*. When he attempted to take possession, he was resisted by *B* on the ground that *B* had purchased the property. The Court passed an order under R. 98 whereby it dismissed the claim of *B*. Subsequently *A* brought a suit for partition of the property, but *B* again resisted on the same grounds taken by him in the previous execution case :

Held : that the order under R. 98 was conclusive under S. 103 and therefore *B* was barred from raising the same plea : *A I R 1914 Mad 121* and *1930 M W N 1051, Disting.* [P 366 C 2]

P. N. Appuswami Iyer—for Appellant.

Judgment.—This is an appeal by the defendant in a suit instituted for partition and recovery of possession of a half share of the suit properties on the ground that the plaintiff had purchased in Court auction the right, title and interest of the defendant's brother, who according to the plaintiff was entitled to a half share in those properties. The Court auction was held in execution of a decree obtained on a promissory note said to have been executed by defendant 1's brother, the deceased Pakkiri Mohaideen Rowther and his wife. When the plaintiff attempted to take possession as execution purchaser, the defendant resisted delivery, alleging that he had obtained a sale of his brother's half share, from his widow. On that obstruction, the plaintiff filed E. A. No. 367 of 1932 and it is alleged in para. 5 of the plaint that that petition was heard and an order was passed thereon by the Court on 13th October 1932 to the effect that the sale obtained by the defendant was not supported by any consideration, that the defendant had no manner of right to the half share of his deceased brother and that the same should be delivered to the plaintiff. The plaint adds that delivery of possession was accordingly given to the plaintiff on 22nd October 1932; but as the deceased was entitled only to an undivided half share there could have been, in the nature of things, no physical dispossession of the defendant and in that sense the delivery was only of symbolical possession.

When the plaintiff instituted this suit for partition on the strength of the title thus acquired, the defendant attempted to re-agitate the questions put forward at the time when he obstructed delivery. The 4th issue was accordingly framed and it raised the question, "whether the defendant is barred from raising the said pleas". Both the Courts below have held that the defendant is barred. Hence this appeal by the defendant. I feel little doubt that the order on E. A. No. 367 of 1932 was one passed under O. 21, R. 98, Civil P. C. Such an order could have been passed only after notice to the defendant and an investigation of the case as contemplated in sub-cl. 2, R. 97. The terms of R. 103, O. 21, Civil P. C., clearly cover an order under R. 98; and so far as the conclusiveness enacted in the final part of R. 103 is concerned, it can make no difference whether the question is sought to be re-agitated

by a person as plaintiff or as defendant. The cases relied on by Mr. Appuswami Ayyar, namely 1 M L W 31[1] and 1930 M W N 1051,[2] do not afford any help in the present case, because, in the former case, the order was passed under the old Code where the language of the rule then in question was somewhat different and as pointed out by Spencer, J. in that case it was not clear that the order was at all unfavourable to the party who was sought to be bound by the one year's rule. In 1930 M W N 1051,[2] it does not appear that there was any resistance to delivery and an order in the presence of the party resisting, overruling his objection.

I am, however, inclined to think that the Courts below went too far in holding that every issue sought to be raised in this case must be taken to be precluded by O. 21, R. 103, Civil P. C. If I found that there was any substance in the issue about adverse possession or the issue which attacks the validity of the decree in the promissory note suit, I should have directed an enquiry into those issues, because I cannot agree that even such questions could have been raised in the obstruction proceedings. But the issues seem to me so unsubstantial and untenable that it does not seem to be worth while putting the parties to the expense of a trial in respect thereof. A person in the position of defendant 1 is not entitled to question the decree in S. C. S. No. 944 of 1930 on the ground that the pro. note then sued on was not genuine. Nor in the face of the allegations in the written statement, am I able to understand that there is any basis for the issue relating to adverse possession. I regret to be obliged to say that the issue has been raised without any regard to the pleadings. In the written statement the defendant admits that Pakkiri Mohaideen Rowther was entitled to a half-share and that he allowed the defendant to enjoy the property in lieu of interest on a sum of Rs. 106 which is said to have represented Pakkiri Mohaideen Rowther's share in the expenses incurred by the defendant during their mother's illness. The sale to the defendant even as alleged in the written statement took place only in 1930. In these circumstances the plea of adverse possession is so obviously untenable that I do not think the Court can take any further notice of it. The second appeal therefore fails and is dismissed. (Leave to appeal is refused.)

C.R.K./P.R. *Appeal dismissed.*

1. Ayyakutti Mankondan v. Periasami Koundan, A I R 1914 Mad 121=24 I C 771=1 M L W 31.
2. Arumugha Padayachi v. Muthal Reddi, (1930) M W N 1051.

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* A. I. R. 1937 Madras 367

KING, J.

N. A. St. Chidambaram Chettiar — Appellant.

v.

Venkatasubba Naik — Respondent.

Second Appeal No. 119 of 1933, Decided on 19th November 1936, against decree of Addl. Sub-Judge, Ramnad, in A. S. No. 72 of 1932.

*** Limitation Act (1908), Ss. 19 and 4— Tacking of period — Limitation under S. 19 is not to include extension given by S. 4— Acknowledgment made after expiry of limitation but before extended period is not valid acknowledgment to save limitation.**

Under S. 19 the period prescribed is to be calculated only from the Articles and other Sections of the Limitation Act but not by including the extension which is given by S. 4. Because under S. 19 it is necessary that the acknowledgment should be signed before expiration of the period prescribed and S. 4 can come into operation only after the period of limitation prescribed has already expired : *A I R 1927 All 577, Dissent.*; *26 Bom 782* and *A I R 1929 Cal 68, Foll.* ; *A I R 1935 P C 85, Rel. on.* [P 368 C 1]

An acknowledgment made therefore before the expiry of the extended period of limitation but after the expiry of limitation prescribed for filing a suit is not a valid acknowledgment to save limitation. [P 396 C 2]

A. S. Srinivasa Ayyar—for Appellant.

K. V. Sesha Ayyangar and *K. Aravamudha Ayyangar*—for Respondent.

Judgment.—The question raised in this second appeal is one of limitation. The suit promissory note was executed on 12th June 1923. There was an acknowledgment on 22nd June 1923 and a second acknowledgment on 27th June 1926. On that date the Court in which the suit should have been filed was closed. It was closed on 22nd June and re-opened on 28th June 1926. The suit was filed on 6th August 1929. Both the Courts below have held that the suit was barred by limitation. The argument in appeal is that S. 19, which is the section of the Limitation Act which has to be applied in this case, deals with the period prescribed by the Act as a whole for the filing of a suit and

that when the Act as a whole is read, that period will be seen to expire not on 22nd June 1926 but only on 28th June 1926 when the Court re-opened and therefore three years can be calculated afresh from 28th June 1926. In other words, to put the argument very succinctly, it is this: that under S. 19 the period prescribed is to be calculated not only from all the Articles and other Sections of the Limitation Act, but also by including the extension which is given by S. 4. It seems to me that this argument is untenable and obviously appears to be untenable from a mere perusal of the two sections concerned. S. 4 runs thus :

> Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

Section 19 reads as follows, omitting unnecessary words :

> Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability has been made in writing, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

It will be clear from S. 19 that it is necessary that the acknowledgment should be signed before the expiration of the period prescribed. It is equally clear from S. 4 that that section itself can come into operation only after the period of limitation prescribed has already expired. In this case therefore the period of limitation prescribed expired on 22nd June 1926, but by reason of the provisions of S. 4 a special right was given to the plaintiff to file his suit on a later date when the Court re-opened. It is impossible in my opinion to give a different meaning to the expression "expiration of the period prescribed" in S. 19 from the meaning which that expression bears in S. 4. True that I have been referred to one case in Allahabad decided by a single Judge in which upon facts similar to the present it has been held that S. 19 can also include the period extended by S. 4 (49 All 726[1]), but the weight of authority is decidedly on the other side. There is a Bench decision by the Bombay High Court reported in 26 Bom 782[2]; there is a decision of the learned Chief Justice of the Calcutta High Court in 55 Cal 1210[3] and finally there is this very significant sentence in the judgment of the Privy Council reported in 57 All 242[4] at p. 248. Their Lordships of the Privy Council are there discussing the meaning of S. 4 and what they say is this :

> What the section provides is that where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, an application may be made on the day when the Court reopens, so that there is nothing in that section which alters the length of a prescribed period.

If that is so, the prescribed period, as I have already said, clearly expired by 22nd June 1926, and the endorsement which was made only on 27th June 1926 cannot possibly come within the provisions of S. 19. In the result the appeal fails and is dismissed with costs. Leave to appeal is refused.

B.D./A.L. *Appeal dismissed.*

1. Abdul Ghani v. Chiranji Lal, A I R 1927 All 577=102 I C 111=49 All 726=25 A L J 589.
2. Bai Hemkore v. Masamalli, (1902) 26 Bom 782=4 Bom L R 608.
3. Debendra Nath Roy v. Kartic Prasad Das, A I R 1929 Cal 68 = 114 I C 483 = 55 Cal 1210.
4. Maqbul Ahmad v. Onkar Pratap Narain Singh, A I R 1935 P C 85=155 I C 205 = 57 All 242 =62 I A 80 (P C).

A. I. R. 1937 Madras 368

GENTLE, J.

In the matter of *Universal Mutual Aid & Poor Houses Association, Ltd., Madras.*

C. V. Nagaraja Sastri, Managing Official Liquidator—Applicant.

A. D. Thoppa Naidu and *others*—Petitioners.

v.

L. M. Gesan—Respondent.

Application No. 1212 of 1936, in Original Petn. No. 111 of 1931, Decided on 23rd October 1936.

Trusts—Creation of—Company having one of its objects to allocate 30 per cent. of moneys coming to them from certificate holders towards specified charities, issuing donation certificates to subscribers—Certificates accepted by subscribers on condition and with knowledge that 30 per cent. of contributions was to go to charity—Trust held created in respect of 30 per cent. of contribution amount.

A certain company in liquidation issued to the subscribers donation certificates which were accepted by the subscribers upon the condition endorsed thereon and in the recital, the certificate-holder expressed himself as desirous of doing charity. In the memorandum of association of the company amongst its primary objects was to allocate 30 per cent. at least of the moneys coming to them from the certificate-holders towards specified charities; in regard to the remaining 70 per cent. of the moneys subscribed, that part was to form a fund from which benefits might from time to

time be available to certificate-holders. Whenever any person desired to become a certificate-holder, he did so only upon the terms of the certificate and upon the terms of the memorandum of association, of which he would have constructive notice, and he would know that of the moneys that he transmitted to the company 30 per cent. was to be allocated to charity and the company on the other hand in accepting contributions from certificate-holders accepted those contributions upon the basis that 30 per cent. was to be so allocated :

Held: that when a certificate-holder sent to the company moneys which were transmitted periodically he was clearly communicating the object which was to be fulfilled in regard to the 30 per cent. and having, by accepting the certificate, undertaken the obligations contained in the certificate, he did all that he had to do and a trust was there and then created; and the company from that time held the moneys as trustees for carrying out of the object of the trust: *Milroy v. Lord*, (*1862*) *7 L T 178*, *Ref.* [P 369 C 2; P 370 C 1]

K. P. Sarvothama Rao and *V. Bhavani Sankar*—for Applicant.

Managing Official Liquidator in person.

V. Sivaprasad and *T. Krishnamachari*—for Respondent.

Order.—This is an application by the Managing Official Liquidator in the matter of the Universal Mutual Aid and Poor Houses Association, Limited (in Liquidation) for directions regarding a sum which, I am informed, amounts to Rs. 2,335-2-10 which is part of monies in a suspense account, and the application arises under these circumstances. The company in liquidation issued to subscribers donation certificates which were accepted by the subscribers upon the condition endorsed thereon and in the recital the certificate-holder expressed himself as desirous of doing charity. In the memorandum of association of the company amongst its primary objects was to allocate 30 per cent. at least of monies coming to them from the certificate-holders towards specified charities; in regard to the remaining 70 per cent. of the monies subscribed, that part was to form a fund from which benefits might from time to time be available to certificate-holders and in respect of which there is no necessity now for me to discuss. The company has received altogether a sum of approximately Rupees 10,000 and instead of allocating 30 per cent. to charity and 70 per cent. to the other objects I have indicated, the whole was placed in what was called a suspense account and the monies paid were entered in a suspense ledger. Whenever any person desired to become a certificate-holder, he did so only upon the terms of the certificate and upon the terms of the memorandum of association, of which he would have constructive notice, and he would know that of the monies that he transmitted to the company 30 per cent. was to be allocated to charity and the company on the other hand in accepting contributions from certificate-holders accepted those contributions upon the basis that 30 per cent. was so to be allocated. From this it is to my mind clear that when a certificate-holder transmitted monies to the company, in regard to 30 per cent. of the amount so paid a trust was created and the monies were accepted by the company upon trust. It is in regard to such 30 per cent. that the sum I have already mentioned, Rs. 2,335-2-10 is found in the accounts of the company and the Official Liquidator requires directions.

It is contended that no trust was created and that the individual certificate-holder intended to create no trust unless and until he himself had derived benefit from the company. I am unable to accept that contention. I have been referred to the case of (1840) 3 Beave 148[1] at p. 172 and to Lord Longdale's remarks at p. 172 by which he lays down that to create a valid trust there are three requisites: (1) the words must be such that on the whole they ought to be construed as imperative; (2) the subject matter of the trust must be certain; (3) the objects or persons intended to be benefited must be certain. It is conceded that in regard to 1 and 3 the requirements there set forth are fulfilled in this case. But it is said that the subject matter of the trust was not certain inasmuch as a specific sum was not mentioned. When a certificate-holder remitted to the company monies he was remitting quite clearly 30 per cent. of that money to the company to be held by them in trust for the charity mentioned and 70 per cent. for that fund out of which benefits were expected to be gained. To my mind requirement No. 2 is amply fulfilled. In 7 L T 178,[2] Turner, L. J., at p. 181, says :

> I take the law of this Court to be well settled that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the

1. Knight v. Knight, (1840) 3 Beave 148=9 L J Ch 354=4 Jur 839=49 E R 58.
2. Milroy v. Lord, (1862) 7 L T 178=4 De G F & J 264=31 L J Ch 798=8 Jur (N S) 806.

property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon himself. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provisions will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes.

When a certificate-holder sent to the company monies which were transmitted periodically he was clearly communicating the object which was to be fulfilled in regard to the 30 per cent. and having, by accepting the certificate, undertaken the obligations contained in the certificate he did all that he had to do as visualised by Turner, L. J., and a trust was there and then created; and the company from that time held the monies as trustees for carrying out of the object of the trust. In the matter of this liquidation, donation certificates and bonds have been very fully dealt with by Stone, J. in his judgment in Application No. 2720 of 1933, in the course of which he expressed the view that the certificate-holders are entitled to 70 per cent. of the monies they subscribed to the company. The exact matter which is before me was not argued before Stone, J., but from his judgment I received great help. In my view the monies in the suspense account amounting to the sum I mentioned, namely Rs. 2,335-2-10, should be allocated towards the trust and the charity which is mentioned in conditions Nos. 3 and 5 of the donation certificate issued by the company before it went into liquidation and the prayer of the Managing Official Liquidator is therefore granted. Costs of the certificate-holders Rs. 75.

C.R.K./S.C. *Prayer granted.*

✻ A. I. R. 1937 Madras 370

BEASLEY, C. J. AND HORWILL, J.

C. M. Raju Chetty — Appellant.

v.

O. C. Raju Chetty and *another* — Respondents.

O. S. A. No. 26 of 1936, Decided on 28th October 1936, from order of Lakshmana Rao, J., D/- 11th November 1935.

✻ (a) Lunatic — Committee appointed to manage estate of lunatic—Direction to submit accounts half yearly—Failure of committee to file accounts for 21 years — Failure is highly reprehensible—Failure can be condoned only under strong exceptional circumstances.

Where a committee has been appointed for the management of the estate of a lunatic with a direction to file accounts half yearly but the committe fails to do so for not less than 21 years, the failure is highly reprehensible especially when the committee incurs expenditure without the previous sanction of the Court. The failure so to account can be condoned only under strong exceptional circumstances. When after these years, the committee is asked to furnish accounts and on accounts being submitted the Court finds that no damage whatever has been done to the lunatic's estate, that the accuracy of the accounts has, after due inspection, not been questioned, that the bona fides of the committee have not been questioned thereafter, that the original order appointing the committee authorises an expenditure on the maintenance of the family, that the person for whose maintenance and education expenditure has been incurred is the next heir, that the testator himself from whom the lunatic got property desired the lunatic to live with the next heir and the other members of the family as one family and that there is evidence upon which the Court can reasonably hold that the lunatic, if of sound mind, would have made the expenditure in question, failure to furnish accounts by the committee can be condoned under such exceptional circumstances and the Court has discretion to condone such failure. [P 371 C 2; P 374 C 1, 2]

✻ (b) Lunatic — Committee appointed for management of lunatic's estate—Committee empowered to appropriate rent thereof towards its upkeep and maintenance of lunatic and his family — Committee incurring expenditure without previous sanction of Court —Expenses incurred on maintenance and education of lunatic's next heir with whom testator desired lunatic to live and for maintenance of lunatic and his family—Expenses incurred being proper, Court has discretion to sanction them retrospectively.

The first care is the comfort of the lunatic who should have everything that his or her circumstances will allow and the next care is the household of the lunatic and the final principle is that the Court should not refuse to do on behalf of the lunatic what the lunatic himself would probably have done. [P 372 C 1]

A committee was appointed for the management of the estate of the lunatic. The committee incurred large expenditure on the maintenance of the lunatic and her household and on the maintenance and education of the lunatic's next heir. The testator from whom the lunatic got the property had expressed his desire that the lunatic should live with the next heir and other members of the family as one family :

Held : that the lunatic if of sound mind would have made the expenditure, namely on the education and maintenance of the next heir and the family the lunatic was living with. The expenditure incurred on the maintenance and education of the next heir with whom she preferred to live as desired by the testator could be supported on the ground that he was the next heir to the lunatic. Moreover the committee was empowered by its order of appointment to appropriate the rent of the estate towards the upkeep and maintenance of the lunatic's family. The expenditure

incurred by the committee under the circumstances was proper though made without the previous sanction of the Court and that the Court had discretion to retrospectively allow such expenditure under the circumstances: *Case law referred.* [P 374 C 1]

A. B. Nambiar—for Appellant.

V. Radhakrishnayya—for Respondents.

Beasley, C. J.—This is an appeal from an order of Lakshmana Rao, J. upon an application by the committees of the estate of one Maragadammal, a lunatic, to sanction certain items of expenditure incurred by them since their appointment for which the previous sanction of the Court had not been obtained. The expenditure was sanctioned by our learned brother. The facts of the case are that one Alagappa who died in 1903 had a wife named Angammal who died in 1909. He had three daughters, Ammakannu who married Manikka Chetty, Maragadammal, the lunatic, and Panchaksharammal. Ammakannu died before Alagappa and after her death Maragadammal was given in marriage to Manika Chetty. This was in the lifetime of Alagappa. Ammakannu and Manika Chetty had two children, namely, Balasundaram and Rajammal. Alagappa made a will leaving some of his property to the lunatic and in that will directed her to continue to live with Balasundaram who was then living and his widow Angammal, Panchaksharammal and Rajammal (Ammakannu's daughter) as one family. This the lunatic did. Angammal died, as already stated, in 1909 and thereafter the lunatic continued to live with the survivors of the family. Manicka died in 1913 and she then lived with his children, Balasundram and Rajammal, and Pachaksharammal, until Balasundaram's marriage when she was taken to live in his house. In 1910 Maragadammal was found to be a lunatic and Manika Chetty, her husband, was appointed committee of her person and estate. The order of appointment has an important bearing on this matter. That order stated that the estate consisted of the property known as "Abbotsbury" and that the committee was empowered to apply its rent for its upkeep and the maintenance of the lunatic and her family.

As before mentioned Manicka Chetty died in 1913 and his brother Govindarajulu Chetty applied to be appointed as committee. That application was opposed and the Official Trustee was appointed. He declined to act and by an order dated 20th January 1914 the present committees, the eldest sister Panchaksharammal and O. C. Raju, the husband of Rajammal (the daughter of Manika Chetty and Ammakannu), were appointed committees of the estate and the powers given by the Lunacy (Supreme Courts) Act of 1858 were conferred upon them and they were directed to submit half-yearly accounts. Nothing was said regarding the maintenance of the lunatic or her family and the committees thought that the rents of "Abbotsbury" were to be applied therefor as before; and it cannot be said that they were unreasonable in so thinking. Most unfortunately the two committees did not file any accounts at all from the date of their appointment until the date of the present proceedings, a period of nearly 21 years. This failure on their part is sought to be excused on the ground of inexperience, O. C. Raju, the second committee, being only 22 years of age on the date of his appointment. The failure to file accounts is undoubtedly most reprehensible particularly so because during the interval a large expenditure was incurred by the committees without the sanction of the Court having been obtained previously.

The appellant here, C. M. Raju, is the husband of Chinnathayammal, one of the sisters of Alagappa, and in 1934 he presented an application to the High Court asking for directions to the committees to file and pass their accounts and an enquiry as regards the management of the estate of the lunatic and charging the second committee with various acts of misfeasance and malfeasance and serious neglect of duty and stating that a sum of Rupees 31,715-13-7 ought to be surcharged against him and praying for his removal from office, and on 3rd May 1934 an order was made directing the committees to file their accounts by 14th August 1934 and get them passed. An account was filed accordingly on 14th August 1934 relating to the period from 25th June 1913 to 5th August 1934. The accounts were gone into by the passing officer an order having been made previously on 3rd May 1934 by Stone, J. directing that the appellant was to have inspection of all accounts.

According to the passing officer's report although an affidavit had been filed by the appellant objecting to the correctness of the entries in the accounts and to the propriety of the expenditure, after the items

of receipts and disbursements were gone into with the vouchers in the presence of the appellant and his advocate, the correctness of the accounts was not disputed but only the propriety of the expenditure was objected to. The passing officer allowed some of the expenditure incurred but disallowed the remainder which amounted to a considerable sum on the ground that it was beyond his province as passing officer to ascertain how far the expenditure was properly allowable and that the Court alone could sanction the expenditure having regard to the fact that it was for the benefit of persons other than the lunatic. He accordingly disallowed the following items of expenditure, viz., Balasundaram's account Rs. 7,411-8-9; maintenance Rs. 28,140-0-0; charities performed Rs. 956-0-0; presents to relations Rs. 1,027-4-9; miscellaneous items Rupees 3,953-4-0 making a total of Rs. 41,488-5-6. He also found that there was a balance in the committees' hands in addition to the expenditure disallowed of Rupees 4,683-8-6. Before us the objection to the expenditure under the heads of "charities performed" "presents to relations" and "miscellaneous items" was not pressed, the expenditure under the other two heads being objected to only. Lakshmana Rao, J. sanctioned the expenditure under all the before-mentioned heads although the sanction of the Court had not been obtained in the first instance; but he made no order as to costs, though we are informed that he allowed the appellant some costs, out of the estate of the lunatic. In his order our learned brother says:

> The bona fides of the applicants who are managers without remuneration was not disputed nor was it seriously contended that the amount spent was excessive or unreasonable.

And, as before stated, the accuracy of the accounts was admitted before the passing officer. Taking the amount spent on Balasundaram till 1923 and the maintenance of the lunatic and her household, Lakshmana Rao, J. applies the principles that the first care is the comfort of the lunatic who should have everything that his or her circumstances will allow and the next care is the household of the lunatic and states that the final principle is that the Court should not refuse to do on behalf of the lunatic what the lunatic himself would probably have done. We are satisfied that the learned Judge has correctly stated the principles. In 39 Ch D 208[1] the head-note of which reads as follows:

> It is not the duty of the Court to deal benevolently or charitably with the property of a lunatic, and applications for allowances out of the surplus income of a lunatic to poor collateral relations who have no legal claims upon him for provision are to be discouraged.

It was held that there being nothing to show that the lunatic would have done what the Court was asked to sanction, the mere fact that the collaterals were in humble circumstances and had difficulties in providing themselves with necessaries was not sufficient to justify the Court in granting the application and that it must be refused. The principles upon which Courts should act are set out by Cotton, L. J. on p. 211; and it is stated by him that Courts sometimes make considerable allowances for persons who have legal claims upon a lunatic such as a son or a daughter and also for persons who have moral claims upon him and that the cases do show however that the Court has sometimes made an allowance to collaterals. He then states as follows:

> I pass over those cases in which an allowance has been made by the Court in favour of a person who is the next successor to the lunatic's estate, for it is the interest of every possessor of an estate that his successor should be educated and brought up in such a manner as to enable him to fulfil the duties attaching to the ownership of the estate, and where the successor is in such a position as not to be able to obtain an education suitable to his prospects, the Court will, no doubt, make an allowance, and sometimes has made a very considerable one
>
> Here the lunatic had several cousins, who happen to be his next of kin, and while sane, he made small allowances to some of them; and the Court, acting on the principle that the Court will do for the lunatic what the lunatic would have done himself if of sound mind, has continued these allowances.
>
> But we are now asked to sanction an increase of the allowance to some of these persons, and also to sanction further allowances to others of them Now to make such an order would, in my opinion, be contrary to the principles on which the Court acts in administering the property of a lunatic.

Bowen, L. J. said:

> The Court has always considered that its jurisdiction to make allowances to collaterals ought to be exercised with the utmost jealousy. The case of successors to property depends on a different principle. But in cases of collaterals who are not successors, the Court ought only to do that which the lunatic would have done himself if he had been of sound mind. If it could be shown that the lunatic would have done that which we are asked to do, that would be a different matter. In my opinion the evidence falls short of doing that.

1. *In re* Darlings, (1889) 39 Ch D 208=57 L J Ch 891=59 L T 761.

Therefore in England Courts may sanction an allowance to be paid to a person who is not the lunatic where such person is the next heir or successor to the lunatic's estate, and collaterals if they are the next of kin, or if not, if the lunatic is of sound mind would have made such an allowance for which of course there must be some evidence. Balasundaram, it must be noted, is the next heir to the lunatic's estate. In 5 Ch A 699,[2] weekly allowances were ordered out of the surplus income of a wealthy lunatic to needy collateral relatives who were supposed to be her next of kin, though their title as such had not been established, and for whom the lunatic, while sane, had expressed an intention to make some provision. James, L. J. on p. 702 said:

> In this case it appears highly probable that if the alleged cousins do not establish their claim to be next of kin no one else will. Considering this, and considering their poverty, the evidence of the intention of the lunatic to do something for them, and the amount of her income, which far exceeds anything that can ever possibly be required for her own wants, I think that I may venture to make the order asked, which will do more than what the lunatic herself probably would have done had she continued sane.

In 20 Ch D 320[3] a lunatic, aged 64, was tenant for life of certain real estates, of which his nephew, aged twenty-eight, was tenant in tail in remainder, producing a considerable yearly income. The nephew had been found heir-at-law and one of the next of kin of the lunatic. The Court, upon the nephew's petition, directed an allowance of £500 per annum to be made to him out of the surplus income of the lunatic after providing for a yearly sum for the lunatic's maintenance, in spite of the opposition of some of the next of kin, upon the terms of the petitioner charging the estate with the repayment of the sums received in respect of such allowance; and in subsequent proceedings the allowance of £500 was increased by £200. On the other side a number of English cases were cited by the appellant in support of his contention that the trial Judge ought not to have sanctioned this expenditure because it had been incurred without the previous sanction of the Court. The argument indeed went to the length of stating that under the English decisions there was a definite prohibition against the granting of such sanction.

The cases referred to upon examination certainly do not establish the latter proposition and as regards the former are merely instances where the Courts have, on the facts of those cases, refused to give sanction. One of these is 41 E R 958[4] where a Committee who, having been authorized by the Court to expend a certain sum in re-building a farmhouse, expended half as much again in building one of larger size on a different site, was not allowed the excess even though what he had done appeared to be beneficial to the estate. This case was stated by Lord Cottenham, the Lord Chancellor, to be an extreme case because the Court had given the Committee leave to enter into a particular contract and he took upon himself to enter into quite a different one involving much greater expense. The Lord Chancellor stated that such conduct was setting the Court at defiance.

In 32 E R 1140[5] the petition was presented by the Committee of the estate of a lunatic, tenant in tail, with remainders over to the Committee and others praying to be allowed for expenditure upon the estate made without any previous application alleging that great improvements had been made. Lord Eldon expressed his regret that the Court had in a hard case been induced to relax the rule not to allow any expenditure made without previous application the consequence of which was that Committees never made application and added that as there was that instance he would see what could be done in that case which appeared fair, desiring it to be understood that in future expenditure made without a previous application would never be allowed. This threat he subsequently carried out in the next case reported in the same volume, namely 32 E R 1141[6] where the Committee of the estate of a lunatic, tenant for life, had expended to the amount of £6000 upon the estate and as to £4000 without an application. Lord Chancellor Eldon said that such a thing could not be permitted. I do not understand these cases as stating that there is a definite prohibi-

2. *In re* Frost, (1870) 5 Ch A 699=39 L J Ch 808=23 L T 233=18 W R 986.

3. *In re* Sparrow, (1882) 20 Ch D 320=51 L J Ch 497=46 L T 785=30 W R 373.

4. *In the matter of* Sir James Langham, (1847) 2 Ph 299=41 E R 958.

5. *Ex parte* Marton, (1805) 32 E R 1140=11 Ves Jun 397.

6. *Ex parte* Hilbert, (1805) 32 E R 1141=11 Ves Jun 397.

tion against retrospectively sanctioning expenditure regardless of every consideration which would show that such sanction ought to be granted. Indeed, 32 E R 1141[6] shows that there had been exceptional cases. In our view, Courts do have a discretion to sanction an expenditure which has been made without the previous sanction of the Court having been obtained although such discretion ought only to be exercised where the reasons are very strong, because Courts in such matters as this ought to have a discretion to do thereafter that which they are empowered to allow on applications made in the first instance. That the Court had the power to sanction the expenditure in question, on an application made to it for permission to do so, is, we think, clear, having regard to the cases already referred to by Mr. Duraiswami Ayyar on behalf of the respondent.

The learned trial Judge allowed the expenditure retrospectively because Balasundaram is the next heir to the lunatic and because in his opinion there was evidence that the lunatic herself, if of sound mind, would have made the expenditure, namely the education and maintenance of Balasundaram and the family she was living with. There is certainly evidence that the lunatic preferred to live with Balasundaram and, as before stated, the testator himself so directed. We think that the learned Judge was justified in holding that the lunatic herself would have made that expenditure. The expenditure on the maintenance and education of Balasundaram can clearly be supported on the ground that he was the next heir of the lunatic : *see* the observations of Cotton, L. J., in 39 Ch D 208[1] at p. 211 already referred to.

There is another important fact as well and it is that in the first order of 1910 appointing Manika Committee of the lunatic, there is a direction that the income from the property "Abbotsbury" is to be spent in its upkeep and the maintenance of the lunatic and his family and Balasundaram obviously was one of the family. It is true that the subsequent order does not contain any such direction. In fact it contains no specific direction as to the application of income; but it can be read as reasonably supplementing the previous order of 1910; and it is made in the same O. P. Against this, the only thing that is urged, although its importance cannot be minimised, is that for 21 years the Committees never rendered any accounts at all. This, as we have stated earlier in this judgment, is a most reprehensible thing. If no case has been referred to in which such laches as this were in evidence, it is because it is almost impossible to imagine that there can have been any similar case before; and if the objection which is founded upon this deplorable neglect is to be overruled, it is because of strong exceptional circumstances. These are that no damage whatever seems to have been done to the lunatic's estate, that the accuracy of the accounts was, after due inspection by the appellant, not questioned, that the bona fides of the Committees was not questioned thereafter, that the original order appointing the Committees authorises an expenditure on the maintenance of the family, that Balasundaram is the next heir, that the testator himself from whom the lunatic got her property desired her to live with Balasundaram and the other members of the family as one family and that there is evidence upon which the learned trial Judge could reasonably hold that the lunatic herself, if of sound mind, would have made the expenditure in question. Having regard to all these matters and in view of our opinion that the trial Court has a discretion in such matters, can it be said that in having regard to the considerations put forward on behalf of the Committees the learned trial Judge has wrongly exercised his discretion and that nevertheless and despite all these matters he ought to have refused sanction ? In other words, ought he to have punished the Committee for not having filed and passed the accounts for 21 years by surcharging them with this expenditure and undoubtedly driving the second committee to insolvency ? In our opinion, in view of the exceptional circumstances of this case, the trial Judge was justified in exercising his discretion in the manner he did; and it follows that this appeal must be dismissed.

On the question of costs, we think that as the appellant has failed, he must bear the costs of this appeal. It was one thing to carry this matter upto the stage of inquiry and into the trial Court. Not having succeeded there, we see no real justification for his pursuing the matter further. As he has chosen to do so and

has failed, it is only right and proper in our opinion that he should bear the costs of the appeal. The Committee must apply on the Original Side for the direction of the Court for the investment of surplus income in his hands.

C.R.K./W.D. *Appeal dismissed.*

A. I. R. 1937 Madras 375

VARADACHARIAR AND MOCKETT, JJ.

K. M. Ramakrishna Mudaliar — Appellant.

v.

V. S. V. Manikka Mudaliar and *others* —Respondents.

Appeal No. 148 of 1931, Decided on 25th September 1936, against decree of Sub-Judge, Chingleput, in O. S. No. 63 of 1927.

(a) Mortgage—Property sold in insolvency proceedings subject to mortgage — Suit by mortgagee—Purchaser is not precluded from questioning truth or validity of mortgage.

Where a mortgaged property is sold by the Official Receiver in insolvency proceedings, subject to the mortgage, the purchaser is not precluded in a suit or the mortgage from questioning the truth or validity of the mortgage but the conduct of the parties can be taken into account in dealing with the question of fact and drawing inferences as to the truth and validity of the mortgage : *31 All 583 (P C), Rel. on.* [P 376 C 1]

(b) Hindu Law—Joint family — Mere description of property by member as his self-acquisition, is not assertion of hostile claim against interest of joint family — Transfer of such property if for family purposes binds family.

The mere fact that properties are described in a mortgage by a member of a family as properties acquired out of his earnings is not the assertion of such a hostile claim as against the interests of the family or an indication that it was his own personal transaction as to preclude the application of the principle that if the purpose was binding on the family, the transferor might still be regarded as having entered into the transaction in the capacity in which he could bind the family : *A I R 1915 Mad 875* and *A I R 1920 Mad 762, Rel. on.* [P 377 C 2]

(c) Hindu Law—Alienation — Joint family business — Manager or accredited agent or even a junior member conducting family business — Such person can mortgage or sell joint family property for debts and liabilities incurred in course of that business.

The manager or the "accredited agent" of a joint Hindu family, conducting a family business may mortgage or sell joint family property for debts and liabilities incurred in the course of that business for proper and necessary purposes. Even a junior member of a joint Hindu family, if he is in charge of the family business, will have all the powers of a managing member to the extent necessary for the proper conduct of the business of which he is in charge : *20 Cal 453, Rel. on ; A I R 1924 Mad 33, Ref.* [P 378 C 1,2]

B. Sitarama Rao and *V. M. Ramaswamy Mudaliar*—for Appellant.

K. S. Krishnaswami Ayyangar, V. Raghavachariar and *N. S. Rangaswami Iyengar*—for Respondents.

Varadachariar, J.—This appeal arises out of a mortgagee's suit for sale. The mortgage document (Ex. A) which was executed by defendant 1 on 25th September 1915 comprised properties which it appears from several statements on record stood in defendant 1's name, but as the title deeds themselves have not been produced it is not possible to make a more positive statement on the point. At the time of the mortgage, defendant 1 was undoubtedly a member of a joint family which consisted of a large number of male members and his father Varadaraja Mudaliar was also alive. The evidence establishes that the family was a trading family and was carrying on cloth trade ; for convenience, they were having two shops which may be referred to as shop No. 154 and shop No. 172. In their dealings with outsiders, the family seem to have found it convenient, whether it be for book-keeping purposes or for other purposes as well, to keep two sets of accounts, one for shop No. 154 and another for shop No. 172, though there was same amount of mixture even in respect of the transactions relating to one shop and the other. The plaintiff is clearly proved to have been supplying goods to and to have had dealings with both these shops for a long period. It is also stated that he was related to the family and presumably he was well acquainted with its position and affairs.

The main contesting defendants are persons who have purchased the interests of defendants 2 and 3 in certain items of property in Court sale and interests of defendant 4 in a sale by the Official Receiver in the insolvency of defendant 4. These purchases took place in the years 1926, 1927 and 1929, and the insolvency proceedings began in 1923. It is clear that between 1915 and the date of the suit no member of the family ever questioned either the binding character of this debt or the binding character of the mort-

gage; on the other hand, we have the fact that in a partition suit instituted by defendant 3 against the other members of the family in 1916 the properties comprised by the suit mortgage were not brought into the partition suit at all by any of the parties thereto nor was any suggestion made that this mortgage was not binding on the family. In the insolvency petition filed by defendant 4, he included the suit debt as one of the debts for which he was liable, and referred to the existence of the mortgage securing repayment of the same. Neither the Official Receiver nor any of the creditors of defendant 4 took any steps to impeach the suit mortgage. On the other hand, the Official Receiver sold the property subject to the suit mortgage and when certain of the creditors attempted to have that sale set aside as having been held at an under-value, the Official Receiver as well as the present defendants 13 and 14 justified the sale on the ground that as the properties were sold subject to mortgages including the suit mortgage, the price fetched at the sale was a fair value. It is true that the mere fact of the sale having been held subject to the mortgage would not preclude the purchasers from questioning the truth or the validity of the mortgage (31 All 583[1]), but the conduct of the parties can certainly be taken into account in dealing with the question of fact and drawing inference as to the truth and validity of the mortgage.

A suggestion was made in the written statements of the alienees defendants in this case, that the suit mortgage was a sham transaction not supported by consideration but brought into existence in favour of a near relative of the family merely for the purpose of screening some property from the creditors of the family. In the argument before us, reliance was placed in this connexion upon the admission of P. W. 1 that the title deeds were not examined before the mortgage was taken nor did the plaintiff make any adequate enquiries. It was also pointed out that the suit had been instituted after considerable delay almost when the period of limitation was about to expire. These circumstances are explained by the very relationship that the parties bore to each other. If the plaintiff was related to the family of the mortgagor defendants and had known their affairs, there was nothing particular for him to enquire about. Similarly when nobody ever disputed his mortgage but on the other hand it was not called in question either in the partition suit or in the insolvency proceedings, it is nothing strange that in view of his relationship to the family the plaintiff did not think it necessary to sue unless and until it became inevitable. The real question therefore is whether there is sufficient proof on record as to the existence of the debt the payment of which was secured by this mortgage. The learned Subordinate Judge has discussed the evidence on this point very fully; a large mass of correspondence has been filed showing the dealings between the parties; the plaintiff also filed his accounts in Court showing how the amount of the suit bond was arrived at. No attempt has been made by the contesting defendants to show that the evidence thus prima facie furnished is open to suspicion.

It has been pressed upon us that the plaintiff did not call any of the members of the mortgagor's family to give evidence on his side. Assuming for the sake of argument that all the members of the mortgagor's family are sympathising with the plaintiff, there is nothing whatever to show that the Official Receiver, if he had been summoned on the defendants' side, would not have produced the accounts of the business or would not have given useful information bearing on the question of the truth of the debt, and he would have been in the best position to explain why neither he nor any of the other creditors in the insolvency of defendant 4 thought fit to impeach the suit mortgage but on the other hand to sell the properties subject to the suit mortgage. In these circumstances, we have no hesitation in concurring in the finding of the lower Court that Ex. A was executed for the balance due on settlement of accounts of dealings between the plaintiff and defendant 1 in respect of the business carried on by defendant 1 in shop No. 172. The only other question in the case was whether the suit mortgage was binding upon the interests of the other members of the family in the mortgaged properties. On a view of the law which seems to us untenable, the learned Subordinate Judge held against the plaintiff on this point. On behalf of the respondents his view has

1. Izzat-un-nissa Begam v. Kunwar Pertab Singh, (1909) 31 All 583 = 36 I A 203=3 I C 793 (P C).

been attempted to be supported on three grounds. The first of them is that in entering into the suit mortgage transaction, defendant 1 did not purport to act on behalf of the family or as manager of the family business but only purported to mortgage the properties standing in his name describing them as properties purchased out of his earnings and in his possession and enjoyment. It was pointed out that the plaint did not proceed on the footing that these properties were the self-acquired properties of defendant 1 and as such defendant 1 was entitled to mortgage them in his own right. It was next argued that in view of the principle of the decision in 34 All 296,[2] the Court will not be justified in treating the suit mortgage as a transaction entered into by defendant 1 on behalf of the family and as its manager. Lastly, it was contended that as defendant 1 was only a junior member of the family he had no authority to mortgage the interests of the other members in the family property.

As to the first of these questions, it must be admitted that though in para. 3 of the plaint there is a reference to some of the mortgaged items standing in the name of defendant 1, the plaint proceeds mainly on the footing that the mortgage was made for purposes of the joint family business and is therefore binding upon whatever interests the other members of the family possessed in the mortgaged items. The lower Court's decision that the mortgaged properties must be held to be properties of the joint family apparently rests upon the presumption of the Hindu law in favour of their joint character and the general rule as to onus of proof in regard to self acquisition when purchases are made in the name of a member of a joint family. By way of excluding that presumption in this case, Mr. Sitarama Rao invited our attention to the observations of this Court in 55 Mad 483[3] at p. 491, following a judgment of the Bombay High Court in 7 Bom H C A C 153[4] at p. 176. If the matter rested upon presumptions alone, Mr. Sitarama Rao is probably justified in the contention that the presumption arising in favour of the joint character at the time of the mortgage may well be set against the presumption arising from the non-inclusion of these properties in the partition suit of 1916 and the presumption of the completeness of a partition when one takes place, so that at the time when the question arises in this suit, there is no scope for the application of any presumption in favour of the joint family character of the properties. But, as pointed out by Mr. Krishnaswami Ayyangar on behalf of the respondents, the matter does not rest upon presumption alone, because the very facts spoken to by P. W. 1 in the evidence go to establish the joint family character of these properties. We do not therefore think it proper or necessary to rest our decision in this case on any finding that the mortgaged properties were the separate properties of defendant 1.

The second head of argument advanced by the learned counsel for the respondents on the strength of the decision in 34 All 296[2] is answered by more than one decision of this Court: *vide* 28 I C 365[5] & 27 M L T 325,[6] to the effect that the mere fact that properties are described by a member of a family as properties acquired out of his earnings is not the assertion of such a hostile claim as against the interests of the family or an indication that it was his own personal transaction as to preclude the application of the principle that if the purpose was one binding on the family the transferor might still be regarded as having entered into the transaction in the capacity in which he could bind the family. It must also be remembered that in this case, cloth shop No. 172 was undoubtedly a concern of the joint family, and there is no reason why defendant 1 should mortgage what he considered his self-acquired properties for the liabilities of that shop. As has frequently been pointed out in the judgments of this Court, the mere description that properties were acquired out of a member's earnings is not the same as claiming for it the character of 'self-acquisition' in the legal sense; it is merely a statement of the fact that they were not originally the property of the joint Hindu family but had been acquired out of the earnings made in the course of

2. Raja Balwant Singh v. Rao Maharaj Singh, (1912) 34 All 296=39 I A 109=14 I C 629 (P C).
3. Kumarappa Chettiar v. Muthuvijaya Raghunatha, A I R 1932 Mad 207=137 I C 616=55 Mad 483=62 M L J 141.
4. Narayan Babaji v. Nana Manohar, (1870) 7 Bom H C A C 153.
5. Sabapathy Chetty v. Ponnuswami Chetty, A I R 1915 Mad 875=28 I C 365.
6. Sadayappa Asari v. Raghava Asari, A I R 1920 Mad 762=62 I C 220=27 M L T 325.

business by one of the members. The fact that the law will in such circumstances impress upon the property so purchased the character of joint family property should not be unduly pressed in construing the terms of the document.

With reference to the third question, namely the power of defendant 1 to bind the interests of the other members of the family by the suit mortgage, the evidence establishes what indeed is admitted in the written statement of defendants 13 and 14 that though Varadaraja Mudaliar, the father of defendant 1 and the eldest member of the family, was alive, defendant 1 was authorized by the members of the family to conduct the family trade carried on in this shop. We have already held that the mortgage was created to secure repayment of a debt incurred in the course of the business conducted in that shop. It is well established as a rule of Hindu law that the manager of a joint Hindu family, conducting a family business may mortgage or sell joint family property for debts and liabilities incurred in the course of that business. In the present case, the learned Subordinate Judge himself has held that the members of the family would be liable for the debt secured by Ex. A, but he felt himself bound to hold that even for securing repayment of such a debt defendant 1 had no authority to create a mortgage binding on the interests of the other members. The proposition of law stated in Mr. Maine's book and adopted in several decisions in India is that a person who is the "accredited agent" of a family so as to be able to bind the family by debts borrowed for a proper and necessary purpose can also pledge the properties of the family for debts so incurred. The plaint proceeds on the footing that defendant 1 was the accredited agent of the family within the meaning of this rule. The written statement denies that the mere fact of defendant 1 being authorized to manage one of the two shops of the family will empower him to alienate the family properties.

Even if the question stood as an abstract proposition of law, there is much to be said in favour of the view that if defendant 1 was the accredited agent of the family for the purpose of managing shop No. 172 to the extent of being empowered to bind the members of the family for debts incurred in connexion with that shop, he would also be entitled to pledge the credit of the family and its properties for such debts. It must be remembered that the Hindu law with reference to the power of the father or the managing member to alienate family property, is intimately connected with the power possessed by the creditor to recover from the family property debts incurred by them for proper purposes. It seems to us meaningless to say that in a case like the present (as the learned Subordinate Judge has held) that the creditor could bring the family property to sale for the realization of the debt under Ex. A as a simple debt though it has been incurred by defendant 1 but defendant 1 himself could not by a voluntary alienation either secure the repayment or arrange for its discharge. The language employed by the learned Judges of the Calcutta High Court in 20 Cal 453[7] is in favour of the view that even a junior member, if he is in charge of the family business, will have all the powers of a managing member to the extent necessary for the proper conduct of the business of which he is in charge.

Reference was made in the course of the argument to the decision in 45 M L J 44,[8] a case which arose out of the partition suit in this very family already referred to, and reliance was strongly placed on behalf of the respondents on the fact that a mortgage executed in favour of defendant 35, in that case by the present defendant 1 was set aside on appeal by this Court; but the observations in that case (at p. 51) do not seem to us to support the proposition of law contended for on behalf of the respondents. It may be that the learned Judges in that case took the view that the security was not created in circumstances making the creation of a mortgage necessary, but their observations do not read as if they intended to exclude the possibility of defendant 1 ever being able to create a valid mortgage even for binding debts. The learned Judges recognized that a person who is not the managing member may, if he is the accredited agent of the family, alienate joint property for family necessity, and in the earlier portion of the judgment they refer to the debts created by the present defendant 1 as debts incurred by an accredited agent

7. Sheo Pershad Singh v. Saheb Lal, (1893) 20 Cal 453.
8. Subbaraya Mudali v. Thangavelu Mudali, A I R 1924 Mad 33=72 I C 815=45 M L J 44.

of the family in the course of the management of the family business and on that very ground hold that the properties of the family were liable for the discharge of these debts. The judgment of Ramesam and Stone, JJ. in Appeals 406 and 467 of 1930 was also referred to in this connexion. There again, the learned Judges based their conclusion on the circumstances of the particular case, namely that for some reason the parties made the transaction a personal one of the junior member and the plaint sought to enforce it on that basis and not on the footing that it was entered into by him as the accredited agent of the family.

The circumstances mentioned by the learned Subordinate Judge in para. 18 of his judgment arising out of certain proceedings for attachment before judgment in O. S. No. 49 of 1915 probably explain why Ex. A came to be executed by defendant 1 alone without the other members of the family joining in it. He points out that during the pendency of the attachment application, some of the other members of the family had given an undertaking not to alienate the properties pending disposal of the application, but defendant 1 did not join in the undertaking. The respondents no doubt wanted to use that circumstance as an argument in favour of the nominal character of the mortgage, but as we have found on the other evidence in the case that the transaction was genuine and fully supported by consideration, that circumstance really seems to us to further the clue for the other people not joining in it though by their later conduct they have clearly shown that this transaction had their full approval. It may also be mentioned that in July 1918, an endorsement was made on the suit bond by adjusting towards it a sum of Rs. 600 and odd due from the plaintiff to Varadaraja Mudaliar, as per account of shop No. 154. This is another circumstance indicating that the family regarded the transaction as binding on them for otherwise there was no reason for them to appropriate that amount in part satisfaction of this claim; and this endorsement is attested by defendant 4. Having regard therefore to the conduct of the family in not attempting to impeach the suit transaction at any time and particularly to the conduct of defendant 4 in admitting it in the insolvency proceedings and of the official receiver in accepting the mortgage and selling the property subject to it and the attitude taken by defendants 1 to 7 and 9 in this litigation in remaining ex parte, we think the proper inference is that the suit mortgage was executed by defendant 1 with the knowledge and approval of all the other members of the family in the circumstances above stated; and as it has been found to be for a debt binding on the family we think that the lower Court erred in holding that the mortgage was not binding on the interests of the other members.

The result is that this appeal is allowed and a decree for sale given to the plaintiff as against the mortgaged property in terms of para. 18 (a) of the plaint. The plaintiff will be entitled to his costs both here and in the Court below. Cl. 3 of the lower Court's decree will be deleted and defendants 12 to 14 will be liable to pay to the plaintiff his costs both here and in the Court below. Time for payment six months.

C.R.K./W.D. *Appeal allowed.*

A. I. R. 1937 Madras 379

VENKATARAMANA RAO, J.

R. Ganesa Ayyar — Petitioner.

v.

Lakshmi Co-operative Building Society —Opposite Party.

Civil Revn. No. 1787 of 1934, Decided on 17th December 1936, from decree of Small Cause Court, Trichinopoly, in S. C. S. No 4995 of 1933.

Company—Co-operative Society—Bye-laws 28, 29 and 60—Interpretation—Services of director to be gratuitous under bye-law 28—Director acting as Secretary is entitled to share profits under bye-law 60 — Word 'honorarium' in bye-law 60 (2) means fee for services rendered—Company cannot withhold under bye-law 29 payment of honorarium conferred by bye-law 60 unless bye-law 60 is itself altered—Bye-law 60 contemplates payment of annual lump sum for service for whole year—Secretary is not entitled to remuneration for service for portion of year.

The word 'honorarium' *prima facie* implies a gratuitous payment, but it also means a fee for services rendered. The context must be looked to in arriving at the meaning of the word 'honorarium'. [P 381 C 1]

Bye-laws Nos. 28, 29 and 60 (2) of the Laxmi Co-operative Building Society Trichinapolly were as follows :

(28) The services of the members of the Board of Directors shall be gratuitous.

(29) The ultimate authority in all matters relating to the administration of the society shall be the general body of the members who shall meet from time to time and among other matters which may be dealt with by the general body is the amendment or repeal of any existing bye-law or the enactment of a new bye-law.

(60) Cl. (2) One-fourth of the profits declared year after year to be paid as honorarium to the Secretary and Treasurer not exceeding Rs. 150.

The Director who worked as the Secretary of the Co-operative Society brought a suit for remuneration for the services rendered by him as Secretary. It was contended that the payment of honorarium was gratuitous and the general body could withhold such payment under bye-law 29 :

Held : that though the services of a Director were to be gratuitous under bye-law 28 it did not prevent the Director who held the office of the Secretary from sharing benefits conferred on him by bye-law 60. The word 'honorarium' in bye-law 60 was used on account of the character of the services rendered. The payment of honorarium was not dependent on the vote of the general body but that the Secretary was entitled to it under bye-law 60 (2). Under bye-law 29, the general body could alter bye-law, but it was not competent to the general body to vary the bye-law and withhold payment of honorarium of the share of profits specifically provided by bye-law 60, unless bye-law 60 itself was altered by it. The Secretary was therefore entitled to claim payment of the profits in accordance with bye-law 60 (2). [P 381 C 2]

Held also : that bye-law 60 contemplated payment of a lump sum annually contingent on a person serving as a Secretary for the entire period and that he was not entitled to claim a share of profits for a portion of the year he served : *Anglo-Australian Printing Co., In re Isaacs' case*, (1892) 2 Ch 158; *In re International Cable Co.*, 66 L T 253; *Swabey* v. *Port Darwin Gold Mining Co.*, 1 Meg 385 and *Moriarty* v. *Regent's Garage & Engineering Co.*, (1921) 1 K B 423, *Rel. on.* [P 381 C 2]

K. V. Sesha Ayyangar—for Petitioner.

Order.—The question in this case is whether the petitioner is entitled to recover a sum of Rs. 242-4-0 as and for remuneration for the services rendered by him as Secretary of the defendant, the Lakshmi Co-operative Building Society Limited for the year 1928-1929 and a portion of the year 1929-1930. The learned Subordinate Judge negatived his claim on the ground that the general body has refused sanction for the payment claimed by him and he has therefore no right to sue therefor. It is contended before me that this view is wrong. To appreciate the contention, reference to a few bye-laws of the society is necessary. Under bye-law 17 the executive management of the affairs of the Society shall vest in a Board of Directors which shall consist of not more than five members. Under bye-law 18, the members of the Board of Control shall be elected by the general body for a period of two years from among the members of the society. After the Board of Directors is elected they shall elect from among themselves a President and a Secretary and Treasurer. Under bye-law 28 the services of the members of the Board of Directors shall be gratuitous. Under bye-law 29 the ultimate authority in all matters relating to the administration of the society shall be the general body of the members who shall meet from time to time, and among other matters which may be dealt with by the general body is the amendment or repeal of any existing bye-law or the enactment of a new bye-law. Bye-law 60 provides for the distribution of profits thus : the net profits of the society as declared by the Registrar year after year shall be divided as follows : (1) one-fourth to the reserve fund; (2) one-fourth to be paid as honorarium to the Secretary and Treasurer not exceeding Rs. 150; (3) the remainder, subject to a maximum of nine per cent. per annum on the paid up share capital may be declared as dividend. The dividend declared shall not be actually distributed as long as any loan is outstanding against them. The amount found due to each member shall be credited to his loan account. Bye-law 63 provides that no amendment to alteration in, or cancellation of a bye-law nor the enactment of a new bye-law shall be made except at a general meeting of the members or shall take effect until it shall have been approved by the Registrar.

It will be thus seen that none but a member can hold the office of the Secretary and he must be one of the Board of Directors and that the services of the Board of Directors shall be gratuitous. This is in accordance with the general principle that the directors of a company cannot claim any remuneration unless the articles expressly provide for it. It is also clear law that if the articles provide for payment of any remuneration the director can sue for it. The question in this case is, what is the right which the Secretary has under bye-law 60 for the payment of the honorarium provided therein? With reference to the right of a director to claim remuneration from a company the rule of law is thus stated by Sterling, J., in (1892) 2 Ch 158[1] at p. 164 :

1. Anglo-Australian Printing Co. *In re* Isaacs' case, (1892) 2 Ch 158=61 L J Ch 481=66 L T 593 =40 W R 518.

Where a man has accepted the office of Director and acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration and all the benefits which those articles provide for Directors.

To use the language of the present Master of the Rolls in 1 Meg 385[2]:

The articles do not themselves form a contract, but from them you get the terms upon which the Directors are serving.

This principle has been held to be applicable to persons who take office as Directors whether members or non-members: *see* Sterling, J. in 66 L T 253.[3] It seems to me that the same principle has to be applied in this case also. Though bye-law 28 provides that the services of a Director are gratuitous it does not prevent the Director who holds the office of the Secretary from sharing benefits which are provided by the bye-laws one of which is the benefit conferred under bye-law 60. But two arguments seem to have prevailed with the lower Court, namely, (1) that Cl. 2, bye-law 60 says that the amount is to be paid as honorarium; and (2) that such honorarium is dependent upon the will of the general body and it was open to the general body under bye-law 29 to withhold or sanction the payment of the honorarium. No doubt 'honorarium' *prima facie* implies a gratuitous payment, but it also means a fee for services rendered. Wharton in his Law Lexicon defines 'honorarium' thus:

A recompense for services rendered; a voluntary fee to one exercising a liberal profession, e. g. a barrister's fee.

In the Standard Dictionary 'honorarium' is defined thus:

A fee or payment to a professional man for services on which the custom requires that no fixed remuneration be placed, as a physician's honorarium and honorarium for literary work.

In the Oxford Dictionary it is defined thus: 'honorary reward, a fee for service rendered'. Thus it will be seen honorarium might according to the context connote a purely gratuitous payment or a fee for service rendered. It is called 'honorarium' in bye-law 60, Cl. 2, on account of the character of the services rendered. From the mere use of the word 'honorarium' it is unsafe to designate it as a gratuitous payment. In dealing with a case where the articles of association provided that a person acting as a Director shall get £150 per annum, Macordie, J. made the following observations in (1921) 1 K B 423[4] at p. 447 to which I can usefully refer, viz.:

The question is not whether the word 'salary' is employed. It may or may not be employed. The word 'reward' or 'emolument' or 'remuneration' may be used. In each case the substance rather than the actual word is to be looked at. Here the agreement says by Cl. 4 that the fees of the plaintiff for acting as Director shall be £150 per annum, that is, in my view a fixed yearly remuneration for a substantial office to be held for a substantial period of time.

In this case the Secretary has a right to a yearly payment contingent on profits. Under Cl. 2 he is entitled to one-fourth of the profits not exceeding a sum of Rs. 150. The bye-law distinctly provides that the profits shall be distributed in accordance with that rule. It is not dependent upon the vote of the general body. The argument based on bye-law 29 seems to be fallacious. It is open to the general body to alter the bye-law; but until bye-law 60 is altered, it is not open to the general body to vary that bye-law and to withhold payment of one-fourth of the annual profits. Thus the Secretary *prima facie* will be entitled to claim payment of the profits in accordance with bye-law 60 (2). It is not disputed that profits have been earned during the period of his service. In fact the Board of Directors recommended in their report that the petitioner would be entitled to Rs. 120-3-0 as remuneration for 1928-29 and Rs. 56 as remuneration for 1929-30 for the period served by him in that year. The general body, in my opinion, was not competent to withhold the payment. So far as Rs. 120-3-0 due for 1928-29 is concerned, there seems to be no question that the plaintiff is entitled to it. But will he be entitled to claim the remuneration of Rs. 56 for the broken period 1929-30? In my opinion, bye-law 60 contemplates the payment of an annual lump sum contingent on a person serving as Secretary for the entire period and he is not entitled to claim any portion of the profits for the year 1929-30. The plaintiff is thus entitled only to a decree for Rs. 120-3-0. I therefore reverse the decree of the lower Court and pass a decree in favour of the

2. Swabey v. Port Darwin Gold Mining Co., 1 Meg 385.
3. *In re* International Cable Co., (1892) 66 L T 253.
4. Moriarty v. Regent's Garage and Engineering Co., Ltd., (1921) 1 K B 423=37 T L R 180.

plaintiff for the sum of Rs. 120-3-0 with interest at six per cent. per annum from the date of plaint with costs on the amount decreed both here and in the Court below.

C.R.K./K.B. *Decree reversed.*

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* A. I. R. 1937 Madras 382

VENKATASUBBA RAO AND CORNISH, JJ.

Pulavarti Lakshmanaswami — Appellant.

v.

Mahammad Galah Hussain Saheb Garu and *others*—Respondents.

Appeal No. 256 of 1931, Decided on 10th November 1936, against decree of Sub.Judge, Ellore, in O. S. No. 2 of 1929.

*** Madras District Police Act (24 of 1859), S. 53—Scope—Police Officer acting maliciously — Benefit of section will not apply —Onus of proving malice is on plaintiff.**

An act done by a Police Officer in the exercise of his police powers will not have the benefit of S. 53 of the Act if it was done maliciously. But the onus is on the plaintiff in the suit to prove by strong and cogent evidence the existence of malice and the absence of any honest desire to execute his powers on the part of the Police Officer : *English case law discussed.*

[P 384 C 2 ; P 385 C 2]

V. Viyanna—for Appellant.

Govt. Pleader—for Respondents.

Venkatasubba Rao, J. — This appeal raises an important question, namely whether in an action for a malicious act against a Police Officer, he is entitled to raise the defence of limitation, relying upon the protection given by S. 53, Madras District Police Act, (24 of 1859). The plaintiff alleges that defendant 1, a Police Sub.Inspector, accusing him falsely of having obstructed a public pathway by heaping bricks, commenced with a malicious motive a prosecution against him (C. C. No. 318 of 1927) on 18th March 1927 under Ss. 188 and 283, I. P. C., and that two days later (on 20th March) he maliciously instituted another false complaint (C. C. No. 320 of 1927) under S. 291, I. P. C., in connexion with the same alleged heaping of bricks. The plaintiff further alleges that although the earlier complaint was inquired into and dismissed, the second charge, instead of being withdrawn, was pressed and continued, which also was ultimately found to be false. Defendant 3 is a circle Inspector, who, it is alleged, came on transfer to the village in question. It was his duty, the plaintiff states, to have withdrawn the second complaint but from improper motives he failed to do so. Defendant 2 is the Secretary of State for India, against whom also damages have been claimed on the ground that he is liable for the tortious acts of his agents. The suit has been dismissed by the Court below and the plaintiff has preferred the present appeal. So far as the Secretary of State is concerned, the appeal has not been pressed ; it fails and is accordingly dismissed with costs.

The order of acquittal in respect of the first complaint was made on 26th July 1927, in respect of the second, on 21st November of the same year, and the suit was filed on 3rd January 1929. Under the Limitation Act, in regard to actions for malicious prosecution, time runs from the date when the plaintiff is acquitted or the prosecution is otherwise terminated and the period prescribed is one year (Art. 23). In this case the plaintiff gave a notice under S. 80, Civil P. C., and according to the lower Court, should the case be held to be governed by the Limitation Act, in computing limitation the period of the notice should be excluded, and the learned Government Pleader concedes that this conclusion is right. But even upon this footing the suit, having been brought more than 14 months from the date of the first acquittal is out of time in so far as it relates to the earlier complaint. The appeal to that extent again has not been pressed. Thus, the action is confined to the second prosecution and is pressed only as against defendants 1 and 3. S. 21, Madras District Police Act provides *inter alia* that it shall be the duty of every Police Officer to use his best endeavours and ability to prevent all crimes, offences and public nuisances ; to preserve the peace, and to apprehend disorderly and suspicious characters ; to detect and bring the offenders to justice. Then the next relevant provision (S. 53), in so far as it applies to the facts of the case, runs as follows :

All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done, under the provisions of this Act, or under the general police powers hereby given, shall be commenced within three months after the act complained of shall have been committed and not otherwise.

The question is, whether the protection given by this section extends to acts done

by a Police Officer out of malice. The learned Government Pleader contends that there is nothing to suggest that such acts are excluded and that the words should receive their plain and natural meaning ; it should be wrong, he maintains, to construe the section as if the word '*bona fide*' occurred before the words "done or intended to be done". But the question is, whether upon a true construction of the section, a person who acts maliciously can be said to act under the provisions of the statute or the general powers conferred by it. There were numerous statutes in force in England, passed from time to time, with a view to afford protection to public authorities. The enactment under consideration is one of 1859 and both before that date and since then, provisions similar to the one in question were and have been considered. In 1 B & Ald 227[1] the question arose under S. 12 of the Statute 53 Geo. III, C. 127, by which it was enacted that :

> If any action shall be brought for anything done in pursuance of this Act, every such action shall be commenced within three calendar months after the act committed and not afterwards.

Lord Ellenborough, C. J. rejected the contention that the statute extended only to acts lawfully done; for, to say that, where the law is exceeded the officer loses the benefit of the statute, would be to render the protection illusory, for it is then that he requires its protection. But illegal acts protected under the statute, the Chief Justice went on to observe, are those done through ignorance or inadvertence. Bayley, J. concurred with this view and said :

> It appears to me that the officer acted illegally but in the supposed *bona fide* execution of his duty, and he is therefore entitled to the protection of this statute.

3 B & Ald 330[2] arose under S. 8 of 24 Geo. II, C. 44 which enacted that :

> No action shall be brought against any Justice of the Peace for anything done in the execution of his office, or against any Constable, Headborough or other officer or person, acting as aforesaid unless within six calendar months after the act committed.

The constable there, under a warrant commanding to take the goods of *A*, took the goods of *B*, believing them to belong to *A*. Abbot, C. J. held that the provision was intended for the benefit of persons who intend to act right but by mistake act wrong. In the judgments of Bayley and Best, JJ. there are observations to the same effect. In that case it being held that the constable acted *bona fide* the action brought beyond the period of six months was dismissed. In 10 B & C 277[3] the question arose with reference to the Commercial Dock Act (50 Geo. III C. 207). It was provided by S. 94 of that Act that :

> If any action shall be brought against any person for anything done in pursuance of this Act, such action shall be commenced within six calendar months next after the act committed or in case there be a continuation of damage, within two months after the doing or committing of such damage shall have ceased.

Bayley, J. delivering the judgment of the Court, observes that according to the decisions which have construed similar words, so long as the person concerned acts *bona fide*, although he acts erroneously, he is to be considered as acting in pursuance of the Act and is to be entitled to its protections. The learned Government Pleader relies upon (1854) 10 Ex 358,[4] which arose under 11 and 12 Victoria, Ch. 44, also a statute passed before the Police Act with which we are concerned. There, the question arose whether a Magistrate, acting *mala fide* in the execution of his office, is entitled to notice of action under S. 9 of that statute and the answer was in the affirmative. That case, however, turned upon the express words of that section which, so far as it is relevant to the present case, may be read thus :

> Whereas it is expedient to protect Justices of the Peace in the execution of their duty; Be it therefore enacted . . . . that every action hereafter to be brought against any Justice of the Peace for any act done by him in the execution of his duty as such Justice . . . . shall be an action on the case as for a Tort; and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause.

Then S. 8 provides that no action shall be brought beyond six months after the act complained of and S. 9 enacts that at least one calendar month's notice shall be given of such intended action. It will be seen that actions for malicious acts are among those contemplated by the statute itself, and, as has been pointed out by Parke, B :

> The first section of the 11 & 12 Vict., C. 44, assumes that a person may act maliciously and without reasonable and probable cause and never-

1. Theobald v. Crichmore, (1818) 1 B & Ald 227 =19 R R 297=106 E R 83.
2. Parton v. William, (1820) 3 B & Ald 330=22 R R 414=106 E R 684.
3. Smith v. Shaw, (1829) 10 B & C 277 = 5 M & Ry 225 = 8 L J (O S) K B 111 = 109 E R 453.
4. Kirby v. Simpson, (1854) 10 Ex 358=2 C L R 1286 = 23 L J M C 165 = 18 Jur 983 = 156 E R 482.

theless be acting in the execution of his duty as a Justice of the Peace.

Parke, B. guardedly adds (and that is important) that his observations apply only to the statute then under consideration and not to those cases which may arise under various Acts of Parliament affording protection to persons acting bona fide. These various statutes to which I have referred, were special statutes passed prior to the Police Act now under consideration. But in 1893 a General Act was passed in England known as the Public Authorities Protection Act, S. 1 of which, so far as it is material, runs as follows :

> Where after the commencement of this Act . . . any action is commenced . . . against any person for anything done in pursuance . . . of any public duty, the following provision shall have effect;

and then it is provided that an action shall not lie, if not commenced, within six months. Dealing with that section Lord Finlay in 2 Ir R 325,[5] declares that the Act will not apply if it is established that the defendant had abused his position for the purpose of acting maliciously.

> In that case he has not been acting within the terms of the statutory or other legal authority; he has not been bona fide endeavouring to carry it out.

To same effect is the observation of Lord Atkinson, who also draws a distinction between an act done maliciously and one done mistakenly but honestly; in the former case the officer is not protected, whereas in the latter he is. This very authoritative statement of the law has been adopted by the Court of appeal in (1929) 1 K B 419.[6] Scrutton, L. J. points out that illegal acts are protected by statute, but the protection disappears if they are done with an improper motive, such as spite; in that case the acts complained of are not done in intended execution of a statute, but only in pretended execution thereof. The learned Lord Justice quotes with approval Blackburn J. who observes in 6 Q B 724[7]:

> . . . The Judge thought that the defendants were not acting under the 5 and 6 William IV, C. 50 and that consequently they were not entitled to the notice of action allowed thereby. I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute.

The observations of Blackburn, J. are quoted with approval also by Greer, L. J. and Shankey, L. J. It is difficult to say upon what particular English statute, S. 53, Police Act, has been modelled, but in substance there is no difference between that section and the provisions which have been judiciously considered in the decisions already referred to. Both S. 52 and those statutes have the same object in view, that of affording protection to public officers in the discharge of public duties and if S. 53 is compared with the English Act of 1893 it will be seen that in regard to the nature of the protection afforded, similar safeguards have been prescribed. The first under the section in question relates to time—three months' limitation; the English Act provides a period of six months. The second under both S. 53 and the English Act, relates to the right given to the defendant to make a tender and thirdly, both the enactments contain special rules as to costs. We shall not be justified therefore in departing from the construction uniformally adopted in English decisions.

There is one further argument that remains to be noticed. The learned Government Pleader relies on S. 44, Police Act, which, while prescribing penalties for certain illegal acts and omissions, refers to Police Officers maliciously preferring false complaints, but I fail to see how it is of any avail to him ; for, the Police Act says nowhere that the protection given by S. 53 refers to all sorts of acts or omissions alluded to in the Act. If an act is done maliciously, upon the construction uniformly adopted, it ceases to be an act 'done or intended to be done under the provisions of the Act' and that construction is not in the least affected by there being a reference, in some section of the enactment, to malicious acts. The moment an act is shown to be malicious, it ceases to be protected by S. 53 and unless a contrary intention can be gathered, as from the language of 11 & 12 Vict., C. 44, S. 1, considered by *Kirby* v. *Simpson*,[4] already referred to, there can be no justification for holding that the Legislature intended to extend the protection to acts actuated by malice. Then, as to 41 Mad 792,[8] it dealt with the construction of S. 80, Civil

5. Newel v. Starke, (1919) 2 Ir R 325=53 I L T 193=89 L J P C 1=83 J P 113=17 L G R 369=146 L T Jo 331.
6. Scammel & Nephew, Ltd. v. Hurley, (1929) 1 K B 419=98 L J K B 98=140 L T 236=93 J P 99=45 T L R 75=27 L G R 53.
7. Selmes v. Judge, (1871) 6 Q B 724.
8. Koti Reddi v. Subbiah, A I R 1918 Mad 62=46 I C 86=41 Mad 792=34 M L J 494 (F B).

P. C., and the decision turned upon the words 'purporting to be done' occurring there. That case has, therefore, no bearing on the point raised. In an action for malicious prosecution, malice being requisite, S. 53 can have no application. In regard to the English Act of 1893, it has been held that actions for deceit or malicious prosecution may be commenced after the expiration of the six months limit, as there can be no *bona fides* in the commission of a fraudulent or malicious act (23 Hals. S. 696).

In the result, so far as defendants 1 and 3 are concerned, the lower Court's decree is set aside, the appeal is allowed and the case is remanded for being disposed of on the merits; as regards the costs of the appeal, the plaintiff will get them if he succeeds in this suit, and the lower Court will in that event provide in its decree for payment of these costs to the plaintiff.

Cornish, J.—I am of the same opinion. I am unable to agree with the proposition that anything done by a Police Officer in his capacity of a Policeman is something done under the Police Act, or under his general Police powers given by the Act, notwithstanding that it was done maliciously. S. 21 of the Act says that a Police Officer shall for all purposes in the Act contained, be considered to be always on duty. But I think it would be going too far to hold that this would cover any act done by a Policeman under colour of his office. The duty which is cast upon the officer by the section is to 'use his best endeavours and ability' to prevent all crimes, offences and public nuisances; to preserve the peace; and to detect and bring offenders to justice, and so forth. He may, of course, make a mistake. He might arrest or charge an innocent person. But in making an honest mistake the officer might still have been using his best endeavours to carry out his duties. In such case he will not have an immunity from legal proceedings for what he has done; though any legal proceedings against the officer by the aggrieved party must be taken within the three months time limit fixed by S. 53. But it can be no part of an officer's duty to wilfully bring a false charge against a man. On this ground alone I think that an officer who so abuses his powers could not claim to have done what he did under the Police Act or under his general Police powers. The question is put beyond doubt by the decision of the case in 2 I R 325,[5] that a Public Officer acting in the exercise of a statutory or other authority will not have the protection of the Public Authorities Protection Act, 1893, if he has acted maliciously. There is no substantial difference between the purposes of the English and the Madras Acts. The English Act provides that an action or prosecution shall not lie against any person for any act done in pursuance of an Act of Parliament or any public duty or authority unless it is commenced within six months after the act complained of. S. 53, Madras Police Act, says that all actions and prosecutions against any person for anything done under the provisions of the Act, or under the general Police powers given by the Act, shall be commenced within three months after the act complained of. The English Act applies to all Public Officers, inclusive of Police Officers, exercising statutory authority; whereas the Madras Act is limited to Police Officers exercising Police authority under the Act. There is, therefore, no reason in point of policy or construction for excluding from the Madras Act the principle which is applicable to the English Act. I think, then, upon this principle, that an act done by a Police Officer in the exercise of his Police powers will not have the benefit of S. 53 of the Act, if it was done maliciously. But the onus is on the plaintiff in the suit to prove by strong and cogent evidence the existence of malice and the absence of any honest desire to execute his powers on the part of the Police Officer: (1929) 1 K B 419.[6] If the plaintiff, the present appellant, is unable to discharge this burden, his suit will come within S. 53 and will be hopelessly time-barred.

C.R.K./B.D. *Order accordingly.*

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* A. I. R. 1937 Madras 385

FULL BENCH

VENKATASUBBA RAO, CORNISH AND VENKATARAMANA RAO, JJ.

P. P. P. Chidambara Nadar — Appellant.

v.

C. P. A. Rama Nadar and *others*— Respondents.

Appeal No. 295 of 1933, Decided on 6th November 1936, against order of Sub-Judge, Madura, D/- 9th February 1933.

*** (a) Limitation Act (1908), Art. 182 (2)—Art. 182 (2) applies not only to appeals but to revision petitions also: *36 Mad 135=24 M L J 457=12 I C 38*, *Overruled*.**

(Per *Full Bench*)—Article 182 (2), Limitation Act, applies to civil revision petitions as well and not only to appeals in the narrower sense of that term as used in the Civil Procedure Code: *36 Mad 135=24 M L J 457=12 I C 38*, **Overruled**; *A I R 1926 P C 22*, *Rel. on*; *Case law referred*. [P 388 C 1; P 390 C 1, 2]

(b) Interpretation of Statutes—Word can be construed in one part of Act in different sense from what it bears in another part if sufficient reasons exist.

(Per *Full Bench*)—Though ordinarily the same meaning should be given to the same words occurring in different parts of the same Act, it is recognized that if sufficient reasons exist, a word can be construed in one part of an Act in a different sense from that it bears in another part. [P 390 C 1]

(c) Limitation Act (1908), Art. 182 (5)—Joint decree against some defendants — Decree against defendant *A* for specified sum solely—Death of *A*—Execution application filed on 24th June 1929 rejected on 18th November 1929—Execution application stating that *B* was legal representative of *A* but not mentioning *B's* name as legal representative in appropriate column—Subsequent application on 16th November 1932 for execution against *B* as legal representative of *A* in respect of decree for specified sum solely—Application of 24th June 1929 held was in accordance with law and saved limitation.

(Per *Division Bench.*) — The law does not require an application to bring on record a person as the legal representative of a defendant. All that is necessary for a valid execution petition against the legal representative is that the execution application must pray for execution against a person as the legal representative of another. [P 391 C 1]

A decree was passed against some defendants jointly and against *A*, who was one of the defendants, the decree was for a specified sum solely. On the date of the prior execution application dated 24th June 1929 *A* was dead and his legal representative *B* was not brought on record. In the execution application at the end of the array of the defendants it was stated that the legal representative of *A* was *B*, thus indicating that *B* was sought to be added as legal representative of *A*. In column 'name of the judgment-debtor against whom the decree is to be executed' was stated '*C* and others'. The only defect in the application was that in the appropriate column *B's* name was not mentioned as the legal representative. The application was rejected on 18th November 1929. On 16th November 1932 there was a second application for execution against *B* as the legal representative of *A* against whom there was a decree for the specified sum solely:

Held: that even assuming that no relief was sought against *B* as the legal representative of *A*, the application of 24th June 1929 would nevertheless be an application in accordance with law and would save limitation: *A I R 1928 Mad 440* and *A I R 1926 Mad 453*, *Rel. on*. [P 391 C 2]

(d) Limitation Act (1908), Art. 182 (5)—Final order—Order is final if it terminates proceeding—It need not be on merits.

(Per *Division Bench*)—An order is final within the meaning of the clause if it terminates the proceeding so far as the Court passing it is concerned. The order need not be one on merits. [P 392 C 1]

B. Sitarama Rao, *P. N. Appuswami Iyer* and *N. Nagaswami Iyer* — for Appellant.

K. V. Srinivasa Iyer—for Respondents.

Order of Reference.

Stone and Pandrang Row, JJ. — This appeal against an order of the Additional Subordinate Judge of Madura made in an execution petition raises a point of some little difficulty which can be expressed as follows: A decree was passed on 24th November 1924, in O. S. No. 71 of 1920 on the file of the First Additional Subordinate Judge of Madura. Later on a revision petition was put in in the High Court and that revision petition was dismissed on 3rd November 1927. An execution petition was put in on 24th June 1929 which was rejected on 18th November 1929 and it was admittedly within time if Art. 182 (2), Limitation Act, applied. There was another execution petition on 26th September 1929, with which we are not concerned. The present petition, in respect of which the appeal is filed was filed on 16th November 1932. If the earlier petition filed on 24th June 1929, and rejected on 18th November 1929 was in time—and it would admittedly be in time if the revision petition falls under Art. 182 (2), Limitation Act—the present petition would be in time. Art. 182 (2) is in the following words:

(Where there has been an appeal) the date of the final decree or order of the appellate Court, or the withdrawal of the appeal.

The starting point where there has been an appeal is the date of the final decree or the order of the appellate Court or the withdrawal of the appeal. It was decided by a Bench of this Court in 36 Mad 135,[1] that the word 'appeal' referred in Art. 182 (2), Limitation Act, does not include a revision under S. 115, Civil P. C., or under S. 25, Provincial Small Cause Courts Act, or even under the Charter Act. That case, so far as we can see, is absolutely on all fours with this case and it is that decision that raises the doubt that we feel in this matter, and out of

1. Subramania Pillai v. Seethai Ammal, (1913) 36 Mad 135=12 I C 38=24 M L J 457.

respect for the learned Judges who decided that case, we think it necessary to refer this point to a Full Bench in order to set at rest this important point. We feel a difficulty in following that case because *inter alia* the Privy Council in 60 Cal 1,[2] in a matter under Art. 182 (2), Limitation Act, made the following observations :

> There is no definition of 'appeal' in the Civil Procedure Code, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent.

A Bench of this High Court in 36 Mad 135,[1] already referred to, arrived at the conclusion they did, because they were of opinion that the word 'appeal' was not used in a more extended sense in Art. 182 than it was in Arts. 150 to 157, and that because in these latter articles distinctions were made between suits, appeals and applications, it could not be contended that an appeal would include a revision petition. We apprehend that the learned Judges were there saying in fact that as it is quite clear that under the Civil Procedure Code, a revision petition and an appeal are not the same thing—as under S. 115, Civil P. C., a revision petition only lies where an appeal does not lie—and as in Arts. 150 to 157 under the heading 'appeals' under the Civil Procedure Code, the Limitation Act deals with appeals in the same sense as it is used in the Civil P. C., therefore, it must be assumed that in Art. 182 (2), where the word 'appeal' is used *simpliciter*, it must be given the same meaning as is given in Arts. 150 to 157.

In the passage cited from the judgment of the Judicial Committee it is equally plain that the Judicial Committee regarded an application by way of revision as an appeal in the ordinary acceptation of the term. We feel that it is reasonably plain, bearing in mind the wording of S. 115, Civil P. C., that a distinction for the purpose of the Code is drawn between a revision petition and an appeal, for it is there stated that a revision petition only lies where an appeal does not lie. The judgment of the Judicial Committee indicates that the word 'appeal' has a wider meaning in Art. 182 than it bears in the Civil Procedure Code. And the same broad view of the meaning of the term 'appeal' seems to have been taken by their Lordships in (1922) 2 A C 128,[3] though they were not dealing with a revision petition under the Indian Procedure Code but with an appeal from a Provincial High Court to the Supreme Court of Canada upon a motion for a writ of certiorari. 13 C L J 90[4] at pp. 93 and 94 also in our opinion points the same way. It may be material to bear in mind the various cases : 22 Mad 68[5] at p. 80, 17 I C 593[6] & 41 M L W 138,[7] where it has been held that a Court hearing a revision petition is acting as an appellate Court. In 49 Mad 335[8] at p. 339, Lord Dunedin made the following observations :

> From this judgment an appeal in the form appropriate to such a case from the Munsif's Court, i. e., Civil Revision Petition, was preferred.

That is an observation made in the course of a case in which a revision petition was treated as an appeal in the ordinary acceptation of the term. It is further in our opinion a matter to be borne in mind that the clauses in the Limitation Act relating to applications do not apply to revisions according to the wording of Art. 182 : *see* 51 Mad 672.[9] One is faced with the further difficulty : If a revision petition is not an appeal for purposes of Art. 182 (2) the following position arises : The period of limitation is entirely different accordingly as the revision petition succeeds or fails. If it succeeds the result would be that there would be a review of judgment or the decree would be amended and where that is the case Art. 182 (3) or (4) would presumably apply. If it fails we think there is a *casus omissus* because the revision petition could not be construed as an application within the mean-

2. Nagendranath De v. Sureschandra De, A I R 1932 P C 165=137 I C 529=60 Cal 1=59 I A 283 (P C).

3. Rex v. Nat Bell Liquors, Ltd., (1922) 2 A C 128=91 L J P C 146=127 L T 437=38 T L R 541=27 Cox C C 253.

4. Secretary of State v. British India Steam Navigation Co., (1911) 13 C L J 90=9 I C 183=15 C W N 843.

5. Chappan v. Moidin Kutti, (1899) 22 Mad 68=8 M L J 231 (F B).

6. Venkata Rangayya Appa Row v. Murala Sriramulu, (1912) 17 I C 593.

7. Siddalingana Gowd v. Bhimana Gowd, A I R 1935 Mad 731=156 I C 640=41 M L W 138=68 M L J 497.

8. Raja of Ramnad v. Kamid Rowthen, A I R 1926 P C 22=94 I C 322=53 I A 74=49 Mad 335 (P C).

9. Muthu Chettiar v. Narayanan Chettiar, A I R 1928 Mad 528=110 I C 63=51 Mad 672=55 M L J 274.

ing of Art. 182, and Cls. 3 and 4 will not apply. Cl. 2 will not apply because it is not an appeal. This seems to be a very unfortunate state of affairs which would leave the party affected in complete uncertainty until the revision petition is disposed of. In these circumstances as the matter is one of some general importance and as 36 Mad 135[1] has decided a case absolutely on all fours with the present case and as the Bench is one for which we have the greatest respect, we think it would be better to have this matter set at rest by a Full Bench rather than have conflicting decisions. The question referred is: "Whether Art. 182 (2), Lim. Act, applies to civil revision petitions as well or only to appeals in the narrower sense of that term as used in the Civil Procedure Code".

OPINION

Venkatasubba Rao, J.—The facts have been fully set forth in the order of the referring Judges and need not be recapitulated. The short question is, whether when a revision petition is filed, it is permissible to hold under Art. 182 (2), Lim. Act, that the date of the order in revision made by the High Court furnishes the starting point; in other words, whether the term 'appeal' is used in a restrictive sense so as to exclude revision petitions and the expression 'the appellate Court' is to be confined to a Court exercising appellate, as opposed to, revisional powers. The only considered decision directly bearing on the point is 36 Mad 135,[1] which places a restrictive interpretation upon the word 'appeal,' but as the learned Judges who have referred the question rightly point out, that decision is inconsistent with the views expressed in numerous authoritative decisions as to the true meaning of the terms 'appeal' and 'appellate Court'. The view taken by the learned Judges in 36 Mad 135,[1] necessitated, if we may say so with respect, their adopting a somewhat curious line of reasoning. They were faced with the difficulty, what should be the starting point when the revision petition fails, and what, when it succeeds? Logically, from their conclusion that the word 'appeal' does not include 'revision,' in neither event should an order upon a revision petition give rise to a fresh starting point. But they were driven to hold that when the revision petition is dismissed, time runs from the original decree or order, but when it succeeds, not from the original, but from the fresh decree or order, either under Cl. (1) or Cl. (4). This involves a certain contradiction, as the learned Judges felt compelled to have recourse to the same clause, for two dissimilar purposes; when the revision petition is dismissed, time would run from the original decree or order under Cl. (1); when it is allowed, under the same clause, from the fresh decree or order. Moreover, by a sort of fiction, the learned Judges held that where the original order is modified as is sometimes done in revision, it must be treated as having been amended, with the result that Cl. (4) is brought into play. It seems in our opinion somewhat artificial to hold, that modifying an order in revision amounts to amending it, when, as is well known in our processual law, the word 'amendment' does not embrace correction by a superior Court. There is yet a further difficulty revealed by the judgment of Wallis, J., as he then was, his decision being the one that was upheld in 36 Mad 135.[1] He is constrained to hold that a revision petition may furnish not only two but three starting points, all of them falling under Cl. (1): (1) Where it is simply dismissed, time runs from the date of the original decree; (2) where it is dismissed with costs, from the date of the original decree so far as that decree is concerned and from the date of the order of the High Court, so far as it relates to costs; (3) where the decree is modified in revision from the date of the decree as modified.

It seems to us that such a straining of words as had led to these contradictory and inconsistent results must, if possible, be avoided. In 22 Mad 68[5] six learned Judges had to consider the question whether under Cl. 15, Letters Patent, as it stood before the amendment of 1919, an appeal lay from the judgment of the Single Judge passed in the exercise of a revisional jurisdiction. Cl. 15 enacted that an appeal lay to the High Court from the judgment of one Judge of the High Court or one Judge of a division Court pursuant to S. 13, Charter Act. Now turning to the last mentioned section, it provided for the exercise by the Judges of the High Court, of the original and appellate jurisdictions vested in that Court. This raised the question whether revisional jurisdiction was comprised within the term 'appellate

jurisdiction' as used in S. 13 for, if it did not, no appeal would lie under Cl. 15, Letters Patent. It was held by a majority of the Judges that an appeal did lie, provided the order amounted to a 'judgment'. Subramania Iyer, J. in the course of his judgment points out what the true meaning of the expression 'appellate jurisdiction' is. That may be exercised in a variety of forms and may be invoked sometimes as a matter of right and sometimes subject only to certain specified conditions or limitations, such, for instance, as those prescribed in the provision in the Code relating to the revisional powers of the High Court; but as Subramania Iyer, J. goes on to observe, no such limitation, however much it may circumscribe the exercise of the power, touches the intrinsic quality of the power itself (p. 80).

The wording of Cl. 39, Letters Patent, has given rise to a similar question. It enacts that an appeal lies to the Privy Council from a final judgment or order passed by the High Court on appeal, and that led to the question whether an order made by the High Court in the exercise of its revisional jurisdiction or powers of superintendence, came within the purview of that clause. Mookerjee and Cox, JJ. held in 13 C L J 90,[4] that such an order, though made in revision, is appealable as there is no ground for construing the word 'appeal' used in Cl. 39 in a narrow sense. Mookerjee, J. after referring to various authorities quotes Lord Westbury in 10 H L C 704,[10] who observes that the right of appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. The learned Judge also points out, after referring to Story's Constitution (Vol. 2, Ss. 1760 to 1766), that the characteristic of an appeal is the revision of the judicial proceeding of an inferior Court, so that the mode in which that power is exercised is wholly immaterial (p. 94). That a remedy by way of revision does not differ in essence from a right of appeal (the only difference being in the mode in which the power is exercised), has often been declared by the Judicial Committee. In 53 I A 774,[8] their Lordships referring to a Civil Revision Petition thus observe :

> From this judgment, an appeal in the form appropriate to such a case from the Munsif's Court, i. e., a Civil Revision Petition, was preferred to the High Court of Madras.

See also 23 Cal 775[11] at page 784.

In 59 I A 283,[2] the question as to what amounted to an appeal under Art. 182 (2) arose, and the language of their Lordships in view of the present question raised, though it does not directly bear upon it, is both suggestive and significant. The facts of that case are somewhat complicated, but for the present purpose it is sufficient to state, that there were two sets of mortgagees—the appellants on the one hand and Madan Mohan and his son, described as respondents 24 and 27 on the other. As between them there was a dispute in regard to a sum of Rs. 4,467 and that was decided in favour of the appellants. Madan Mohan, as one of the decree-holders, applied for a final mortgage decree and in doing so, he again claimed as against the appellants, his co-decree-holders, the sum which had already been disallowed. The Subordinate Judge on 24th June 1920 delivered his judgment, again negativing Madan Mohan's claim and passed a final decree for the sale of the mortgaged properties. The decree was drawn up on 2nd August 1920 but properly dated as of 24th June.

On 27th August 1920 Madan Mohan presented an appeal to the High Court, not from the decree of the Subordinate Judge, which in truth it was, but from what was wrongly alleged to be an order made on 24th June. As his objection was only to the decision, in so far as it related to his claim against the other decree-holders, he joined them alone as parties to the appeal and not the judgment-debtors. The appeal though irregular in form, as not being an appeal against the decree of the Subordinate Judge, and though insufficiently stamped, was admitted and heard by the Court, and in the result, it was dismissed, both on the ground of irregularity and upon the merits, and the dismissal was embodied in a decree of the High Court dated 24th August 1922. The appellants on 3rd October 1923 presented an application for execution of the decree against the judgment-debtors. It was contended for the latter that the three years were to be calculated from 24th June 1920 in which case the application would be manifestly out of time ; it would, on the other hand,

10. Attorney-General v. Sillem, (1864) 10 H L C 704=10 Jur 446=10 L T 434.

11. Baijnath Sahai v. Ramgut Singh, (1896) 23 Cal 775=23 I A 45=7 Sar 1 (P C).

be within time if the critical date was that of the decree of the High Court of 24th August 1922; and the decision of the question depended upon, whether Madan Mohan's appeal, which was dismissed on the latter date, was an appeal within the meaning of Art. 182 (2). Their Lordships held that any application by a party to an appellate Court to set aside or revise a decree or order of a Court subordinate thereto is an 'appeal' within the meaning of that provision, even though (a) it is irregular or incompetent or (b) the persons affected by the application to execute were not parties, or (c) it did not imperil the whole decree or order. It is only the first of these three points that is now material and it is with the words used by their Lordships in this connexion that we are here concerned "There is no definition of 'appeal' in the Civil Procedure Code," they observe,

> but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of that term and that it is no less an appeal because it is irregular or incompetent.

True, much importance cannot be attached to the word 'revise' in this passage, as their Lordships were not adverting to what is technically known as a revision petition; but the view that there is no essential difference between a remedy by way of appeal and by way of revision, is considerably reinforced by the passage in question and its value becomes all the greater when we bear in mind that their Lordships made these observations in construing the very provision with which we are now concerned. The only serious objection urged against the view is that in one and the same Act the same word ought not to be construed in two different senses and that as the word 'appeal' has a narrower meaning in Arts. 150 to 157, it would be wrong to give it an extended sense in Art. 182. But as a canon of construction, though ordinarily the same meaning should be given to the same words occurring in different parts of the same Act, it is recognized that if sufficient reasons exist, a word can be construed in one part of an Act in a different sense from that it bears in another part: Craies's Statute Law, Edn. 4, p. 153. We think we have shown that cogent reasons exist in the present case and what is more, the word 'appeal' within the ordinary acceptation of that term bears not the narrower but the extended meaning. Our answer to the question referred is therefore in the affirmative.

(This appeal coming on for final hearing after the expression of the opinion of the Full Bench, the Court delivered the following judgment.)

Venkataramana Rao, J. — The question in this case is whether the execution application dated 16th November 1932 filed by the plaintiff is barred by limitation. For the disposal of the same, a few dates of the prior proceedings may be relevant. They are 24th November 1924, the date of the decree, 24th June 1929, the date of the application for execution, 3rd November 1927, the date of the order of the High Court dismissing the revision petition presented against the decree and 16th November 1932, the date of the present application for execution. When this matter came up on a prior occasion for hearing before Stone, J. and my learned brother, the question was whether the starting point for the execution of the decree would be the date of the dismissal of the revision petition in the High Court. 36 Mad 135[1] held that it would not. As a doubt was felt as to the correctness of that decision, the matter was referred to a Full Bench. The Full Bench has now decided that the term 'appeal' under Art. 182, Cl. 2, Lim. Act, would include revision and therefore the order dismissing the revision petition would be the final order within the meaning of that article. In the order of reference the learned Judges observed that if the application dated 24th June 1929 was in time, the present application would be in time. From the order it would mean that the only question that was raised and argued before the Division Bench was that if the starting point for limitation be the date of the dismissal of the revision petition, there will be no question of limitation. But Mr. Srinivasa Iyer now contends that he had no opportunity on the prior occasion to contend that the application dated 24th June 1929 would not save limitation even if it be held that under Art. 182 (2), Lim. Act, the term 'appeal' would include revision. He is now permitted to argue that question subject to his filing an affidavit to the effect that he had not the said opportunity on the prior occasion. He has now raised two questions, namely (1) the application dated 24th June 1929

is not in accordance with law, and (2) there was no final order within the meaning of Art. 182, Cl. 5, and therefore the present application would be barred by limitation in any event.

The contention regarding the first point is put thus. The present execution application is to recover a sum of Rs. 1,400 odd from defendant 8 as the legal representative of defendant 1 against whom there was a decree for the said sum solely. On the date of the prior execution application dated 24th June 1929, defendant 1 was dead; defendant 6 who was recognized as his legal representative was also dead; defendant 8 was not brought on record as the legal representative of defendants 1 and 6 and there was no application for execution against him in respect of the sum now sought to be recovered; thus the application would not be in accordance with law within the meaning of Art. 182, Cl. 5, Lim. Act. It seems to me that this contention is untenable. Looking into the execution application it will be seen that in the cause title against the name of defendant 1 it is stated that he was dead. A similar entry is made against the name of defendant 6 and at the end of the array of the defendants, the following note is added that the legal representative of defendants 1 and 6 is Rama Nadar, thus indicating that Rama Nadar is sought to be added as the legal representative of defendants 1 and 6. Then turning to the column 'name of the judgment-debtor against whom the decree is to be executed', it is stated 'C. P. A. Palani Kumara Nadar and others'; 'and others' would certainly include Rama Nadar. Therefore the application is in substance one to have the decree executed also against the legal representative of defendant 1 and defendant 6. The law does not require an application to bring on record a person as the legal representative of a defendant. All that is necessary for a valid execution petition against the legal representative is that the execution application must pray for execution against a person as the legal representative of another. That in my opinion is complied with in the present application. It is not every defective application that can be said to be an application not in accordance with law. The only defect that can be alleged in this application is that in the appropriate column Rama Nadar was not mentioned as the legal representative. It was laid down in 27 M L W 475[12] that an application which contains defects such as these cannot be said to be an application not in accordance with law. The decree, it will be noticed, is a joint decree within the meaning of the explanation to Art. 182, Lim. Act. The decree provides that in respect of outstandings all the partners should collect the amounts and the amount should be distributed between them. In addition to this there is a joint decree for a specified sum against defendant 1. In 50 M L J 215[13] it was held that a decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly, even though some other reliefs may be given against the defendants separately, so that if in respect of the joint relief an application for execution is made against one of them it will save limitation in regard to the other defendants even in respect of the reliefs which have been decreed against solely. If the principle of that decision is to be applied to this case, even assuming that no relief was sought against defendant 8 as the legal representative of defendant 1, the application of 24th June 1929 would nevertheless be an application in accordance with law and save limitation.

The next question is whether there is a final order within the meaning of Art. 182, Lim. Act, because under the amended Article it is not the date of the execution application that saves limitation but the final order thereon. Mr. Srinivasa Iyer contends that there is not relying very strongly on a recent decision reported in 71 M L J 336.[14] In that case the actual decision was that an order returning an execution application would not be a final order even in cases where the application is not represented. I may notice that there is also authority for the view that it would be: *vide* the judgment of my learned brother reported in 1936 M W N 547 (2);[15] and also of Stodart, J. in 1936 M W N 547 (1).[16] It is unnecessary to express

12. Abdul Karim Sahib v. Lakshmanaswamy, A I R 1928 Mad 440=112 I C 36=27 M L W 475.
13. Pattannayya v. Pattayya, A I R 1926 Mad 453=92 I C 782=50 M L J 215.
14. Kesavaloo v. Official Receiver, West Tanjore, A I R 1936 Mad 613=163 I C 354=71 M L J 336=I L R 1937 Mad 112.
15. Mottayya Padayachi v. Rajagopalan, (1936) M W N 547 (2).
16. Shanmugha Pathar v. Swaminatha Pathar, (1936) M W N 547 (1).

my opinion on the question whether the order returning an execution application in cases where it is not re-presented would be a final order, because it is unnecessary for the disposal of this case. In my opinion an order would be a final order within the meaning of the clause if it terminates the execution proceeding so far as the Court passing it is concerned. The order need not be one on the merits. I agree with my learned brother when he says:

> I do not think it can be contended reasonably that the legislature intended that where the Court chose to pass certain orders which were not final in the sense that they did not deal with the merits of the application it was to be held that there was no final order within the meaning of the amended articles: 1936 M W N 547 (2)[15] at p. 548.

There is nothing in the decision, 71 M L J 336,[14] which runs counter to this view. In fact Venkatasubba Rao, J. at p. 341 observes:

> The words "final order" imply that the proceeding has terminated so far as the Court passing it is concerned.

He cites with approval the decision in A I R 1933 Rang 87,[17] where it was held that an order made on an execution application closing the case for want of non-compliance with certain requirements would be final. In that case it was closed at the request of the party. What happened in this case was that the Court rejected it thus terminating the proceeding. Therefore the order of rejection in this case would be a final order within the meaning of Art. 182, Cl. 5, Lim. Act, and therefore the present application is not barred by limitation. We therefore reverse the decision of the lower Court and remand the case for disposal in accordance with law.

Pandrang Row, J.—I agree and I wish to say a few words. When the matter originally came up before Stone, J. as he then was and myself it appears to have been admitted clearly that if the petition presented in June 1929 was in time, there was nothing else to be done but to allow the appeal and remand the petition for disposal. If certainly the points that are now raised and which have been dealt with by my learned brother had then been raised before us, it is difficult to believe that we would have troubled the Full Bench for an opinion before deciding the points now raised by the respondents. The respondents' advocate however assures us that it was not that he raised these points but that he had no opportunity to raise them. If this means that he was not called upon at all, it is not supported by the preamble to the order of reference which shows that he was heard. What exactly the learned advocate means I am unable to say; but as he has given us the assurance that he would undertake to file an affidavit in support of what he has said and in view of the fact that the questions raised are questions of law, we have thought it desirable in the interests of justice to allow the points to be raised and decided instead of refusing him any opportunity to raise them.

As regards the question whether the execution petition filed in June 1929 is in accordance with law, I have nothing to add to what my learned brother has said. As regards the other point whether the order thereon dated 18th November 1929 is a final order, the respondents' advocate relies upon a recent decision of a Bench reported in 71 M L J 336.[14] Indeed, it was hinted by Mr. Sitarama Rao that it was this subsequent decision which was pronounced after we made the order of reference that is responsible for the raising of the points at present. That decision no doubt supports in some respects the argument of the respondents' advocate. Apart from this, I have given my anxious consideration to that decision because that decision purports to disapprove of my decision in C. M. S. A. No. 173 of 1932.[15] It is with unfeigned sorrow that I express my inability to change my opinion on the point. I do not wish to say anything more on this subject because my learned brother is prepared to base his decision, with which I agree, on what I would call the narrow ground that the order in that case was of a different tenor from the order in the present case and also that there are certain observations in that decision which are themselves sufficient to lead to our present conclusion. In fact, in that Bench decision there are two definitions, a positive and a negative definition, of a final order. At p. 359 it is stated that:

> When an order is made returning a petition, it does not deal judicially with the matter of the petition and cannot therefore be regarded as final.

The other definition is given at p. 341 thus:

17. Kadiresan Chettyar v. Maung Sanya, A I R 1933 Rang 87=142 I C 435.

The words "final order" imply that the proceeding has terminated so far as the Court passing it is concerned.

This latter definition is sufficient to conclude the point raised in this case against the respondents. I have looked into the decisions of the Judicial Committee relied upon in 71 M L J 336.[14] I do not think they decide the present question. They deal with the question as to what is a final order or decree in an appeal within the meaning of Art. 182, Cl. 2, and it was held that where an appeal fails by reason of the non-compliance of the rules of procedure prescribed or is dismissed for want of prosecution, there is no order or decree of the appellate Court in which the decree of the Court below is merged and that all that remains is only the decree of the Court from which the appeal is preferred. In the present case, we are dealing with an order which rejected the execution application. That order of rejection certainly put an end to the petition so far as the Court is concerned. It was conceded before us by the advocate for the respondents that if a petition is dismissed because it is not pressed, it would be a final order. I do not see why the substitution of the word "rejected" for "dismissed" should make any difference in deciding whether the order is final or not. Similarly, if an execution petition is dismissed for default, it would also be a final order. On the other hand, if the other definition is strictly applied, it may be contended that there was no judicial determination of the matter involved in the application and therefore there was no final order. I am unable to accept this as a correct interpretation of the words "final order" found in Art. 182 (5), Lim. Act. In innumerable cases execution petitions are dismissed or struck off either for default or for failure to take steps, and it has never been contended that there is in such cases no final order which alone will provide a fresh starting point for limitation. I concur in the view expressed by my learned brother that in this case there was a final order, and that order being one dated 18th November 1929 the subsequent petition filed in 1932 was in time. That petition must therefore be remanded to the Court below for disposal according to law.

We think in the circumstances of this case, and especially in view of the fact that this case necessitated a reference to a Full Bench and an argument before the Full Bench and a further argument after the Full Bench opinion was delivered, that a special fee should be allowed in this appeal. The advocate's fee is fixed at Rs. 150. The contesting respondents 2 to 4 must pay the costs of the appellant in this appeal and bear their own costs. Their costs in the Court below will be within the discretion of the Court below.

C.R.K./S.C. *Petition remanded.*

A. I. R. 1937 Madras 393

SPECIAL BENCH

BEASLEY, C. J., MOCKETT AND LAKSHMANA RAO, JJ.

S. A. S. S. Chellappa Chettiar — Petitioner.

v.

Commissioner of Income-tax, Madras— Opposite Party.

O. P. No. 252 of 1935, Decided on 15th January 1937.

Income-tax Act (1922), S. 10 (2) (iii)—Money-lender assessee borrowing and lending out capital for his business—Assessee obliged to receive and cultivate agricultural land in return for his loans—Assessee is entitled under S. 10 (2) (iii) to deduct interest charges, at time of computation on borrowed capital (now in form of agricultural land) even though capital produced non-taxable income.

An assessee, who was carrying on business as a moneylender, borrowed money for his money-lending business and lent it out to constituents. He was obliged in the course of the business to receive agricultural lands in re-payment of his debt from such constituents. He retained and cultivated those lands, as it was the only way of preserving his capital pending a return of the agricultural economic conditions. At the time of the assessment he claimed a deduction of the interest paid by him on so much of the capital borrowed by him for business purposes as was represented by agricultural lands, got in under S. 10 (2) (iii) in computing the profits and gains of the banking business for the year of account :

Held : that in the absence of any express provision in the Income-tax Act, the assessee was not to be deprived of the advantages conferred by exemptions under S. 10 (2) (iii), because the capital therefrom by means of permissible deductions happened to produce a non-taxable income and that he was entitled to a deduction in respect of the establishment and other charges for managing and cultivating the lands under S. 10 (2) (ix) : *Case law discussed.*

[P 394 C 2 ; P 398 C 1]

T. R. Venkatarama Sastry and *K. S. Sankara Iyer* — for Petitioner.

M. Patanjali Sastry — for Opposite Party.

Order. — The assessee is the manager of a Hindu undivided family carrying on moneylending business in India, Burma and the Federated Malay States with

borrowed capital. The findings of fact are not very clear but before us the argument has proceeded on the following basis; owing to certain clients in Burma being unable to meet their obligations, the assessee was compelled to receive in repayment of loans made by him agricultural lands in Burma. The money which had been lent had originally been borrowed by the assessee for the purpose of his moneylending business, that is to say, that he borrowed and in his turn lent the same money—no doubt at a higher rate of interest. It was conceded by Mr. Patanjali Sastri that the assessee was carrying on one business for the year of assessment 1934-35. It has not been contended before us that the assessee was retaining and cultivating these lands of his own inclination, but owing to the fall in agricultural lands he was involuntarily in possession and was preserving his capital in the only way open to him pending a return of agricultural economic conditions which made it possible for him to realize if not all at least some of the capital originally lent to the borrowers, the previous owners of the lands. It was not disputed that the whole of the money borrowed, a great part of which is now in the form of land, was originally borrowed for the purpose of the moneylending business. In view of these admissions of fact, it is not necessary for us to send this matter back to the Commissioner for findings. For the assessment of the year 1934-35 the assessee was assessed on a total income computed at Rs. 30,963. In computing the income the Income-tax Officer disallowed Rupees 17,796 under interest payments in the Kyailkat branch and Rs. 3,114 under establishment and other charges in the Kyailkat and Thayetmyo branches. The interest charges disallowed were claimed by the assessee under S. 10 (2) (iii), Income-tax Act, as representing the capital borrowed by him for the purpose of his business which capital was now represented by agricultural lands. The Income-tax Officer held that four-fifths of the money borrowed was so represented but he disallowed the claim on the ground that as the money was invested in agricultural lands the income from which is exempt from income-tax under S. 4 (3) (viii) of the Act the assessee was not entitled to the allowance mentioned in S. 10 (2) (iii). He accordingly disallowed the claim for interest as regards four-fifths of the money borrowed which he considered was the amount of the capital then represented by lands but he allowed the remaining one-fifth as being money borrowed for the purpose of the moneylending business and utilised therein. The assessee also claimed a sum of Rs. 3,114 made up as follows :

Establishment charges	...	Rs. 2,298
Loss in cattle purchase, lands and bulls accounts	... ...	779
Conveyance charges relating to lands	...	37

The last item was allowed by the Commissioner. The other items were claimed as being charges under S. 10 (2) (ix). The Commissioner disallowed the amount of these other items also on the ground that as it is expenditure for the purpose of earning agricultural income, it also was not deductible on the same grounds on which he had ruled that money borrowed and subsequently used in agricultural lands was not a permissible deduction. The assessee moved this Court and in compliance with the Court's directions the Commissioner has referred to us the following two questions :

(1) Where a person, who is carrying on business as a moneylender, borrows money for his moneylending business and lends it out to constituents, is obliged in the course of the business to receive agricultural lands in repayment of his debts from such constituents, is he not entitled to a deduction of the interest paid by him on so much of the capital borrowed by him for business purposes as is represented by the agriculturai lands got in under S. 10 (2) (iii) in computing the profits and gains of the banking business for the year of account ;

(2) Whether the petitioner is not entitled to a deduction in respect of the establishment and other charges for managing and cultivating the lands in the Kyailkat and Thayetmyo on the ground that they are expenses incurred for agricultural purposes and the amount spent for obtaining conveyances on the ground that it is an expense of a capital nature ?

Section 10 (1) and (2) is as follows :

(1) The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :

. . . . . .

(iii) in respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid.

It is, as we have emphasized, conceded that this capital was borrowed for the purpose of the business and on the facts we hold that it has also been used for the purpose of the business because it is an unquestioned fact that the assessee received these lands in repayment of the loans made by him not of his own volition but of necessity, there being no other method of getting payment, and that therefore these lands came into his possession directly in the course of his moneylending business and represented the capital originally borrowed. Prima facie therefore the assessee is entitled to the benefit of S. 10 of the Act, but the Commissioner's learned counsel argues that nothing which cannot help to earn taxable income is the subject of exemption and agricultural income is not taxable and by implication in S. 10 (1) and (2) before the words "profits or gains" must be read the word "taxable". He contends that the object of S. 10 is to reduce the amount of taxable income and that it cannot therefore possibly apply to any income which is not the subject of taxation. No case exactly in point has been cited. But the Commissioner has relied especially on two Indian decisions, one of this High Court and the other of the Bombay High Court. In 2 I T C 505,[1] the question arose whether interest on capital borrowed in India to be used abroad (in that case the Federated Malay States) was a permissible deduction under S. 10 (2) (iii), Income-tax Act. It must be emphasized that no complication with regard to the use of the capital in a foreign country arises here, Burma and Madras being subject to the same Act. This High Court took the view that "business" in S. 10 (2) (iii) means the business whose profits are being assessed in the year under consideration. In 6 I T C 21,[2] the Bombay High Court held that where an Indian finance company borrowed money in British India and invested it abroad keeping both the income and capital abroad, the interest on the money so borrowed was not deductible under S. 10 (2) (iii), Income-tax Act, by reason of the fact that the income was not the subject of taxation in British India. The decision of the Court there again rested on the fact that the whole of the interest derived from the borrowed capital was outside the jurisdiction and was not the subject of taxation in India. At p. 25 Beaumont, C. J. expressed himself as follows :

> Now looking at that section again in the light of the context, tax is to be payable by an assessee under the head of "Business" in respect of the profits or gains of any busiuess carried on by him. Clearly that must mean in respect of the taxable profits or gains of any business carried on by him and the business must be one which earns taxable profits or gains. Then when we come to subs. (2) (iii), an allowance is to be made in respect of interest on capital borrowed for the purposes of the business. Now, I think that again must be for the purpose of the business which earns or is capable of earning taxable profits. Whether in fact taxable profits are earned or not is not necessarily the criterion because the borrowed money may earn no profit, but I think the "business" referred to in that section is a business which is so carried on that taxable profits may be earned, and unless it is a business of that character a deduction for interest on capital money borrowed for the purposes of that business is not allowable under the Act.

It will be noticed that in both these cases the income derived from borrowed capital was not the subject of any taxation in British India. In this connection it should be observed that S. 4, Income-tax Act, makes the Act applicable to all income, profits or gains, accruing or arising or received in British India, or deemed to be received therein. But the Act does not apply to agricultural income in British India. Under S. 4 (3) (viii) it is provided that "this Act shall not apply to . . . . . agricultural income". "Agricultural income" is defined in S. 2 (1) as meaning :

> (a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such : (b) any income derived from such land by (i) agricultural, ...

The rest of the definition is not relevant. It should be observed that the agricultural income must be derived from "such land" i. e., land assessed to land revenue in British India or subject to a local rate assessed and collected by the officers of Government as such. There is no foundation therefore for the argument which we have heard that agricultural income is exempt from all taxation and it is therefore prima facie inequitable that money borrowed and represented by an income which does not pay tax should be subjected to any of the benefits of the Act. On the

1. Somasundaram Chettiar v. Commissioner of Income-tax, A I R 1928 Mad 487=109 I C 369=54 M L J 436=2 I T C 505.

2. Provident Investment Co., Ltd. v. Commissioner of Income-tax, Bombay, A I R 1932 Bom 94=135 I C 810=56 Bom 92=33 Bom L R 1587=6 I T C 21.

contrary under the Act such income is expressly excluded from the burden of income-tax because it has already paid tax to Government in another form. That such circumstances as we now have to consider were in the contemplation of the Legislature when passing this Act we take leave to doubt, but they have arisen and must be dealt with not on general principles but in accordance with the principles relating to the construction of a fiscal statute, viz., that it should be strictly construed.

It seems to us that the governing section in order to decide this matter must be S. 10 (2) (iii). Was the capital borrowed for the purpose of the assessee's business? No difficulty arises about that, for it is conceded that it was so borrowed. It was also unquestionably used for the purpose of the business because it is again conceded that it was lent to the borrowers. Does it continue to be so used? It is in that respect that it is important again to emphasize that this case has been argued before us on the basis that these lands came into and were retained in the possession of the assessee in payment of a moneylending debt and *ex necessitate rei*. In this Presidency there is a current of authority to the effect that immoveable property received by a moneylender in repayment of loans is an asset of his moneylending business and that any profits derived from the sale of such lands and also any income from the land such as rents, etc., must be regarded as the profits of such business and taxable as such: *see* 4 I T C 188.[3] In that case as here the assessee was a money-lender who had secured his advances on rubber estates which he had finally to take over in repayment of his debts and to hold until a favourable opportunity occurred for resale and it was held that any profits from such resale were profits of his moneylending business: *see also* 4 I T C 200.[4] In 14 Pat 623,[5] the Judicial Committee had before them for consideration the question as to whether income received from an estate taken over by a lender as security for an amount advanced under an usufructuary mortgage was agricultural income. At p. 631 Lord Macmillan in delivering the advice of the Board after setting out the facts and emphasizing that prima facie the income of the land was agricultural income states as follows:

> In answer to this prima facie conclusive ground for excluding the sum in question from the respondent's assessment the appellant concedes that if the respondent were not a moneylender and if the transaction in virtue of which he receives the rents had not been a transaction entered into in the course of his moneylending business, he would have been entitled to invoke the statutory exemption of agricultural income; but the appellant submits that the fact that the respondent carried on a moneylending business and receives the rents as the result of a transaction entered into in the course of that business makes all the difference.

It would appear therefore that the Board recognized the position that rents from agricultural lands could be received in virtue of a moneylending transaction. Their Lordships then proceed to hold that agricultural income does not lose its character by reason of the nature of its receipt and state:

> The exemption is conferred, and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient, ...

In view of the above, we consider that all the provisions of S. 10 (2) (iii) are complied with in that the money concerned was borrowed and at all material times was used and continued to be used "for the purpose of the business". Certain cases were referred to in which for the purpose of assessment the business of the assessee had been split into two categories for instance, (1919) 1 K B 647[6] in which the business of a journalist and the business of an editor were divided and (1918) 2 K B 709[7] in which the business of a chemist and the business of husbandry were split. In the *Ipoh case*, 2 I T C 505,[1] the Madras and Ipoh businesses were treated as distinct. That aspect does not arise before us because Mr. Patanjali Sastri argued the case on the basis as is unquestionably the fact that only one business was carried on by the assessee. In both the English cases cited above it must be observed that the separate enterprises were of design carried on by the

3. Chettiappa Chettiar v. Commissioner of Income tax, Madras, A I R 1930 Mad 119=122 I C 349=4 I T C 188 (S B).
4. Lakshmanan Chettiar v. Commissioner of Income-tax, Madras, A I R 1930 Mad 121=124 I C 151=58 M L J 68=4 I T C 200 (S B).
5. Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraj of Darbhanga, A I R 1935 P C 172=157 I C 289=14 Pat 623=62 I A 215 (P C).
6. Commissioners of Inland Revenue v. Maxse, (1919) 1 K B 647=88 L J K B 752=120 L T 680=63 S J 429=35 T L R 348.
7. Commissioners of Inland Revenue v. William Ransom & Son, Ltd., (1918) 2 K B 709=88 L J K B 342=119 L T 369=34 T L R 533.

assessee. For instance in *Ransom's case*[7] no doubt the firm's directors could have bought their herbs in the market but they preferred to grow them themselves. Nor was there any obligation on Mr. Maxse to be a journalist as well as an Editor. But in the case before us where is the moneylender's choice? Here is the only method by which he can be repaid if further losses in the moneylending business are to be avoided. And how can agricultural land be preserved except by cultivation? The cultivation was merely a necessary incident of his involuntary possession which came to him because as a moneylender he had lent money to a borrower who could not repay in money.

It appears therefore that only by straining the Act against the assessee can he be excluded from the benefits of S. 10 (2) (iii). Apart from the fact that that is not the method of construing a taxing statute it appears there is nothing unreasonable in the result at which we arrive. The Legislature has thought fit to exclude agricultural income from the incidence of Income-tax because it has already paid the tax in another form. The position is peculiar to India and not to England and in this case we are told—and it appears to be the fact—that the assessee would be better off if he had not taken this land from the debtor and was therefore unable to realize anything in cash as he would then be able to get the benefit of S. 10 (2) (iii). The argument of the Commissioner's learned Counsel appears to be entirely based on the fact that agricultural income is not the subject of income-tax in British India for he conceded that had the repayment of the loan to the moneylender been received in the form of a number of motor cars which could be let out on hire until a favourable opportunity to sell them arose, (such profits would of course be taxable), the assessee would have been entitled to the benefits of S. 10 (2) (iii). The Commissioner has relied on 5 I T C 397.[8] In that case a receiver was appointed by the Court for the management of an estate which derived taxable and non-taxable income and the question arose what proportion of the salary of the receiver was allowable expenditure. That decision is of no assistance in this matter because it deals with income from "other sources" and S. 12 (2) which governs that decision permits a deduction of expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains. In the present case we are dealing with business and interest on capital borrowed for the business.

Since the arguments in this reference were concluded, a report of a very recent decision of the Court of Appeal has been received in this country and has been brought to our notice : (1936) 3 All E L R 975.[9] In that case the bank had a branch in London and from its floating capital had purchased 5 per cent. war loan which is tax free and 3 per cent. India Government Stock and other Securities on which the amount of the tax had been repaid on the ground that there was no residence by the assessee in the United Kingdom. It was sought by the Income-tax authorities to tax the interest on all the above securities. The authorities further denied the right of the bank to deduct the expenses incurred by the bank for the purpose of earning the income from the above securities. The Court of appeal after holding that the immunity from taxation of the above securities was absolute dealt with the question whether the expenses of the bank incurred for the purpose of earning non-taxable income were properly deducted. £41,262 was found to be the expenses attributable to the earning of the profits derived from the above-mentioned securities and it would appear that very much the same argument was advanced by the Inspector of Taxes in that case as has been advanced here. It is summarized by Lord Wright at p. 997 as follows:

> It is contended on behalf of the Crown that, if the bank get the benefit of that exemption, it should be deprived of the advantage of deducting this sum of £41,262 being the expenses attributable to the earning of the income which has been held to be immune from taxation. In other words, it is said if the corpus—that is to say, the income—is to be excluded, the accessory that is to say—the expense of earning it—ought also to be excluded. The exclusion on the one side ought to be balanced by an exclusion on the other, otherwise the taxpayer is getting a double advantage: he is getting his exemption in respect of the interest, and he is also having the additional benefit of deducting the expenses of earning that interest, just as if the interest had been included

8. Sachindramohan Gosh v. Commissioner of Income-tax, Bihar and Orissa, A I R 1932 Pat 102=136 I C 63=11 Pat 47=5 I T C 397.

9. Hughes Inspector of Taxes v. Bank of New Zealand, (1936) 3 All E L R 975.

as taxable. I confess that there seems to be great force in that argument, and if I had been able to find a warrant for giving effect to that argument in the language of the Act I should certainly have done so, because it seems to me to be both a reasonable and a proper conclusion.

With regard to this last observation of Lord Wright, as I have already pointed out in India, a special provision is made for taxing agricultural lands so that "the double advantage" referred to is not applicable here. But at p. 998 his Lordship says:

The expenses which are dealt with here by the Commissioners are interest on the money borrowed and used to purchase these particular securities, and it would be a suitable conclusion if that could be deducted.

Lord Wright rejected the contention that one part of the expenses could be eliminated and the trade as it were divided observing that there was one indivisible trade. In the present reference as already indicated the agricultural activities of the assessee were inextricably mixed with and incidental to the money-lending business. The above decision seems to support the view which we have expressed that in the absence of any express provision in the Act, the assessee is not to be deprived of the advantages conferred by exemptions such as S. 10 (2) (iii), because the capital benefiting therefrom by means of permissible deductions happens to produce a non-taxable income. It follows from what has been stated above that the answer to the first question must be in the affirmative. The answer to the second question will admittedly follow from the decision on the first and the answer to it therefore is also in the affirmative. The assessee will have the costs of this petition fixed at Rs. 250. The Rs. 100 deposited by the assessee will be refunded.

V.B.B./D.S. *Reference answered.*

A. I. R. 1937 Madras 398

VARADACHARIAR, J.

Tadikonda Ramakrishna Rao and *another* — Appellants.

v.

Kottagundu Subba Rao — Respondent.

Second Appeal No. 1271 of 1932, Decided on 11th November 1936, against decree of Addl. Sub-Judge, Masulipatam, in A. S. No. 14 of 1932.

(a) Landlord and Tenant — Merger — Tenancy of entire property — Tenant acquiring ownership of portion — Leasehold interest is not extinguished (*Obiter*).

Obiter.—If a person is a tenant of the whole of a property, acquisition by him of ownership in a portion thereof will not of itself extinguish the lease-hold interest : *A I R 1931 P C 63, Disting.* [P 399 C 2]

(b) Co-sharer — Co-owner using common property is liable to account for profits made by him in excess of his share — Co-owner merely on ground of his possession is not bound to pay occupation rent to other co-owner.

If a co-owner makes profits by the use of common property he is accountable to the other co-owner for the profits made by him in excess of his share, but it cannot be said that a co-owner in possession can merely on the ground of his possession be made liable to pay an occupation rent to his co-owners. [P 400 C 2]

K. Umamaheswaran — for Appellants.

P. Satyanarayana Rao — for Respondent.

Judgment.—This second appeal arises out of a suit for rent. The appellants are husband and wife but it will be convenient to refer to the husband who is plaintiff 1 as the plaintiff. He has a brother named Hanumantha Rao and the arrangement made by the defendant with Hanumantha Rao for the purchase of the latter's undivided half share in the suit house has been the cause of differences and disputes between the parties.

It is admitted by the defendant that, to begin with, he was a tenant of the whole of the suit house under the plaintiff who at that time is said to have acted on behalf of himself and his brother Hanumantha Rao. Later on, however, it seems to be common ground that the defendant was a tenant only of the eastern portion of the house, which is referred to as portion A in the plan. It also appears from the evidence that for some years, up to 1925, the western portion was in the occupation of another tenant, but it is stated that the western portion was much less commodious, and as it also got into disrepair it was apparently not continued to be occupied by anybody. The latest registered lease between the parties seems to have been entered into in 1918 for a period of two years, but though its term expired in 1920 the defendant admits having continued in occupation of the eastern portion presumably on the same terms as under Ex. A, till October 1926. The plaint alleged that during the interval there was a fresh arrangement for pay-

ment of enhanced rent but apparently that allegation has not been persisted in.

The dispute between the plaintiff and his brother is said to have been the result of an attempt on the plaintiff's part to treat the eastern portion of the house which is said to be the better portion of the property as having become his own and trying to force the western portion on the brother, while the brother contended that both of them were undivided and that plaintiff was not entitled exclusively to the eastern portion. The defendant apparently was induced to make some capital out of these unfortunate differences between the brothers and purported to purchase Hanumantha Rao's undivided half share in the suit property. After the defendant obtained this sale deed from Hanumantha Rao the plaintiff, on 1st November 1926, purported to transfer to his wife the eastern portion of the house treating it as his property and on 19th November 1926 the wife sent a notice, Ex. 5, to the defendant asking him to quit the house on 15th January 1927. The defendant promptly replied by Ex. 5-a stating that he did not even propose to wait till 15th January 1927 but as from the date of his purchase from Hanumantha Rao, he had in law become a co-owner of the house there was no longer any relationship of landlord and tenant between themselves. He no doubt says that the sale by the plaintiff to his wife was collusive and nominal, but it certainly does not lie in the plaintiff's mouth to say that it was not open to the wife to give that kind of notice.

The claim in the plaint was that the defendant was bound to pay rent as from 30th August 1926, but alternatively the claim was also put forward as one for damages for use and occupation. The written statement raised the plea foreshadowed in the reply notice, Ex. 5-a. It was also stated that rent had in fact been paid to the plaintiff up to 31st October 1926. The rent suit was in the first instance filed in the Masulipatam Sub-Court as a Small Cause Suit. Within 5 or 6 weeks after its institution, the defendant on the strength of the sale deed obtained by him from Hanumantha Rao filed a suit for partition of the suit house in the District Munsif's Court. The rent suit was accordingly transferred to the Munsif's Court and the two suits were tried together.

In the partition suit both the Courts upheld the plea that there was no partition between the brothers, that the present plaintiff was therefore not entitled in his own right to the eastern portion of the suit house and that the present defendant was entitled to have the house partitioned between himself and the plaintiff. I understand that that decree has now become final. Proceeding on the above basis, the Courts below have held that after 10th November 1926 the defendant was in possession as a co-owner and not as a tenant nor as a trespasser and that therefore he was not liable to pay any rent or damages to the plaintiff. A decree was given for a small sum representing the rent between 31st October 1926 to 10th November 1926. The plaintiff has filed this Second Appeal claiming that he is entitled to rent even in respect of the period subsequent to 10th November 1926.

On behalf of the appellants, three contentions have been urged before me. It was first contended that the purchase by the defendant from Hanumantha Rao will not bring about a merger of the leasehold and the vendee's interest because the purchase was only of a half-share. Reliance was placed in support of this contention on the decision of the Judicial Committee in 6 Luck 197.[1] As a proposition of law there can be little doubt that if a person is a tenant of the whole of a property the acquisition by him of ownership in a portion thereof will not of itself extinguish the leasehold interest. In the Lucknow case the tenant was sought to be treated as having forfeited the tenancy and incurred liability to account for the full profits of the property to his co-sharers. The facts stated in the judgment show that he had a term lease and the tenant insisted that as long as the term lasted his co-sharers must only be deemed to have purchased the right to receive the rent and there was no extinction of the lease by merger. I do not see how that question arises in the present case. Apart from the doctrine of merger, if this was a case in which the defendant held possession of the whole house as lessee, it may be open to the plaintiff to contend that after the pur-

1. Fakir Baksh v. Murli Dhar, A I R 1931 P C 63=131 I C 334=58 I A 75=6 Luck 197 (P C).

chase by the lessee of a half-share in the house the defendant should continue to pay to the plaintiff a proportionate share of the rent in respect of the other half on the principle laid down in S. 37, T. P. Act. But as I have already stated it is not the plaintiff's case that the defendant was a tenant of the whole house. No question therefore of merger or apportionment arises in the case.

The next contention on behalf of the appellants was based upon the observations in Mulla's Hindu Law, pp. 295, etc, with reference to the rights of a purchaser of an undivided share in an item of joint family property from a co-parcener. The learned author points out the different views obtaining in the various High Courts as to the right of such a purchaser to obtain possession or to remain in possession. Here again it is unnecessary for me to express any opinion on the point on which there is so much divergence of judicial opinion. For one thing, the plaintiff in this case all along insisted that he was entitled to a portion of the house exclusively ; there was accordingly no question of his claiming to recover the house for the family. Again Sir D. F. Mulla himself points out that even in cases in which a decree for ejectment has been given against the purchaser in possession it has been the practice to grant a stay of execution till the purchaser files a suit for partition of the property in which he has purchased a share. As I have observed already, a partition suit was instituted in the present case within five or six weeks of the institution of the rent suit. So far as the claim to recover rent is based upon the defendant's character as tenant, it is difficult to see how it could be maintained that the defendant occupied that status in the face of the notices Exs. 5 and 5-a. By Ex. 5 the plaintiff's wife presumably with the knowledge of the plaintiff purported to terminate the tenancy by notice to quit as from 15th January 1927. As the original period of the registered lease had long ago terminated, the defendant must have been in possession subsequent to 1920 only as a tenant from month to month. If the defendant had acquiesced in Ex. 5 it will be impossible to treat him as in the position of a tenant after January 1927. But he was prepared to throw up his tenancy even on an earlier date as shown by Ex. 5-a and he relied on his title by purchase. Whether that purchase entitled him to remain in possession or not is another matter, but in view of Exs. 5 and 5-a it is impossible to treat the parties as continuing to retain the relationship of landlord and tenant after that date.

As for the alternative claim for damages for use and occupation, I do not see how in the face of the finding in the partition suit that the present defendant was entitled to a half-share in the house, the defendant could be held liable for damages. It is one thing to say that he could have been ejected and that his only right was to sue for partition, but it is a different thing to make him liable for mesne profits as a person in possession without title, and as I have stated already the partition suit was filed very shortly after the institution of the suit for rent. Lastly, the appellant's learned counsel suggested that as the eastern portion, that occupied by the defendant, represented more than a half-share which the defendant would have been entitled to, the plaintiff was entitled to claim some payment as from a co-owner who has received a larger share of the profits than he would be entitled to. The authorities, no doubt, recognize that if a co-owner makes profits by the use of common property he is accountable to the other co-owner for the profits made by him in excess of his share, but no authority has been brought to my notice in which a co-owner in possession can merely on the ground of his possession be made liable to pay an occupation rent to his co-owners. It is not suggested that the plaintiff wanted to occupy the property and was prevented from so doing by the defendant. In these circumstances, I do not see any reason to differ from the conclusion reached by the Courts below. The Second Appeal fails and is dismissed with costs. Though points of law have been attempted to be argued before me I am not satisfied that they really arise on the facts. I therefore refuse leave to appeal.

C.R.K./B.D. *Appeal dismissed.*

A. I. R. 1937 Madras 401

VARADACHARIAR AND HORWILL, JJ.

P. S. Venkatarama Ayyar—Appellant.

v.

K. P. Sarvothama Rao—Respondent.

O. S. Appeal No. 35 of 1936, Decided on 12th October 1936, from order of Lakshmana Rao, J., D/- 2nd April 1936.

(a) Companies Act (1913), S. 185—Scope of —Discretion is with Court — Elaborate enquiry is not contemplated.

Section 185, Companies Act does not contemplate an elaborate enquiry but the discretion must be left to the Court to decide whether any particular claim can or cannot be conveniently dealt with under S. 185. [P 401 C 2]

(b) Companies Act (1913), S. 185—Liquidator claiming amounts overdrawn by managing agent—Managing agent ceased to be so at time of liquidation but submitting to jurisdiction of Court by way of making counter claims against claims of liquidator—Objection to jurisdiction cannot be raised in appeal—True test is whether money claimed came into hands as managing agent—Managing agent bound to refund although he had ceased to be so at time of liquidation.

In the liquidation proceedings the Official Liquidator applied under S. 185, Companies Act claiming certain amounts from the managing agent that were overdrawn by him. The managing agent first claimed to retain certain sums against those amounts but on finding his counter claim disallowed by the trial Court, in appeal he took exception to the application on the grounds that he was not liable to refund because at the time of liquidation he was no longer a managing agent and secondly that S. 185 was not applicable:

Held: that real test was whether the money claimed against the agent came into his hands as the managing agent. As the amounts had come into his hands as the managing agent he was liable to refund them although he had ceased to be the managing agent at the time of liquidation, and secondly as he had originally submitted to jurisdiction he could not take exception to the applicability of S. 185 at a later stage: *A I R 1933 Lah 437, Rel. on*; *In re Palace Restaurants, Ltd., (1914) 1 Ch 492 Ref.* [P 401 C 2; P 402 C 1]

K. Rajah Aiyar and *T. M. Venugopala Mudaliar*—for Appellant.

K. Ramanatha Shenoi and *K. P. Sarvothama Rao*—for Respondent.

Varadachariar, J.—In the course of the winding up of the South Indian Film Corporation Limited, the Official Liquidator took out an application under S. 185, Companies Act, for a direction to the Managing Agent Mr. P. S. Venkatarama Ayyar that he should pay up immediately a sum of Rs. 5,400 odd representing the amount overdrawn by him from the Company while he was in charge as Managing Agent. The Managing Agent by his counter affidavit claimed: (1) that he was entitled to retain a sum of Rs. 2,800 towards arrears of salary due to himself; (2) that he was also entitled to two sums of Rs. 976-0-9 and Rs. 1,083 which were according to him improperly debited against him on the 15th November 1935; and (3) that he was entitled to retain moneys which might be required to enable him to meet the expenses of certain suits filed against him as Managing Agent. The learned Judge has disallowed these claims and given a direction for payment as asked for by the Liquidator. Hence this appeal by the Managing Agent.

An objection was taken before us on behalf of the appellant that the case is not one that can be dealt with under S. 185, Companies Act, as it is not the intention of the Legislature that matters in respect of which there is a contest should be dealt with under that section. Stress was laid upon the use of the words 'prima facie' in the section and reference was made to certain observations in (1914) 1 Ch 492[1] at p. 500, and to a concession said to have been made by Counsel in 8 Lah 549[2] at p. 551. A point was also made of the fact that the appellant has ceased to be the Agent of the Company from November 1935, i. e. even before the date of the commencement of the liquidation proceedings. We are not satisfied that these considerations exclude the application of S. 185 to the case in 14 Lah 68.[3] It is true the section does not contemplate an elaborate enquiry but the discretion must be left to the Court to decide whether any particular claim can or cannot be conveniently dealt with under that section. The observation in (1914) 1 Ch 492,[1] itself lends some support to this conclusion, because the learned Judge in that case actually held that as the counter claimant had submitted to the jurisdiction of the Court it was not open to him to take exception to the proceedings at a later stage. In the same way, we may point out in this case also, the appellant did not take exception to the maintainability of the application under S. 185 in the lower Court, but was only

1. *In re* Palace Restaurants, Ltd., (1914) 1 Ch 492 =83 L J Ch 427=110 L T 534=21 Manson 109=58 S J 268 =30 T L R 248.
2. Billimoria v. Mrs. C. M. De Souza, A I R 1926 Lah 624=97 I C 783=27 P L R 676= 8 L L J 376=8 Lah 549.
3. Haribans Prasad Ayodhya Prasad v. National Sugar Mills, Delhi, Ltd., A I R 1933 Lah 437 =142 I C 766=14 Lah 68=34 P L R 388.

anxious and we daresay rightly anxious that his claims to credit under various heads should be considered. We do not also think that the mere fact of his having ceased to be an agent before the commencement of the liquidation proceedings excludes action under S. 185. It seems to us the test is whether the money now claimed came into his hands in his character as agent or not. It is not denied in the present case that the money did so come into his hands. (Their Lordships after deciding the various claims proceeded.) It is represented that the decree in the suit brought by the Kodaks Ltd., was passed only subsequent to the date of the application to the lower Court. We do not think we will be justified in dealing with an application of this kind as if it were an ejectment suit and seek to ascertain the rights of the parties only as on the date of the initiation of the proceedings. It will probably be in the best interests of all concerned to direct that accounts be taken up to 1st November 1936, in respect of such of the items as the appellant will be entitled to retain either under the terms of S. 217, Contract Act, or the terms of Cl. 10 of the agreement and Art. 191 of the Articles of Association and the balance alone out of the amount claimed by the liquidator be directed to be paid to him as the amount 'prima facie' payable by the appellant to the liquidator in these proceedings. As the appellant has failed in part and has succeded in part so far as this appeal is concerned, we do not make any other order as to costs in this appeal except that the Official Liquidator will be entitled to take his costs of this appeal out of the estate.

C.R.K./B.D. *Order accordingly.*

A. I. R. 1937 Madras 402

VARADACHARIAR, J.

Karia Nachi Bivi — Appellant.

v.

Allapichai and *others* — Respondents.

Second Appeal No. 913 of 1932, Decided on 2nd December 1936, against decree of Dist. Court, Tinnevelli, in A. S. No. 91 of 1931.

(a) Court-fee — For purposes of calculation allegations in plaint must be taken as prima facie correct — Even suspicion that plaint is so drafted as to show that higher court-fee is unnecessary will not justify departure from this rule.

Even where there is room for some suspicion that a plaint has been so drafted as to avoid inconvenient facts and make it appear that it is not necessary to pay a higher court-fee than that paid in the first instance, such a suspicion will not justify the departure from the principle that for purposes of the calculation of court-fee, the Court must take the allegations in the plaint to be prima facie correct. [P 402 C 2]

(b) Court-fees Act (1870), S. 7, Cl. (5)—Suit for possession of property — Property in alienee's possession—Court-fees must be paid under Cl. (5)—That alienee may retain possession by proper partition cannot be pleaded to avoid court-fee under Cl. (5).

When a person sues for possession of properties some in possession of alienor and some in that of alienee, he must pay court-fee under S. 7, Cl. (5), Court-fees Act, in respect of the property in possession of the alienee. It cannot be contended that he should not be called upon in the first instance to pay court-fee under Cl. (5), S. 7 in respect of that property on the ground that it may be possible finally to allow the alienees to remain in possession of those properties by allotting them the share of the alienor. The proper basis for the court-fee is that the plaintiff asks for possession from the alienee. [P 403 C 1]

T. L. Venkatarama Iyer—for Appellant.

T. M. Ramaswami Ayyer and *Miss M. A. Janaki* (Court guardian) — for Respondents.

Judgment.—The second appeal raises a question as to the court-fee payable on the plaint. There is no doubt room for some suspicion that the plaint has been so drafted as to avoid inconvenient facts and make it appear that it is not necessary to pay a higher court-fee than the plaintiff paid in the first instance. But I do not think that even such a suspicion will justify the departure from the well established principle that for purposes of the calculation of court-fee, the Court must take the allegations in the plaint to be prima facie correct. On the pleadings in this case, I think a distinction ought to be drawn between the properties which have admittedly been alienated by defendant 1 and properties which are in his possession in his own right. So far as the former set of properties is concerned, the plaintiff cannot claim to treat the alienee's possession as the possession of a co-tenant and for this purpose it can make no distinction even if physical possession of such properties happens to be with defendant 1 himself as the result of any arrangement between defendant 1 and the alienees. But as regards the properties which have not been alienated by defendant 1, I am

not able to agree in the view taken by the Courts below, because in paras. 5 and 6 of the plaint there is a distinct allegation that defendant 1 has all along been giving either 15 kottahs or 11¼ kottahs of paddy as representing the share of the income due to the plaintiff's predecessor in title and to the plaintiff.

As regards the documents referred to in paras. 8 and 9 of the plaint, the Court must leave it to the plaintiff to decide whether or not she is prepared to take the risk of insisting on proceeding with the suit without a prayer to have them set aside. If she is right in her contention that they are totally inoperative and they may be ignored, there is no reason for calling on her to pay any court-fee in respect of an implied prayer relating to them. If on the other hand it turns out that without getting them set aside the plaintiff cannot succeed in this suit she takes the risk of the suit failing, having so framed the plaint as not to ask for necessary declarations. In the circumstances of the case I can only say that any Court will be justified in refusing to show any indulgence to the plaintiff if later on the plaintiff prays for any amendment of the the plaint according to eventualities. As matters now stand, the plaintiff is entitled to insist that the court-fee should be assessed on the basis on which she has framed her plaint. I must therefore set aside the orders of the Courts below and send the case back to the trial Court with directions to receive the plaint on payment of court-fee under Art. 17 (b), Sch. 2 so far as the unalienated properties in the possession of defendant 1 are concerned and on payment of court-fee under Cl. 5, S. 7 in respect of the plaintiff's share of the properties which have been alienated by defendant 1.

Mr. Venkatarama Ayyer contends that even in respect of the alienated properties, the plaintiff should not be called upon in the first instance to pay court-fee under Cl. (5), because it may be possible finally to allow the alienees to remain in possession of those properties by allotting them to the share of the alienor. I do not think that this consideration can be taken into account in dealing with the question of court-fee. The proper basis is that the plaintiff asks for possession from the alienee but that the alienee may in certain circumstances have an equitable right to ask the Court so to work out the partition as to leave him if possible in possession of the alienated properties. In this view I cannot accede to Mr. Venkatarama Ayyer's contention that Cl. (5) ought not to be applied to any part of the plaintiff's claim. The trial Court will, with all convenient speed, assess the court-fee payable on the plaint on the above basis. Costs of the second appeal and of the appeal to the lower appellate Court will abide the result of the suit in the trial Court. The court-fee paid on the memorandum of appeal to the lower appellate Court and on the memorandum of second appeal here will be refunded.

C.R.K./B.D. *Order set aside.*

A. I. R. 1937 Madras 403

KING, J.

Ramalingachi Reddi and *others* — Appellants.

v.

Elayyaperuma Goundan and *others* — Respondents.

Second Appeal No. 50 of 1933, Decided on 8th January 1937, against Sub-Judge, Salem, in A. S. No. 41 of 1930.

Civil P. C. (1908), S. 9—Claim to lead horse and hold "kalasam" in certain festival—Claim held one for doing duties of an "office" — Suit held maintainable — Office held could be without emoluments having money value.

The plaintiffs in a suit claimed the right to lead a horse and of holding the "kalasam" when the festival of Selli Amman was held and that as a reward for these religious services they were entitled to receive the honours (ceremonial gifts of pansupari) before any other worshippers received them. The question raised was whether the suit was maintainable under S. 9, Civil P. C. :

Held : that though what the plaintiffs claimed to do might be "an act of worship" and "a right in a religious ceremony" yet it was the performance of the duties of an office even though that "office" might have been in abeyance whenever no festival was held and might have had no other duties attached to it and hence the suit was maintainable : *9 M L J 355* and *28 Mad 23, Distinq.* ; *11 Mad 450, Foll.* [P 404 C 2]

Held further : that there could be an "office" without emoluments which possessed a definite money value : *15 Cal 159* ; *A I R 1917 Mad 903* and *A I R 1927 Cal 783, Foll.* [P 404 C 2]

K. S. Desikan — for Appellants.

S. S. Ramachandra Iyer — for Respondents.

Judgment. — The two plaintiffs in this suit claimed certain rights and honours in connexion with the Selli Amman festivals in Thammampatti (Salem District). Plain-

tiff 1 claimed that he had the right to lead a horse whenever this festival was held, and plaintiff 2 the right of holding the "kalasam" and both claimed that as reward for these religious services they were entitled to receive the honours (ceremonial gifts of pansupari) before any other worshippers received them. These rights were declared by the first Court and an injunction granted against the defendants. In appeal the learned Subordinate Judge of Salem upheld the 1st plaintiff's rights but refused to recognize those claimed by plaintiff 2. His decree in favour of plaintiff 1 was also to some extent modified. It omitted the injunction and added a condition that if plaintiff 1 should fail or refuse to lead the horse the defendants might make other arrangements for holding the festival. Against such of the decree as was unfavourable to them the two plaintiffs have filed this second appeal, and there is a memo of cross-objections by three of the respondents. The memorandum of cross-objections raises the main issue in the case, viz., whether plaintiff's suit is maintainable. This issue has to be decided with reference to the language of the Explanation to S. 9, Civil P. C., which runs as follows :

> A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies ;

and the question at issue clearly resolves itself into this : "Does the leading of the horse, or the holding of the kalasam in this festival, form part of or the whole duty of any 'office' ?"

It is argued for the respondents that what plaintiff 1 or plaintiff 2 claims to do is not the duty of an office or the rendering of any service in the ordinary sense of the word. The plaintiffs are not temple servants, they receive no remuneration which has any financial value for what they do, and they cannot be compelled to do it. In support of this argument I have been referred to two cases 9 M L J 355[1] and 28 Mad 23,[2] in which an exclusive right was claimed to recite sacred texts at festivals. A distinction was drawn in these rulings between "an office" and "an act of worship" or "rights in religious ceremonies" and the recitations of sacred texts was held to fall within the latter category. But a very important feature of both cases was this—that the plaints were filed on behalf of a large community of worshippers — and the learned Judges who decided them point out how absurd it is to say that a vast fluctuating body of worshippers can hold any "office" connected with a temple. In the present case no such difficulty exists. The plaintiffs are individuals, and though what they do may be "an act of worship" and what they claim may be "a right in a religious ceremony" I am unable to see how it may not also be the performance of the duties of an office even though that office may be in abeyance whenever no festival is being held and may have no other duties attached to it. Amongst the large number of cases cited by both sides the true parallel to the present case appears to me to be that reported in 11 Mad 450.[3] There the exclusive right claimed was the right to present to certain persons at a certain festival a gold crown and some sacred water, and it was held that the distributing of the water and the serving of the crown themselves amounted to an office. This decision has never been overruled, and in my opinion applies to the facts of this case far more cogently than 9 M L J 355[1] and 28 Mad 23[2] can be held to do.

It is finally argued for the respondents that even if the leading of the horse can be called an "office" in the sense that it is the performance of an act of religious service, it still cannot be an "office" because there can be no office without emoluments, and emoluments which possess a definite money value. This argument however cannot be sustained in the face of 15 Cal 159,[4] 4 M L W 562[5] and 54 Cal 614.[6] These are the only authorities amongst those cited which seem to me to require discussion, and their examination shows clearly enough that the learned Subordinate Judge was right in holding that this suit was maintainable. The memorandum of cross-objections is therefore dismissed with costs. The appeal requires very little discussion. Plaintiff 1

1. Srinivasa Thathachariar v. Srinivasa Aiyangar, (1899) 9 M L J 355.
2. Subbarayamudaliar v. Vedantachariar, (1905) 28 Mad 23=14 M L J 171.
3. Srinivasa v. Tiruvengada, (1888) 11 Mad 450.
4. Mamat Ram Bayan v. Bapu Ram Atai Bura Bhakat, (1888) 15 Cal 159.
5. Thirumalai Alwar Iyengar v. Srinivasachariar, A I R 1917 Mad 903 = 36 I C 568=31 M L J 758=4 M L W 562.
6. Debendra Narain v. Satyacharan Mukerji, A I R 1927 Cal 783 = 105 I C 188 = 54 Cal 614.

can have no real quarrel with the clause of the decree which provides for the possibility of his wilful refusal to perform the duties of his office and the case for or against plaintiff 2's claim has been decided entirely upon an appreciation of oral evidence with which I cannot interfere in second appeal. All that I think is necessary in plaintiff 1's interests is to restore to the decree the injunction which restrains the defendants from interfering with the exercise of his rights. Except for this slight modification the appeal also is dismissed with costs. Leave to appeal granted. The costs having been set down to be spoken to this day, the Court passed no order.

C.R.K./B.D. *Appeal and cross-objections dismissed.*

A. I. R. 1937 Madras 405

CORNISH, J.

Madura Mills Co., Ltd. — Petitioner.

v.

N. M. S. Krishna Ayyar — Opposite Party.

Civil Revn. No. 819 of 1936, Decided on 24th November 1936, from order of Dist. Court, Madura, D/- 20th July 1936.

(a) Arbitration Act (1899), S. 12 — Award — Extension of period — Court can extend period of its own accord — Arbitration proceedings unduly delayed — But Court refusing leave to revoke submission — Extension of period is only alternative.

Section 12, Arbitration Act, enables the Court to enlarge the time for making an award, whether the time for making the award has expired or not. There is nothing in the section to suggest that the Court should not exercise this power unless it has been expressly asked by a party to do so. So where arbitration proceedings are unduly delayed but the Court thinks fit to refuse leave to the petitioner to revoke the submission, there is no other alternative but to extend the time for the making of the award. [P 405 C 2]

(b) Arbitration Act (1899), S. 5—Revocation—Arbitrators not having jurisdiction—Party to submission can apply for revocation—Refusal of Judge to decide question of jurisdiction amounts to failure to exercise jurisdiction.

If a matter in dispute is not within the jurisdiction of arbitrators the proper remedy to a party to the submission is to apply to the Court for leave to revoke the submission. Question of jurisdiction is essentially a question which a Judge should decide and his refusal amounts to a failure to exercise his jurisdiction: *Faviell* v. *Eastern Counties Ry. Co., 2 Ex 344* and *East and West India Dock Co.* v. *Kirk, 12 A C 738, Ref.* [P 405 C 2; P 406 C 1]

(c) Companies Act (1913), S. 152—Arbitration — Shareholder has no right against company to refer dispute to arbitration.

Section 152, Companies Act, empowers a Company to refer to arbitration an existing difference between itself and any other Company or person. But a share-holder of a Company has no such right against the Company. [P 406 C 2]

King and *Partridge* — for Petitioner.

T. M. Ramaswamy Iyer — for Opposite Party.

Order. — The petitioner in this Revision Petition is the Madura Mills Co., Ltd. It presented a petition in the District Court of Madura under S. 5, Arbitration Act, for leave to revoke a submission to arbitration. The main grounds of this petition were firstly, that the arbitration proceedings had been unduly delayed, and secondly, that the arbitrators had no jurisdiction to entertain the submission to arbitration. The learned District Judge has considered the second of these grounds, but he left it undecided. He did however find that there had been inordinate delay. Undoubtedly there had been, seeing that the arbitration began in 1932 and no award had been reached by 1936. But he thought that after so much labour it would be better to give an extension of time for the making of the award. I think that this was a matter entirely within the discretion of the learned Judge. S. 12, Arbitration Act, enables the Court to enlarge the time for making an award, whether the time for making the award has expired or not. There is nothing in the section to suggest that the Court should not exercise this power unless it has been expressly asked by a party to do so. If the Court thought fit to refuse leave to the petitioner to revoke the submission, there was no other alternative but to extend the time for the making of the award. But the other ground of the petition, viz., the want of jurisdiction of the arbitrators, went to the very root of the matter. The learned Judge has disposed of it in this paragraph:

Whether it is a case falling under Art. 113 of the Articles of Association or not is itself a question that has been raised before the arbitrators as would be seen from the pleadings, Exs. A and B. It has to be decided by them, and there is no use urging this as a ground of revocation of the submission. It is true that the point was raised by the petitioner Company in the written statement, but no such objection was raised when the company nominated their arbitrator.

I think it was essentially a question which the learned Judge should have

decided, and his refusal amounts to a failure to exercise his jurisdiction. If a matter in dispute is not within the jurisdiction of arbitrators the proper remedy to a party to the submission is to apply to the Court for leave to revoke the submission. That was the ruling of Baron Alderson in (1848) 2 Ex 344.[1] In 12 A C 738[2] at p. 744, Lord Halsbury, in the course of the arguments, stated that there was no doubt that the Court had jurisdiction to give leave to revoke a submission if there was reasonable ground for supposing that an arbitrator was going wrong in point of law even in a matter within his jurisdiction. There is therefore no doubt that the Court has the power to give leave to revoke the submission to arbitration in this particular case, and that this is the appropriate remedy if the Court is satisfied that the submission was ultra vires the particular provision of the Company's Articles of Association under which it purported to have been made. The Article in question is Art. 113 which says:

> The managers shall not take any proceedings at law against any member or members of the Company; nor shall any member or members take any such proceedings against the managers or against any other member or members with reference to the affairs of the Company or in consequence of any dispute arising out of them; but the same shall be left to the arbitration of any person to be jointly agreed upon between the parties in dispute and failing so to agree then of two arbitrators (one to be appointed by each party).

There is no question that the present respondent is a member of the Company, or that his dispute is "with reference to" or "arising out of" the affairs of the Company. The dispute arises out of the refusal of the Company, acting through its managers, to recognize a transfer of the respondent's shares and its neglect to send the respondent the share certificate and a cheque payable to him in respect of the transaction whereby the respondent's shares in a Company known as the Pandiyan Company were taken over by the Madura Co. The crucial question is whether his dispute is with the Company or with the managers of the Company; and this is by no means the same thing. There are no directors of the Madura Mills Co. Art. 69 provides that the affairs of the Company shall be managed by the managers and there shall be no Directors; and Art. 70 says that the managers of the Company shall be the person or persons for the time being constituting the firm of A. & F. Harvey. It is clear from the respondent's case, as put forward in his plaint, that his claim is against the Company. Throughout this document it is "the defendant Company" whose conduct is impeached, and it is the defendant Company that he seeks to make liable for damages. Para. 22 summarizes his case:

> The plaintiff states that the defendant Company has by its unreasonable conduct and unjustifiable delay caused enormous loss to the plaintiff. The plaintiff by reason of the said conduct of the defendant Company could not completely settle his debts in 1929 and there was loss of interest on the amounts held back by the defendant Company and enormous interest accrued due to the plaintiff's debts and plaintiff put to enormous loss. The defendant Company had no reason or justification of any sort not to have sent the share certificates to the plaintiff as above stated after 25th November 1929 and the defendant Company is liable to make good the loss sustained by the plaintiff.

This is not a dispute with the managers or a claim against the managers. The dispute is, no doubt, in respect of something which the managers neglected to do; but the managers are not the Company. The claim is against the Company, and the determination of such a claim by arbitration at the instance of a member of the Company is not within the purview of Art. 113. Apart from this Article the respondent has no power to compel a submission to arbitration of a dispute arising out of the affairs of the Company. S. 152, Companies Act, empowers a Company to refer to arbitration an existing difference between itself and any other Company or person. But a shareholder of a Company has no such right against the Company. I am therefore of opinion that the respondent's submission of his claim to arbitration was ultra vires Art. 113, and that consequently the petitioner is entitled to have the submission revoked. The Civil Revision Petition is accordingly allowed with costs.

C.R.K./B.D. *Petition allowed.*

1. Faviell v. Eastern Counties Ry. Co., (1848) 2 Ex 344=6 D & L 54=17 L J Ex 223.
2. East and West India Dock Co. v. Kirk, (1887) 12 A C 738.

A. I. R. 1937 Madras 406

PANDRANG ROW, J.

In re *Kanda Moopan* — Accused.

Criminal Revn. No. 801 of 1934 and Ref. No. 54 of 1936, Decided on 27th November 1936, referred for orders of High Court by Dist. Magistrate, Ramnad, in his letter, D/- 30th October 1936.

Criminal P. C. (1898), S. 35—Order directing sentences of imprisonment in default of fines to run concurrently is illegal.

It is not competent for the Court to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. Such order, if passed is illegal ; such direction can only be given in respect of sentences of imprisonment or transportation : *5 S L R 263* ; *A I R 1929 Sind 179* ; *A I R 1926 Bom 62* and *A I R 1926 Bom 416, Rel. on.* [P 407 C 1]

Parakat Govinda Menon for *Public Prosecutor* — for the Crown.

Order. — The question raised in this reference by the District Magistrate of Ramnad is whether a criminal Court is competent to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. The section that relates to this subject is S. 35, Criminal P. C., and the words of the section show that the direction can be given only in respect of sentences of imprisonment or transportation. The point appears to be covered by authority as will be seen from the decisions in 15 I C 808,[1] A I R 1926 Bom 62,[2] A I R 1926 Bom 416[3] and 118 I C 224,[4] the last three cases being rulings by Benches of the High Courts concerned. It follows therefore that the direction of the Sub-Magistrate in this case to the effect that the sentences of imprisonment awarded by him in default of payment of the fines imposed by him should run concurrently is illegal and it is therefore cancelled.

C.R.K./K.B. *Order accordingly.*

1. Imperator v. Akidullah, (1912) 5 S L R 263=15 I C 808=13 Cr L J 536.
2. Emperor v. Subrao Sesharao, A I R 1926 Bom 62=91 I C 543=27 Cr L J 111=27 Bom L R 1351.
3. Shidlingappa Gurulingappa v. Emperor, A I R 1926 Bom 416=96 I C 270=27 Cr L J 926=28 Bom L R 668.
4. Emperor v. Ghulam Ahmed, A I R 1929 Sind 179=118 I C 224=1929 Cr C 452=30 Cr L J 907.

A. I. R. 1937 Madras 407

BEASLEY, C. J.

Perumal Mudaliar — Petitioner.

v.

South Indian Railway Company, Ltd. —Opposite Party.

Civil Revn. No. 603 of 1935, Decided on 17th November 1936, from decree of Dist. Munsif, Coimbatore, D/. 8th December 1934.

Experts—Evidence of experts, subject to certain exceptions, must be oral and by going into witness box—Mere report or certificate by him cannot be evidence.

The evidence of experts must be given in the ordinary way. Subject to certain exceptions—those exceptions being amongst others the certificates of the Imperial Serologist touching the matter of blood stains and of the Chemical Examiner, which are made admissible in evidence by themselves—it is quite obvious that the opinion of an expert must be given orally and that a mere report or certificate by him cannot possibly be evidence. Unless he goes into the witness box and gives oral evidence, there can be no cross-examination of the expert at all. [P 408 C 2]

R. Rangachari and *V. Seshadhri*—for Petitioner.

S. S. Ramchandran—for Opposite Party.

Order.—This is really a comparatively simple case although a great deal has been made of it here and certainly one part of the case, although it does not affect the matter, gives rise to a considerable amount of discussion. With that I will deal later.

The suit was filed by the petitioner against the South Indian Railway Company claiming a refund of an excess charge levied by the Company at Podanur on a consignment of 200 bags of cocoanut oil cakes and also a charge made for demurrage as well. There was also a claim for interest. The bags were consigned at Rajahmundry on 20th September 1932, the destination of the consignment being Podanur. The bags arrived at Podanur and on 27th September 1932 a sum of Rs. 159-14.0 was tendered as freight for the bags by the petitioner to the Railway Company. The Company refused to deliver the consignment to the petitioner unless an excess charge of Rs. 90.8.0 was paid and also a smaller sum of Rs. 7-15.0 for demurrage. On 29th September 1932 the amount of excess charge and demurrage was paid by the petitioner under protest and delivery of the bags taken. The goods when they were put on the railway for carriage at Rajahmundry were certified by the consignor in the risk-note as being "intended for manurial purposes and for inland use only, not intended for shipment". A declaration (Ex. 3) was also given by the consignor to the following effect :

This is to certify that the consignment of 200 bags oil cake booked under Invoice No. 3 of 20th September 1932, Rajahmundry to Podanur, and loaded in E. I. R. C. G. No. 27300 is for manurial purposes and for inland use only and not intended for shipment.

As before stated, the consignment arrived at Podanur and the Railway Company, having reason to suppose that these oil cakes were not going to be used for the purpose set out in the certificate but as cattle fodder, under Rr. 15 and 20, South Indian Railway Company Ltd., Goods Tariff, Part 1, re-classified the consignment and called upon the consignee to pay the excess charge which the Railway Company are entitled under R. 20 to levy. The question in the lower Court was whether in fact there had been an incorrect description of the consignment given by the consignor at Rajahmundry. The question of description is one of considerable importance because if the oil cakes were intended for the purposes of manure as was stated the consignment would have applied to it a lower rate, namely, the C.FF rates whereas, if the oil-cakes were for other purposes, a higher rate, namely, that ultimately levied by the railway company, would have to be applied. The learned District Munsif after hearing the evidence of the petitioner's witnesses which he describes as not being very convincing held that the petitioner had not established his case, namely, that these goods were correctly described in the certificate and the declaration to which I have already referred. He accordingly dismissed the suit. Then a further point was taken, namely, that the Railway Company was not entitled after the acceptance of the declaration at the forwarding station to re-classify the goods consigned. Upon this point he was in favour of the Railway Company, and obviously quite rightly, having regard to Rr. 15 and 20 to which I have already referred and, I imagine, every commonsense principle. Here it has been contended that there was no evidence before the District Munsif upon which he could hold that there had been a misdescription of these goods at Rajahmundry; in other words, the learned District Munsif was bound to accept the plaintiff's oral evidence and that of his own witnesses upon this point, there being no evidence at all to the contrary called on behalf of the Railway Company.

It is here that the matter to which I first referred at the beginning of my judgment arises. At the trial the following documents were put in and marked as exhibits, on behalf of the Railway Company, namely, a report made by a Claim Inspector of the South Indian Railway to the Company touching this matter setting out the result of his enquiries and the opinions of others and his own with regard to the use of cocoanut oil cakes in Coimbatore and elsewhere. This report was marked as Ex. 6. Two letters were put in, Exs. 7 and 7-a, the former being from the Chief Commercial Superintendent of the Railway Company to the Director of Agriculture, Madras, and the latter being the reply from the Director of Agriculture giving his opinion upon the question put to him touching the matter of these oil cakes. I am amazed to see that those documents were allowed to be exhibited without the writers of them being called to give evidence if they were tendered, as apparently it is contended they were, as forming the opinion of experts. But Ex. 6, the report of the Claims Inspector, cannot be regarded as expert evidence on the question as to the use of oil cakes since the report is based purely upon hearsay evidence though the opinion of the Director of Agriculture is certainly the opinion of an expert but this evidence being only documentary is clearly inadmissible. The evidence of experts must be given in the ordinary way. Subject to certain exceptions—those exceptions being amongst others, the certificates of the Imperial Serologist touching the matter of blood-stains and of the Chemical Examiner, which are made admissible in evidence by themselves—it is quite obvious that the opinion of an expert must be given orally and that a report merely or certificate by him cannot possibly be evidence. Unless he goes into the witness box and gives oral evidence, there can be no cross-examination of the expert at all.

Most amazingly these documents were allowed to be marked as exhibits without any sort of objection by the pleader for the petitioner and had he raised the objection, which it was his duty and right to do, then the Railway Company would have been given time, I have no doubt, to call the experts in question. No such objection was ever taken; and, quite apart from that, even without an objection, it seems to me that the learned District Munsif was quite wrong in allowing those documents to be marked at all as exhibits in the case. This matter—no objection having been taken to the evidence—I thought at one time would justify me in remanding the case for a further finding of fact after the respondent Company had

been given an opportunity of putting forward the evidence in the regular way by means of witnesses. But having gone through the evidence adduced on behalf of the petitioner, I entirely agree with the learned District Munsif that the petitioner did not show that the certificate Ex. 3 given was a correct one and that the description that the goods were intended for use as manure was a correct description. He could have shown this by producing evidence to show that the oil cakes had in fact been put to that use but, although the evidence was given two years after the consignment was taken delivery of at Podanur, no such evidence was forthcoming. The plaintiff was bound to prove that this particular consignment was used for the purpose of manure. It would not have availed him, and in fact his evidence did not go to anything like that length, to show that some other consignment of cocoanut oil cakes had been used for that purpose.

As I read the evidence, account books were kept but no account books were produced in order to show that this consignment was used for the purpose of manure or was sold to somebody for use for that purpose. No evidence whatever worthy of the name has been called to show how that consignment was dealt with by the petitioner after he had taken delivery of it. On the facts, therefore, the petitioner failed to prove his case. On the question of law, I am clearly of the opinion that the learned District Munsif was right in holding that the Railway Company was entitled to re-classify the goods in the manner it did. I had presented to me an argument which completely ignored Rr. 15 and 20, South Indian Ry. Co., Ltd., Goods Tariff, Part. 1, and proceeded to the length of stating that when once a Railway Company has accepted goods and the certificate and the declaration made as to the nature, quality and description of the goods, then thereafter even if the Railway Company discovers that the certificate is false and the description is wrong and that the goods ought to have had applied to them a higher rate, it is not entitled to charge the higher rate. Quite apart from the fact that this amazing proposition is not supported by any authority in point, were that to be the law, then fraud would be made easy. For example a person could consign goods enclosed in a securely packed chest and give to them a certain description and without opening the case the Railway Company would be unable to say at the time the consignment is made whether the goods answer to the description or not. If the Railway Company accepts the goods as being of that description, it does so on the assumption that the description is correct. If it finds that the description is otherwise, it is entitled to its remedy.

Apart from this obvious right there are Rr. 15 and 20. R. 15 lays down that the Railway reserves the right of re-measurement, re-weighment, re-classification and re-calculation of rates, terminals and other charges and correction of any other errors at the place of destination and of collecting any amount that may have been omitted or undercharged and that no admission is conveyed by a railway receipt that the weight as shown therein has been received or that the description of goods as furnished by the consignor is correct. How the argument addressed to me could possibly be presented with any hope of success in view of the latter words of this rule I cannot understand. R. 20 provides that if on arrival at destination it is found that the goods have been improperly described and that a lower rate than that correctly applicable has been thereby obtained, charges at double the highest rate in force (viz. Cl. 9) will be levied, calculated on the entire distance over which the consignment has been carried. I may here mention that no double rate was in fact levied by the company but all that the company did was to levy the rate which is properly applicable to that particular consignment, it being a consignment which could not be carried under the C.FF rates. This disposes of the case entirely. Both on the facts and upon the law the petitioner's suit rightly failed and this Civil Revision Petition must be dismissed with costs.

C.R.K./S.C. *Petition dismissed.*

A. I. R. 1937 Madras 409

VARADACHARIAR, J.

Karuppa Goundan and *another* — Appellants.

v.

Jagannmandalathipathi Gopanna Mudaliar — Respondent.

Second Appeals Nos. 28 and 29 of 1933, Decided on 12th November 1936, against decree of Dist. Judge, Coimbatore, in A. S. Nos. 218 and 219 of 1931.

Madras Court of Wards Act (1 of 1902), Ss. 52 and 8 — Scope — Third parties cannot take advantage of provisions in Ch. VI of Act —They are primarily meant for benefit of ward — Suit by Collector on behalf of ward filed without previously obtaining sanction of Court of Wards — Collector taking upon himself responsibility of obtaining necessary sanction — Similar suits filed by Collector with necessary sanction — Collector held acted in accordance with proceedings of Court of Wards and also of S. 52 of Act— —Suit held proper.

The provisions of Ch. VI, Madras Court of Wards Act, are not provisions which third parties can take advantage of. They are primarily meant for the benefit of the ward, and not for the benefit of third parties, though some of them may impose restraints upon third parties in the interests of the ward. The provisions in S. 52 can by no means be regarded as taking away the jurisdiction of the civil Court to deal with the matter whatever responsibility a Manager might incur if he should institute a suit in contravention of the provisions of S. 52. The proviso to that section, that to avoid the bar of limitation a Manager may file a suit even before obtaining the sanction of the Court of Wards, is itself an indication that restrictions of this kind cannot reasonably be regarded as a matter going to the jurisdiction of the civil Court. The authorization required by S. 52 is no doubt stated to be one from the Court of Wards, but S. 8 provides not merely that the Court may exercise its powers through the District Collectors but also that it may confer its powers on any such Collector. Even though the sanction of the Court of Wards is necessary for the institution of any suit on behalf of the ward before the suit is filed, still when the Court of Wards has approved the institution of a suit and the draft plaint to be filed in it, Collectors may themselves authorize the institution of suits in similar and connected cases arising subsequently. [P 410 C 2; P 411 C 1]

The Court of Wards sanctioned the institution of suits on behalf of the ward in respect of some items of land; and in respect of one item sanction was not then found necessary as the person against whom the suit was to be filed was expected to execute a lease in respect of the land in his possession, but on his not having done so, the Collector instituted a suit in respect of the said item without obtaining the sanction of the Court of Wards before the suit was filed, taking upon himself the reponsibility of obtaining sanction for the same :

Held : that inasmuch as the suit instituted by the Collector without the necessary sanction was similar to those instituted previously with the sanction of the Court of Wards the action of the Collector in instituting the suit was in accordance with the proceedings of the Court of Wards and the suit could be held to have been instituted in accordance with the provisions of S. 52 of the Act. [P 411 C 1]

V. V. Srinivasa Iyengar and *V. V. Ramadurai* — for Appellants.

V. K. Thiruvenkatachari — for Respondent.

Judgment.—The two second appeals arise out of suits in ejectment instituted on behalf of a minor whose estate is under the management of the Court of Wards. The questions of fact arising in the case are concluded by the concurrent findings of the Courts below. The only question of law raised in these second appeals is that referred to as point No. 1 in para. 2 of the lower appellate Court's judgment, namely, whether in view of the provisions of S. 52, Court of Wards Act, these suits are maintainable in the absence of express sanction from the Court of Wards. I may at the outset state that I am not by any means satisfied that the provisions of Ch. VI, Court of Wards Act, are provisions which third parties can take advantage of. They are primarily meant for the benefit of the ward, and not for the benefit of third parties, though some of them may impose restraints upon third parties in the interests of the ward. The provision in S. 52 can by no means be regarded as taking away the jurisdiction of the civil Court to deal with the matter, whatever responsibility a Manager might incur if he should institute a suit in contravention of the provisions of S. 52. The proviso to that section, that to avoid the bar of limitation a Manager may file a suit even before obtaining the sanction of the Court of Wards, is itself an indication that restrictions of this kind cannot reasonably be regarded as matters going to the jurisdiction of the civil Court. It is not however necessary to come to any final conclusion on this aspect of the matter, because the documentary evidence in the case suffices to establish that the suit has been instituted with the proper authority. The authorization required by S. 52 is no doubt stated to be one from the Court of Wards but S. 8 provides not merely that the Court may exercise its powers through the District Collectors but also that it may confer its powers on any such Collector.

As regards institution of suits on behalf of the ward, the provision in R. 137 of the Madras Court of Wards Manual is to the effect that when difficult or doubtful points of law or special important issues are involved, the Manager should obtain the sanction of the Collector before instituting the suit and whenever in the Collector's opinion, the matter is of sufficient importance, the Court's sanction should be obtained. Even if the above had stood by itself, an authorization by the Collector would be good because the rule leaves it to his discretion as to whether or not he

should obtain the Court's sanction in a particular case. In the notes to that Rule, reference has been made to proceedings No. 3674 dated 14th November 1893 and to proceedings No. 43 dated 4th September 1911, the result of which is stated as follows :

When the Court of Wards has approved the institution of a suit and the draft plaint to be filed in it, Collectors may themselves authorize the institution of suits in similar and connected cases arising subsequently.

This is apparently what happened in the present case. Ex. M shows that the Collector has been in correspondence with the Court of Wards in respect of steps to be taken for the recovery of several items of land belonging to the temple under the management of the Ward. Suits were sanctioned in respect of some items but it was apparently expected at that time that in respect of one item now in suit a litigation might not be necessary if the present defendant in O. S. 920 of 1929 would agree to execute a lease in respect of the land in his possession. This was apparently not done and hence both the suits now before me had to be instituted. Ex. M-1 shows that the District Collector took upon himself the responsibility of sanctioning the institution of these two suits. Reading Exs. M and M-1 together, it is obvious that the Collector acted in accordance with the Court of Wards proceedings above set out, because there can be very little doubt that these suits are similar to the ones whose institution had been sanctioned by the Court of Wards as recorded in Ex. M. The lower appellate Court was therefore right in holding that the suits have been instituted in accordance with the provisions of S. 52, Court of Wards Act. The second appeals accordingly fail and are dismissed with costs. (Leave to appeal is refused).

C.R.K./K.B. *Appeals dismissed.*

A. I. R. 1937 Madras 411

VARADACHARIAR AND HORWILL, JJ.

K. G. Ponnappa Nadar and *another*— Appellants.

v.

Thenazhi Parakkalati and *others* — Respondents.

Appeal No. 242 of 1930, Decided on 7th October 1936, against decree of Sub-Judge, Ottavalam. in O. S. No. 18 of 1928.

Evidence Act (1872), S. 106—Bailor bringing suit against bailee for loss of property bailed based on negligence—If loss of property is prima facie evidence of negligence, burden of proof lies upon bailee to disprove negligence — S. 106 however casts duty on bailee to give reasonable explanation of loss when no prima facie inference of negligence can be drawn—Distinction in cases of loss of goods and loss of animals stated.

There is no general exception to the rule that the person who alleges negligence must prove it. In an action against a bailee for loss of property bailed to him, if the loss of property is *prima facie* evidence of negligence, then the burden of proving that loss was not due to his negligence lies upon the bailee under S. 106, Evidence Act.
[P 415 C 2; P 416 C 2]

But where no *prima facie* inference of negligence can be drawn, even though it is not incumbent upon the bailee to prove a negative case that he was not negligent when the bailor on whom the burden lies fails to prove negligence, S. 106 of the Act, however casts a duty on the bailee to give a reasonable explanation how the accident occurred, inasmuch as it is clearly inequitable to call upon the bailor who has no personal knowledge as to how the accident happened to prove a positive case of negligence when the bailee has failed to set forth the circumstances leading to the accident.
[P 418 C 2; P 419 C 1]

There is a clear distinction between cases, where there is loss of goods and loss of animal. In case of loss of goods the fact of loss is itself *prima facie* evidence of negligence but in case of loss of animals it is not so. If the manner of loss is known, then it would be possible whether or not it leads to a *prima facie* inference of loss by neligence. [P 413 C 2; P 416 C 2]

A. Krishnaswamy Ayyar and *C. S. Swaminathan*—for Appellants.

T. M. Krishnaswami Ayyar and *P. Govinda Menon*—for Respondents.

Varadachariar, J.—The material facts have been set out in my learned brother's judgment and I need not re-state them. The paucity of reliable evidence in the case has compelled us to base our decision almost wholly on our view as to the burden of proof; and as the question was argued before us at some length, I have thought it right to make a few observations on that point. The lower Court has dealt with the case on the footing that:

The burden of proving that the elephant died when in the possession of the defendant, notwithstanding the exercise of that care which in law he was bound to take is upon him.

On behalf of the appellant, the learned Advocate-General argued that an action between bailor and bailee was no exception to the general rule that the party seeking to recover compensation must make out that the party against whom he complains was in the wrong. On the other hand Mr. T. M. Krishnaswami Iyer (the learned

counsel for the respondents), maintained that as a bailee, the defendant was under no obligation to restore the thing bailed at the termination of the bailment and it is for him to excuse himself by proper reasons, if he is unable to restore the thing bailed. Stated in the above simple form, both the propositions are true enough; but in their practical application, they have to be modified in the light of other principles coming into play in varying circumstances. Even after allowing for the inter-action of different principles according to circumstances, it is by no means easy to reconcile the dicta found in numerous cases on this question of burden of proof.

Story in his 'Law of Bailments' noticed these discrepancies in the authorities : *see* S. 410. The learned editor on Edn. 8 of that work attempted a reconcilation of the authorities in an elaborate foot-note but the editor of Edn. 9 felt that the authorities were not easily reconcilable and pointed to a difference in the trend of decisions between the English and the American Courts. In (1919) 1 K B 443,[1] Bankes, L. J. draws attention to the difference in the points to be proved, according as the bailor brings an action of detinue or of trover or on the case for negligence: *see* Story, Para. 213. This classification may, to some extent, help to reconcile apparently divergent dicta. If the action was one of detinue it was well established that a bailee who was unable to restore the bailed goods would not be permitted to plead his negligence any more than his wrongful act in justification of his inability: 141 E R 33.[2] In the absence of explanation by the bailee, the loss was taken to be the result of want of due care and attention : *see also* Story on Bailments, Para. 278. Even when the action is one based on negligence, there are observations to be found in the judgments of eminent Judges suggesting that the onus lies on the bailee to disprove negligence. In (1927) 2 K B 432[3] at p. 436, there is a dictum quoted by Wright, J. from the judgment of Atkin, L. J. in (1925) 21 Ll L Rep 310,[4] to the effect that :

> It is wrong to say that the onus on the bailee to prove absence of negligence does not arise until the bailor has first shown some negligence on the part of the bailee.

As the report is not available to me, I have not been able to examine the context in which the above observation of the learned Lord Justice occurs. On the other hand, the learned Advocate-General contended before us on the authority of (1887) 12 A C 41[5] that it is not sufficient for the plaintiff merely to prove negligence on the part of the defendant but he must also prove that that negligence caused or materially contributed to the injury complained of. This last proposition does not however seem applicable as between bailor and bailee, in view of the decision of the House of Lords in *Morison* v. *Walton* (unreported) referred to and followed in (1915) 1 K B 73[6] and (1919) 1 K B 443.[1] These authorities seem to establish that in cases in which negligence or breach of duty on the part of the bailee is established, the onus lies on the bailee to show that the negligence or default did not cause the loss. On this point, the Court of appeal in (1915) 1 K B 73[6] reversed the judgment of Pickford, J. As to the extent of the initial burden lying on the plaintiff, even the recent authorities are not precise or uniform. The observation of Lord Halsbury in *Morison* v. *Walton* as quoted in (1915) 1 K B 73[6] at p. 88 is couched in very broad and general terms :

> The bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment ; the proof of that rested upon him.

Similar language is used by Buckley, L. J. on the same page. The observations of Lord Loreburn in the unreported case are however qualified by reference to the circumstances of the case. The learned Advocate-General drew our attention to the observations of the Judicial Committee in 27 C L J 615[7] at p. 619, where their Lordships say that the learned trial Judge was wrong in holding that

> it was incumbent upon the defendant company to satisfy him that they had taken such care of the goods as a man of ordinary prudence would take of his own goods.

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1. Coldman v. Hill, (1919) 1 KB 443=88 LJKB 491=120 LT 412=35 TLR 146=63 S J 166.
2. Reeve v. Palmer, (1858) 141 E R 33=5 C B N S 84=28 L J C P 168=7 W R 325=5 Jur N S 916.
3. Gossee Millard v. Canadian Government Merchant Marine, Ltd. (1927) 2 K B 432=43 T L R 544=71 S J 681=32 Com Cas 291.
4. The Ruapehn, (1925) 21 Ll L Rep 310.
5. Wakelin v. L. & S. W. Ry. Co., (1887) 12 A C 41=56 L J Q B 229=55 L T 709=35 W R 141=51 J P 404.
6. Travers and Sons, Ltd. v. Cooper, (1915) 1 K B 73=111 L T 1088=20 Com Cas 44=30 T L R 703=83 L J K B 1787=12 Asp M C 561.
7. Dwarkanath v. Rivers Steam Navigation Co., Ltd., A I R 1917 P C 173=46 I C 319=27 C L J 615 (P C).

Referring to S. 106, Evidence Act, their Lordships add :

> It was therefore right that the defendant company should call the material witnesses who are on the spot (as it seems to have done) ; but this provision of the law of Evidence does not discharge the plaintiffs from proving the want of due diligence or (expressing it otherwise) the negligence of the servants of the defendant company. It may be for the company to lay the materials before the Court, but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant company have not shown due care, skill and nerve.

See also 47 Cal 6[8] at page 25. The above statement of the law by the Judicial Committee is binding upon us, and as we have come to the conclusion that even judged by this test, the appellant has not discharged the obligation laid on him by S. 106, Evidence Act, it is not necessary for us to exmine the other cases to which Mr. Krishnaswami Iyer drew our attention. He suggested that as this judgment of the Board was delivered by Sir Walter Phillimore, the observations occurring in this judgment must be interpreted in the light of the decision of the Court of appeal in (1915) 1 K B 73[6] to which also Sir Walter Phillimore was a party. But the judgment of Phillimore, L. J. in that case deals not with the initial onus but with a later stage. On page 97, he observed that :

> When the bailee of goods has to admit that the goods have been damaged while in his custody and in the absence of the custodian, and it is found that the absence was improper and negligent and that that very absence makes it difficult to determine what was the cause of the damage, and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage.

Dealing with the English authorities generally, I may observe that they all purport to be based on the judgment of the Exchequer Chamber, in 159 E R 665=3 H & C 596,[9] and the very first proposition there stated is: "there must be reasonable evidence of negligence". The Court however went on to add that :

> Where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care.

See also (1933) P 154[10] at pp. 169 & 170, and Bevan on Negligence, 4th Edn., p. 971.

As pointed out in Bevan on Negligence, Ch. 3 the application of the principle, *res ipsa loquitur* will explain why in several cases the burden is cast on the defendant almost from the beginning. In the application of this maxim, there is a difference between animals and goods ; because, in the case of the latter, they have no power of motion in themselves and the very fact of motion, disappearance or loss argues negligence in the bailee : *see* Bevan on Negligence 4th Edn., Vol. 1, p. 124 and Story on Bailments, para. 406. This distinction was recognized by the Privy Council in 3 P C 115[11] at p. 122, though in a different connexion. This distinction must be borne in mind when the Court is called upon to presume that the death of an animal must be the result of negligence on the part of the bailee (*cf.* the authorities noticed in Bevan on Negligence, Vol. II, pp. 972, 973). 83 I C 151[12] is not really analogous to the present case. There is no doubt a general observation on p. 154 that on proof of loss of the thing bailed

> the law presumes negligence to be the cause and casts upon the bailee the burden to show that the loss is due to causes consistent with due care on his part.

This observation must be understood in the light of the authorities above referred to. The actual decision rests on S. 161, Contract Act, because the animal hired was not returned at the proper time and died when in the custody of the hirer after he had made default. That the liability of the hirer in such circumstances is heavier will be seen from the discussion in paras. 413 (c) and (d) of Story on Bailments : *see also* Bevan on Negligence, p. 970, and A I R 1932 All 584.[13] It only remains to add a word of caution in respect of the use of observations found in judgments relating to the liability of railway companies. In India actions against these companies have to be dealt with in

8. Dekhari Tea Co. v. Assam Bengal Railway Co., Ltd., A I R 1920 Cal 758=57 I C 406=23 C W N 998=47 Cal 6.
9. Scott v. London Dock Co., (1865) 3 H & C 596=159 E R 665=34 L J Ex 220=11 Jur (N S) 204=13 L T 148=13 W R 410.
10. The Kite, (1933) P 154=102 L J P 101=149 L T 498=49 T L R 525=46 Ll L Rep 83.
11. Moffatt v. Bateman, (1870) 3 P C 115=22 L T 140=6 Moore P C (N S) 369.
12. Kush Kanta v. Chandra Kanta, A I R 1924 Cal 1056=83 I C 151=28 C W N 1041.
13. Secretary of State v. Kesheo Prasad Sheo Prasad, A I R 1932 All 594=139 I C 381=1932 A L J 788.

the light of the provision expressly enacted in S. 76, Railways Act, that it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused. Even when such actions have to be decided on general principles (especially in cases of torts) the Court has to proceed on the footing that as these companies act under statutory authority, they cannot be called upon to observe precautions which the Legislature has not thought fit to enjoin: (1887) 12 A C 41[5] at p. 46. On the facts, I concur in the opinion expressed by my learned brother as to the nature and effect of the evidence in the case. I only wish to add that Mr. T. M. Krishnaswami Iyer rightly laid stress upon the omission of the defendant to produce the accounts which D. W. 5 swore he kept, because, according to his own evidence, those books would show when and for how many days the elephant worked, when and for how many days it did not work and when and for what purpose D. W. 6 was called in. The information gatherable from the account books under the above heads would have a very important bearing on at least three of the points material to the case, namely the complaint of overworking, i. e., working the animal for more than 20 days in the month as provided for in Ex. A, the possibility of the animal having been unable to work on account of illness for sometime before its death, and the truth of the story of D. W. 6 having been paid for conducting a post mortem examination. This omission seems to me sufficient even by itself to warrant the conclusion that the defendant has not discharged the duty imposed on him by S. 106, Evidence Act. He cannot in the circumstances take shelter under the argument that the plaintiff did not summon him to produce the account books, because under S. 106 the duty of full disclosure lies on the defendant. The importance of the books was sufficiently stressed by plaintiff's counsel during the course of the cross-exnmination of D. W. 5 and the defendant, if only he so chose, had ample time to cause the production of the books before the case closed.

I must refer to another circumstance on which also Mr. Krishnaswami Iyer was, in my opinion, justified in relying, namely, the haste with which the carcase was buried : *see* the observations in Bevan on Negligence, Vol. 1, on page 134 with reference to *Rooney* v. *Allans*. It is not disputed that it was buried on the evening of 8th October itself. It is not as if there was any particular necessity for such haste as the animal died in a forest and not in the vicinity of a town. Defendant's witnesses admit that they had not even obtained the usual written permission of the State Authorities before burying it in a portion of the reserved forest. It not being the defendant's case that the plaintiff could have had any other information as to the animal's illness or death than that conveyed by the telegrams F and FI, it would have been reasonable in the circumstances that the defendant's men should have given the plaintiff an opportunity of inspecting the animal at least after its death so as to satisfy himself that there had been nothing wrong on the part of the defendant's men. Defendant and his witnesses realized the force of such an argument and they accordingly state that a man sent by the plaintiff reached the forest before the evening (before the post mortem was completed) and satisfied himself that the animal died of heart disease. They would have it that the telegrams F and FI which were addressed to the defendant at Olavakkot were sent on by him to the plaintiff (who was living several miles away) early enough on the 8th noon to enable him to send a man to reach the forest before the evening ; but in view of the hours noted on the telegrams, the distances to be covered, and the means of communication available, I am not prepared to accept this story. It seems more probable that the plaintiff's man was able to reach the spot only on the next day as the plaintiff swears. The learned Advocate-General commented upon the omission of the plaintiff to examine the individual whom the defendant's witnesses named as the person that was present on the plaintiff's behalf at the post mortem. But here again Mr. Krishnaswami Iyer points out that if, as D. W. 5 swears, his account books will contain entries relating to amounts paid by him for the expenses of plaintiff's man who is said to have come to the forest on the 8th evening, the production of those books would have been the best way of disproving the plaintiff's version. I agree that the appeal must be dismissed, except for the small modification in the form of the decree. I also concur in the order proposed by my learned brother as to the costs of the appeal.

Horwill, J.—By the written contract Ex. A, dated 12th March 1927, the defendant took an elephant on hire from the plaintiff, for one year from 13th March 1927, and sent it to the forest for timber hauling. A few days later one of the mahouts, Narayanan Nayar, sent with the elephant, left. In September, so the learned Subordinate Judge finds, the other mahout Velayudhan Chetty left. On 8th October 1927 the elephant died. The plaintiff's case is that the elephant was grossly underfed and overworked and had lost its life on that account. The defendant on the other hand contends that after the plaintiff's mahouts left, he was unable to find any man who was able to manage the elephant; for it was of bad temper and got excited at the presence of strangers. He alleges that on 6th October 1927 the animal died suddenly, of heart failure. The Subordinate Judge of Ottapalam seemed disinclined to accept the plaintiff's story that the elephant died of overwork but found that it had died of exposure to the heavy monsoon rains. He was of opinion that the burden of proving how the animal had died rested on the defendant as bailee and he not having put forward a satisfactory account of the animal's death, the suit was decreed. Hence this appeal by the defendant.

It is not necessary to refer to the numerous cases which lay down the common law principle that a person who alleges negligence must prove it; for we do not think that Mr. T. M. Krishnaswami Iyer for the plaintiff would deny that in general the principle holds good. This principle applies also when the action is on a contract; for the person alleging a breach of contract by negligence has of course to prove it. Mr. T. M. Krishnaswami Iyer, however, argues that there is an exception to that general rule when property is entrusted to a bailee. There is, however, no warrant for such a contention either in the Contract Act or in any of the cases quoted before us. No case that we have seen has been decided on the simple ground that a bailee is liable for any accident to the article bailed unless he can prove that the injury resulted through no fault of his own. It is argued on behalf of the respondent that S. 161, Contract Act, lays this burden upon the bailee; but it clearly does not. S. 161 lays down the common law rule that a bailee who retains an article after the period for which it has been bailed does so at his own risk and is liable for the loss, destruction or deterioration of the goods after the period has elapsed, even though such loss, destruction, or deterioration has occurred through no fault of his. The many cases quoted by Mr. Krishnaswami Iyer in support of his contention that the onus of proving that there was no negligence rests always upon the bailee may be divided into two groups. The first relates to articles lost by the bailee. Such cases are 22 Mad 524,[14] 25 C L J 37,[15] 50 All 246,[16] 39 Bom 191,[17] and 91 I C 963,[18] in which the responsibility of a bailee for the loss of the article bailed was considered. We do not refer to certain other cases quoted where there was a loss by a common carrier; for in such cases the bailee has much greater liability. In all the cases referred to above where there has been any discussion of the principles which govern liability, it has been clearly explained that the reason why the burden is thrown on the bailee is that the fact of the loss is itself prima facie evidence of negligence; and it is incumbent on the bailee to rebut that presumption of negligence. In 22 Mad 524,[14] for example, the defendants were unable to explain the loss of 816 tons of coal. Benson, J. says:

> The defendants contend that the plaintiffs must show affirmatively that the defendants were guilty of negligence. It seems to me that no evidence could establish the defendants' negligence more clearly and affirmatively than a bare statement of the fact that in the short space of a hundred days they lost no less than 640 tons of coal in their sole custody without being able to give the slightest explanation of its loss.

In 50 All 246,[16] where there was a theft from a railway wagon, it was pointed out that the manner of the loss was within the peculiar knowledge of the railway and that they must therefore prove that the loss was not due to negligence on their part. In (1919) 1 K B 443,[1] some cows were lost by a bailee, who made no attempt to recover them at all.

14. Trustees of the Harbour, Madras v. Best & Co., (1899) 22 Mad 524.
15. Surendra Lal v. Secretary of State, A I R 1918 Cal 892=43 I C 263=21 C W N 1125=25 C L J 37.
16. Sheo Narain v. E. I. Ry. Co., A I R 1928 All 103=108 I C 691=50 All 246=25 A L J 996.
17. Hirji Khetsy & Co. v. B. B. & C. I. Ry. Co., A I R 1914 Bom 154=25 I C 241=39 Bom 191=16 Bom L R 467.
18. Gauri Mal Narain Das v. Secretary of State, A I R 1926 Lah 217=91 I C 963.

The Court observed that he should have informed the police and the plaintiff, that he was negligent in not doing so, and that as it could not be presumed that if he had done his duty the animals would not have been found, it was held that he was liable. The leading English case on the subject of loss of an animal is 9 C & P 632=173 E R 987,[19] where it is made clear that the mere loss of the dog was prima facie evidence of negligence. Of the other batch of cases relied on by Mr. T. M. Krishnaswami Iyer dealing with loss by accident, that case on which he places most reliance, and which has been discussed in considerable detail by the learned Subordinate Judge is (1915) 1 K B 73,[6] where a servant negligently neglected to tie up a barge. At low tide the barge sank in the mud and when the tide rose again the goods were submerged and damaged. There it was held that the failure to tie up the barge was negligence and such negligence might have caused the sticking of the barge in the mud. As the bailee had therefore been negligent and that negligence might have caused the loss, it was incumbent upon the bailee to prove the damage did not in fact result from that negligence. The reasons given by the Judges who tried this case are clear enough; but great reliance has been placed upon quotations in the judgment from Lord Loreburn in *Morison* v. *Walton* and from Lord Halsbury in an unreported case. The quotation from Lord Loreburn is that :

> A bailee who had omitted to take a necessary precaution should not be permitted to saddle upon the parties who had not broken the contract the duty of explaining how things went wrong.

It appears that in that case a barge had been towed across the Atlantic and that there was no man on board it. The barge sank and there was no explanation at all how the accident happened. It was held that the bailee should have kept a man on board the barge and it was quite probable that if he had done so this accident would not have happened. The burden of proving that the accident was not the result of this negligence was therefore upon the bailee. The quotation from Lord Halsbury is :

> It appears to me that there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment. The proof of that rested upon him.

As it was an unreported case we have unfortunately not been able to refer to it; but it seems most unlikely that any such general principle was laid down which was intended to have universal application. If a bailee were always liable for any loss that might occur to goods while in his custody unless he could prove absence of negligence, there would have been no need either in this case or in the other cases quoted to us for a lengthy discussion of the law relating to bailees. As already pointed out, no case has been decided on this simple ground. In 26 Cal 398[20] which was an appeal to the Privy Council from 24 Cal 786,[21] prima facie evidence of negligence was presumed from the fact that a fire broke out inside a ship in a place where it would seem that it could hardly have occurred without negligence on the part of those in management of the ship. It is thus seen that there is no general exception to the rule that the person who alleges negligence must prove it, and the question therefore that has to be decided in this case is whether the death of the elephant was itself prima facie evidence of negligence. We do not think so, for animals, like men, are heirs to a thousand diseases, and it would be most unreasonable to conclude from the mere fact of death, whatever the age of the animal might be, that it was due to some form of negligence; and we do not find any warrant for such a conclusion from any of the cases quoted. If the manner of death is known, it is possible for a Court to say whether or no it would lead to a prima facie inference that the animal died of negligence. For example, in 9 All 398,[22] a horse died through rupture of the diaphragm, resulting from severe exertion soon after taking a substantial meal. This seemed to the learned Judges who tried the case prima facie evidence of negligence to take reasonable precautions not to overwork an animal immediately after a full meal; and so the person in whose charge the animal was, was called upon to give some reasonable

19. Mackenzie v. Cox, (1840) 9 C & P 632=173 E R 987.

20. Rivers Steam Navigation Co. v. Choutmull Doogar, (1899) 26 Cal 398=26 I A 1=3 C W N 145 (P C).

21. Choutmull Doogar v. Rivers Steam Navigation Co., (1897) 24 Cal 786=1 C W N 201.

22. Shields v. Wilkinson, (1887) 9 All 398=1887 A W N 44.

explanation of the animal's death which would not lead to a necessary inference that there was negligence. As he was able to give such a reasonable explanation it was found that the burden was again shifted upon the plaintiff to show that the death resulted from negligence.

In Bevan on Negligence, Edn. 2, p. 970 the question was discussed and the learned author writes that ordinarily the burden of proving injury to an animal lies upon the bailor; but that if the article was returned in such a state that negligence would ordinarily be presumed, then the burden was on the bailee. He illustrated this principle with reference to two cases. In the first a horse was returned with broken knees (i. e., the skin of the knees had been abraded) and it was held that such an abrasion was not prima facie evidence of negligence, as such an injury could result to the horse by its tripping and falling, even though it was proved that the animal was not in the habit of so tripping. Where however a horse was returned with some unusual injury, such as a gash in its side, which could not result from an ordinary use of the horse, the burden was upon the bailee to prove that this injury did not result from negligence on his part. Story, after pointing out the difficulties in deciding upon whom the burden lay in question of bailment, discussed the difference between the French and the English law and explained that under the French law the person in possession of an animal that met with an injury or death was bound to show that that injury or death did not result from any negligence on his part; whereas English law threw the burden of proof on the bailor. The burden of proving that the elephant died of negligence therefore rests upon the plaintiff. The evidence in this case with regard to the circumstances which led to the death of the elephant, is most unsatisfactory. None of the witnesses seems to be satisfactory or to have made an attempt to put before the Court the whole truth. The plaintiff, to prove the case of negligence, has examined only P. Ws. 3 and 7, P. W. 8 deposing only that he saw the animal fall and that at that time there was a large log of wood near by. P. W. 3 is one of the mahouts sent by the plaintiff with the elephant. He deposes that he remained with the elephant until September, although the defendant would have it that he left as early as June. We agree with the learned Subordinate Judge that in this respect at least his evidence is probably true. We cannot however agree with the learned Subordinate Judge that the two mahouts Narayanan Nayar and P. W. 3 were sent away by the servants of the defendant in order that the latter might illtreat the animal with impunity. A person who has to use an animal for as long a period as a year would not deliberately neglect the animal in such a way that its usefulness for the work required would be materially impaired. Narayanan Nayar left within a few days of his arrival and we find that an agent of the defendant writes a letter (Ex. B) on 16th April 1927, to the plaintiff in which he says that the elephant did 19 days' work during the previous month, that Narayanan Nayar had gone away after doing only two days' work, that on account of that he had to go off urgently and bring two other men, and that he is very greatly perturbed because P. W. 3 says that he must go away too. He says that if P. W. 3 goes away it will not be possible for anyone there to untie the elephant or make it work, and he asks the defendant to prevent P. W. 3 from leaving. P. W. 3 was a very experienced mahout and had been for 14 years the keeper of this elephant, and it seems to us most unlikely that even in September the defendant would have deliberately sent him away. If, as the learned Subordinate Judge suggests, P. W. 3 had been sent away in order to facilitate the overworking of this animal P. W. 3 would assuredly have gone to the plaintiff, who would himself necessarily have taken steps to protect his own animal. P. W. 7 states that he was the mahout of another elephant but D. W. 7, an owner of an elephant said to have been cared for by him (P. W. 7), has been examined to show that P. W. 7 is to a great extent a liar, and the learned Subordinate Judge has not felt inclined to attach any weight to the evidence of P. W. 7. P. W. 8's evidence was intended only to suggest that the elephant had been put to hard labour; but the evidence of the various officials shows that there is no timber of such a size as was said by P. W. 8 to have been drawn by the elephant. The learned Subordinate Judge seems to have been of opinion that the elephant was not overworked, and we are not satisfied that there is any satisfactory evidence that it was. We do not think that the plaintiff would have done

nothing at all if his elephant had been grossly overworked and underfed and his own servants sent away in order to render this easier. The learned Subordinate Judge has given a gratuitous finding that the elephant died of exposure in the forest but we find no reason for thinking that an elephant would suffer by being exposed to the monsoon. Moreover, the finding of the lower Court that the elephant was working until September is inconsistent with this theory; for the monsoon must have ended by that time. We therefore find that the plaintiff has failed to make out a positive case of negligence.

We are not however prepared to agree with the learned Advocate-General that the defendant, who through his agents had the care of the animal, was entitled to fold his arms and leave it entirely to the plaintiff to prove his case. Only the servants of the defendants are in a position to inform the Court of the conditions under which the elephant lived and died. The Court would have liked to have known for example what food was given to the animal, how much work it was given, what happened to it after P. W. 3 left, who was then looking after it, when it first began to show signs of a failure of power to do its work, when it became definitely sick, what was done for the animal when it first began to show signs of serious illness, under what circumstances it met with its death, and what steps the servants of the defendant took to care for it. There is evidence by the defendant and P. W. 3 and P. W. 7 supports him in that respect, that the elephant had been showing some disinclination to work for some time before its death. Even in a case of heart disease, as the evidence of the Veterinary Surgeon (P. W. 6) would show, an animal would show certain symptoms of illness for some time before its death; and we feel sure that the illness of this elephant was not so sudden as the defendant would make out. We also think it extremely unlikely that after Velayudhan Chetty left, the animal was not worked at all. Even at the first, new mahouts had been brought in; and they would surely have become accustomed to the animal, and he to them, by the time Velayudhan left. The defendant has examined a Veterinary Officer of the Cochin State who claims to have conducted a post mortem examination and to have found that the animal died of a long-standing heart disease. The learned Subordinate Judge has discussed his evidence at considerable length and he saw the witness in the witness box; and we are not prepared to disagree with him that the evidence of this witness is quite unreliable. For the reasons given by the learned Subordinate Judge, and in particular because in the suit notice no mention was made of this post mortem and its result, we do not believe that a post mortem examination was held. We further feel it to be unlikely that the defendant's agent Kochappu would have incurred the considerable expenditure of Rs. 60 for the examination without the defendant's consent. D. Ws. 8 and 9 are the only other witnesses who claim to have an intimate knowledge of the working of the elephant, but D. W. 9 says that he left immediately after Velayudhan. The lower Court came to the conclusion that these witnesses were not working in the forest at all and that their evidence is of no value. We are not prepared to disagree with this finding. The only other evidence giving intimate details of the life of the elephant is that of D. W. 3, a kariasthan of the defendant. D. W. 1, the head clerk of the defendant, went occasionally to the forest; and it was he who brought the Veterinary Officer. Three forest officials, D. Ws. 3, 4, and 10, said that they casually visited the scene of the timber hauling operations and found the elephant tied up. Their evidence has been discredited by the learned Subordinate Judge, and it would not be very valuable even if accepted.

It is true we think that the defendant was not called upon to meet any case that was not put forward by the plaintiff in his pleadings, nor was it incumbent on him to prove a negative case that he was not negligent; but we are not satisfied that he frankly put before the Court the material within his peculiar knowledge, that would give the Court some idea of the condition of the animal and the work done or neglected by it during the period that it was with him. Even in two of the cases quoted by the learned Advocate-General on the question of the primary burden of proof in an action on negligence, the duty of the bailee cast upon him by S. 106, Evidence Act, is referred to. For example, in (1933) P 154,[10] a case decided in favour of the bailee, it was pointed out that the plaintiff had to put forward a reasonable explanation of the accident.

In 27 C L J 615[7] the suit barge was tied to another, which caught fire, the fire spreading from one barge to the other, with the result that certain goods which were the subject of the suit, were destroyed. This case was quoted by the learned Advocate-General to show that the burden lies upon the bailor to prove negligence by the bailee and that is what their Lordships held in that case. It was argued before them that under S. 106, Evidence Act, the duty lay upon the defendant to explain the accident, the facts of which were known to him alone, in such a way as to prove that they were not negligent. Their Lordships agreed that a duty was cast upon the bailee under S. 106, Evidence Act; but they thought that the bailee had given a reasonable explanation of how the accident happened and that explanation should be accepted in the absence of proof by the plaintiff that negligence had occurred. A reasonable explanation is all that was required from the defendant in this case; but we cannot say that he has given one. It is only after the defendant, as bailee, has given a reasonable explanation of how the accident happened, that the plaintiff is called upon to prove a positive case of negligence. It would clearly be inequitable to call upon the bailor, who could have had no personal knowledge of how the accident happened, to prove a positive case of negligence when the bailee has failed to set forth the circumstances that led to the sickness and death of the animal.

A slight modification of the decree will have to be made as the moveables claimed in the plaint are said to be still available. The Rs. 100 awarded by the lower Court will therefore be ordered to be paid only in the event of the articles not being returned within two months. The appeal is therefore dismissed except as indicated in the above paragraph, but in view of the fact that the plaintiff has failed on the principal ground on which this appeal has been argued and has put forward untenable contentions in both Courts, we think that it would not be just to call upon the defendant to pay the costs of the plaintiff throughout. While not interfering with the order of the lower Court as to costs, we will pass no order as to costs in this Court.

C.R.K./K.B. *Appeal dismissed.*

A. I. R. 1937 Madras 419

VENKATARAMANA RAO, J.

Perakam Catholic Sangham Proprietors, Parinchu and *others* — Petitioners.

v.

Vekkekovilakath Kavutti Nambrashtadri Amma's son Ravi Varma Thirumalpad and *another* — Opposite Parties.

Civil Revn. Petn. No. 1236 of 1934, Decided on 7th December 1936, from decree of Dist. Munsif, Chowghat, in S. C. S. No. 903 of 1933.

Partnership Act (1932), Ss. 69, Cl. (2); 74 (b) —S. 69, Cl. (2) being rule of procedure is retrospective—Provision though not affecting right itself yet governs its enforcement—Suit by unregistered firm on promissory note executed before Act is barred if instituted after October 1933.

Section 69, Cl.(2), Partnership Act, which is only a rule of procedure would not affect the right to sue, and being an enactment relating to procedure and therefore retrospective in its operation, will certainly govern the enforcement of that right because a mode has been provided by the Legislature in which the right of action already existing should be asserted. The Legislature intended that all actions brought after October 1933 should be governed by the said provision. An interpretation consistent with this intention should be placed on S. 74 (b) and the only possible interpretation is that S. 74, Cl. (b) was only intended to save pending legal proceedings from the bar of S. 69, Cl. (2) and not future proceedings. So a suit by an unregistered firm to recover sum of money due on a promissory note executed before Partnership Act is barred if instituted after October 1933.

[P 420 C 2]

K. Kuttikrishna Menon — for Petitioners.

K. P. Ramakrishna Iyer—for Opposite Parties.

Order.—The question involved in this Civil Revision Petition is whether the suit is barred by S. 69, Cl. 2, Partnership Act. The suit is to recover a sum of money due on a promissory note to an unregistered firm executed before the Partnership Act of 1932. The action was laid admittedly after October 1933 when S. 69, Clause 2 of the Act came into force. The learned District Munsif of Chowghat dismissed the suit holding that as the firm was unregistered, S. 69, Cl. 2 was a bar to the suit. S. 69, Cl. 2 runs thus:

No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

There is no doubt that this section enacts a rule of procedure. It imposes a condition for the enforcement of a right and does not affect the right itself. Being an enactment relating to procedure it will apply to pending actions as well as to future actions. The Legislature, to avoid hardship, provided that S. 69, Cl. 2 shall come into force on 1st October 1933. This provision is also a clear indication that the enactment is intended to be retrospective. This enactment has been the subject of judicial interpretation and a view has been consistently taken that S. 69, Cl. 2 will bar a suit by an unregistered firm even in respect of a contract entered into before the Act: *vide* A I R 1934 Cal 754;[1] A I R 1935 Lah 893;[2] A I R 1935 All 898;[3] 40 C W N 1180[4] and A I R 1936 All 3,[5] since reported in 58 All 495.[5] But a dissenting note was struck by Sulaiman, C. J. in 58 All 495.[5] The observations in his judgment were relied on by Mr. Kuttikrishna Menon for the position that S. 74, Cl. (b) of the Act saved all actions pending at the date of the Act or to be filed subsequent to and founded on contracts entered into before the Act from the bar of S. 69, Cl. 2. It may be stated that even Sulaiman, C. J. ultimately concurred with Bennet, J. in dismissing the suit holding that S. 69, Cl. 2 would be a bar. S. 74, Cl. (b) runs thus:

> Any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act.

The view taken by Sulaiman, C. J. was that the words are general and would ordinarily include any suit or application for the enforcement of a legal remedy in respect of a right already acquired. He was also of the view that the words "before the commencement of the Act" would not qualify legal proceeding or remedy. It seems to me that the interpretation placed by Sulaiman, C. J. is correct, namely, Cl. (b) is intended to cover a legal proceeding or remedy in respect of matters mentioned in Cls. (a) and (c). So interpreted Cl. (b) would run "any legal proceeding or remedy in respect of any right, title, interest, obligation or liability incurred before the commencement of the Act or in respect of anything done or suffered before the commencement of the Act". But I do not agree with him when he says that a suit which is brought to enforce a right which has already accrued would not be governed by the provisions of S. 69, Cl. (2) of the Act. In my opinion, he seems to interpret "affect" as meaning "apply to". What S. 74, Cl. (b) enacts is if a legal proceeding has already been commenced it would not be affected by S. 69, Cl. 2. In other words, in this context it would mean that the suit will be proceeded without reference to S. 69 and the same would not apply to the case. But when the section enacts that nothing in this Act shall affect any remedy, 'affect' cannot be interpreted to mean 'apply to'. The term 'remedy' connotes a right to sue or to take any other appropriate proceeding for the enforcement of a right. S. 69, Cl. 2 which is only a rule of procedure would not affect the right to sue, and being an enactment relating to procedure and therefore retrospective in its operation will certainly govern the enforcement of that right because a mode has been provided by the Legistature in which the right of action already existing should be asserted. As already indicated by me, the Legislature intended that all actions brought after October 1933 should be governed by the said provision. An interpretation consistent with this intention should be placed on S. 74 (b) and the only possible interpretation is that S. 74, Cl. (b) was only intended to save pending legal proceedings from the bar of S. 69, Cl. 2 and not future proceedings. I am therefore of opinion that the suit is barred by the provisions, of S. 69, Cl. 2, of the Act and the view of the lower Court is correct. In the result the Civil Revision Petition is dismissed.

C.R.K./B.D. *Petition dismissed.*

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1. Surendranath v. Manohar De, A I R 1934 Cal 754=153 I C 671=39 C W N 67=62 Cal 213.
2. Krishen Lal Ramlal v. Abdul Ghafur, A I R 1935 Lah 893=160 I C 513.
3. Ram Prasad Thakur Prasad v. Kamta Prasad Sitaram, A I R 1935 All 898=157 I C 154=1935 A L J 1243.
4. Ramsundar v. Madhu Sudan, (1937) 40 C W N 1180=64 C L J 554.
5. Danmal Parshotam Das v. Firm Babu Ram Chhote Lal, A I R 1936 All 3=160 I C 277=58 All 495=1935 A L J 1245.

A. I. R. 1937 Madras 421

VENKATARAMANA RAO, J.

P. P. Koyakutti and *others* —

Appellants.

v.

A. Veerankutti — Respondent.

Appeal No. 152 of 1933, Decided on 26th October 1936, against appellate order of Sub.Judge, South Malabar, D/- 9th February 1933.

(a) Limitation Act (1908), Art. 182 (2) — Interpretation—Expression 'where there has been an appeal' means appeal in suit which is likely to affect decree sought to be executed —Final decree passed pending appeal from preliminary decree—Preliminary decree confirmed in appeal—Application filed within three years from appellate decree confirming preliminary decree but more than three years from date of final decree is within limitation.

The expression 'where there has been an appeal' in Art. 182 (2),Lim. Act, means an appeal in the suit which is likely to affect the decree sought to be executed. It is not therefore necessary that the appeal should be from the decree sought to be executed. [P 422 C 2]

Pending an appeal from the preliminary decree in a mortgage suit, a final decree was passed. The preliminary decree was confirmed in appeal. The decree-holder filed an application for execution of final decree within three years from the date of the appellate decree confirming the preliminary decree but beyond three years from the date of the final decree:

Held: that the application was not barred by time under Art. 182 (2) of the Act: *4 All 274*; *8 Cal 248*; *A I R 1932 P C 165*; *A I R 1933 Bom 255* and *A I R 1928 Pat 581, Rel. on*; *AIR 1927 Cal 904* and *A I R 1931 Cal 332, Doubted*; *A I R 1927 Pat 215, Foll.*; *A I R 1933 Mad 315, Dissent.* [P 423 C 1]

(b) Civil P. C. (1908), O. 34, R. 5—Appeal from preliminary decree—Final decree passed during pendency of appeal — Preliminary decree confirmed in appeal — Final decree already passed is valid and executable—No application for making fresh final decree is necessary (*Obiter*).

Obiter.—A final decree in a suit on a mortgage passed during the pendency of an appeal from the preliminary decree which is eventually affirmed by the Court of appeal is valid and binding on the parties and capable of execution. The mortgagee-decree-holder can apply for execution of the final decree already passed and it is not necessary for him to apply for a fresh final decree: *A I R 1929 All 287, Foll.*; *Case law discussed.* [P 423 C 1; P 424 C 1]

K. P. Krishnan Menon — for Appellants.

K. Kuttikrishna Menon — for Respondent.

Judgment.—The main question argued in this appeal is whether an application to execute the final decree in a suit on a mortgage is barred by limitation. The relevant dates necessary for its disposal are as follows:

Preliminary decree	21-7-1925,
Final decree	9-11-1925,
Decree of the appellate Court confirming the preliminary decree	16-3-1927,
Application for execution	15-3-1930.

The learned District Munsif held, following the decision in 6 Pat 780,[1] that the application was not barred by limitation. But the learned Subordinate Judge following the decision of Madhavan Nair, J. in 56 Mad 458[2] held that it was barred. The Article of the Limitation Act applicable to the case is Art. 182 (2):

For the execution of the decree of a civil Court.	Three years.	(Where there has been an appeal) the date of the final decree or order of the appellate Court.

The view of Madhavan Nair, J. is that the appeal in Col. 3 must be from the decree or order sought to be executed, that the appeal from the preliminary decree could not be held to be an appeal from the final decree sought to be executed and when there is no appeal against the final decree, limitation would run from the date of the said decree. The view of the learned Judges of the Patna High Court in 6 Pat 780[1] which was dissented from by Madhavan Nair, J. is thus expressed by Kulwant Sahay, J. at p. 785:

> There is nothing here to show that the appeal must be against the decree sought to be executed. In my opinion the intention of the Legislature in making the provision was that if an appeal in any way imperils the decree sought to be executed then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed.

This view was taken in two early cases decided with reference to Art. 179, Cl. 2 of Act 15 of 1877, which corresponds to Art. 182 (2) of the present Limitation Act and the language of both the Articles is word for word the same. In 4 All 274[3] Oldfield and Brodhust, JJ. observed:

> The article makes the limitation run, 'where there has been an appeal', from 'the date of the final decree or order of the appellate Court', and we think the appeal contemplated is an appeal

1. Somar Singh v. Deonandan Prasad Singh, A I R 1927 Pat 215=102 I C 811=6 Pat 780=8 P L T 379.
2. Ahmadkutty v. Kottakkat Kutti, A I R 1933 Mad 315=148 I C 58=56 Mad 458=64 M L J 251.
3. Narsingh Sewak Singh v. Madho Das, (1882) 4 All 274=1882 A W N 25.

in the suit, not necessarily an appeal from the original decree in the suit.

In that case a decree was passed on 23rd August 1873, but a review of the judgment was admitted and a decree passed on 29th November 1876 by which the original decree was altered. Then an appeal was preferred by the plaintiff from the decree passed on review, and on a cross-objection taken by the defendant, the decree made on review was set aside by the High Court on 28th March 1879. It was held that the time for execution of the original decree ran from 28th March 1879 though no appeal therefrom was preferred. So far as I know this decision has never been doubted or dissented from but has since been followed. In 8 Cal 248[4] the facts were as follows: An ex parte decree was passed on 7th February 1876; on 15th November 1876 the defendant made an application to revive the suit. The application was rejected on 15th November 1876 and an appeal therefrom was dismissed on 19th November 1877. It was held that the limitation for the execution of the decree ran from 19th November 1877, the date of the final order of the High Court. Morris, J. says:

> The application to revive the suit really kept the decree open, and that decree did not become final until the order of the appellate Court was passed on 19th December 1877.

I am aware that the above decision was dissented from in 54 Cal 1052[5] and 35 C W N 155.[6] But I doubt the correctness of the said decisions and other cases which have taken a similar view as in my opinion the decisions in 4 All 274[3] and 8 Cal 248[4] are consistent with the principle enunciated by the Privy Council in 60 Cal 1[7] at p. 7:

> It is at least an intelligible rule that so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage.

As already stated by me, the decision in 4 All 274[3] has since been followed in 57 Bom 388[8] and the interpretation placed on the article by the former decision that the appeal need not necessarily be from the decree sought to be executed was accepted: *vide* Patkar, J. at p. 395 and Barlee, J. at p. 399. Madhavan Nair, J. ignores the principle laid down by the Privy Council referred to by me above, when he says:

> I am not satisfied there is much substance in the argument that the final decree is imperilled by the decree that may be passed by the appellate Court on the appeal against the preliminary decree.

The view in 6 Pat 780[1] has since been confirmed by another Division Bench of the same High Court in A I R 1928 Pat 581[9] which refused leave to appeal to His Majesty in Council against the said decision in 6 Pat 780.[1] Dawson Miller, C. J. made the following observations in the course of the judgment with which I agree, namely:

> It is further well established that the test in such cases is whether the decree of the appellate Court imperils the validity of the decree it is sought to execute. There can be no doubt that the appeal to the High Court from the preliminary decree, had it been successful, would have had the effect of discharging the final decree passed by the trial Court as well as the preliminary decree. It seems to follow therefore as a matter of course that the appeal in this case was not only an appeal from the preliminary decree but an appeal from all that naturally followed by the passing of that decree, namely, the final decree for sale which after all is merely part of the machinery prescribed for carrying out the direction for sale contained in the preliminary decree. In these circumstances it seems to me upon the decided cases and upon the established principles that there is no real substance in the objections taken by the appellant to the decision of this Court.

I may also point out that Rankin, C. J. in 35 C W N 155[6] observed that he was not prepared to say that the case in 6 Pat 780[1] was wrongly decided. Even Madhavan Nair, J. says that the wording of Cl. 2 of Art. 182 as it stands supports the conclusion arrived at by the learned Judges of the Patna High Court but the context according to him compelled him to take the view he did. I am therefore of opinion that the expression "where there has been an appeal" means an appeal in the suit which is likely to affect the decree sought to be executed. I therefore respectfully dissent from the decision of Madhavan Nair, J. in 56 Mad 458[2] and following the

4. Lutful Haq v. Sumbhudin Pattuck, (1882) 8 Cal 248=10 C L R 143.
5. Fakirchand Mandal v. Daiba Charan, A I R 1927 Cal 904=104 I C 466=54 Cal 1052.
6. Profulla Kumar v. Sm. Soraj Bala, A I R 1931 Cal 332=131 I C 263=35 C W N 155.
7. Nagendranath De v. Sureshchandra De, A I R 1932 P C 165=137 I C 529=59 I A 283=60 Cal 1 (P C).
8. Nagappa Bandappa v. Gurushantappa Shankarappa, A I R 1933 Bom 255=147 I C 1227 =57 Bom 388=35 Bom L R 432.
9. Somarsingh v. Devanandan Prasad, A I R 1928 Pat 581=110 I C 483.

decision in 6 Pat 780[1] hold that the application is not barred by limitation.

Mr. Kuttikrishna Menon contended that the application for execution of the final decree in this case is not maintainable. His argument is that after the decree of the appellate Court affirming the preliminary decree there must be a fresh final decree and the decree originally passed in pursuance of the preliminary decree of the first Court is not capable of execution. This objection was not taken in the Courts below and must be deemed to have been abandoned. If the said objection had been taken, it would have been open to the learned District Munsif to treat the application for execution as an application for a final decree and pass a final decree if it was necessary : *vide* 25 Mad 537 [10] and 4 M L T 27.[11] Were it necessary to decide this question, I am of opinion that a fresh application for a final decree or amendment of the original decree is not necessary. In support of his contention Mr. Kuttikrishna Menon relied on the recent decision of Pandalai, J. in 38 M L W 946[12] and the decisions of the Privy Council in 6 Pat 24[13] and 8 Lah 253.[14] If the decisions are closely examined they do not support his contention. But before doing so, let me refer to the relevant provisions of the Civil Procedure Code in force at the material dates when the various decrees were passed in the case. Under O. 34, R. 4 in a suit for sale, the Court shall pass a preliminary decree ordering an account of the amount due to the mortgagee for principal and interest and for his costs of the suit or declaring the amount so due and directing that if the defendant pays into Court the amount so due on a date within six months from the date of declaring the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant all title deeds relating to the property and if so required re-transfer the property and if such payment is not made, the mortgaged property be sold.

Under R. 5 the Court is bound to pass a final decree either at the instance of the mortgagor or at the instance of the mortgagee when the mortgagor on or before the date fixed either pays the money into Court or commits default. In case the mortgagor pays the money into Court the decree will be directing the mortgagee to deliver possession of the documents of title relating to the mortgaged property and if so required retransfer the mortgaged property to the mortgagor or put the mortgagor in possession thereof. If default is committed in payment the Court is bound to pass a final decree directing the mortgaged property or sufficient portion thereof to be sold. A decree so passed is valid and operative and remains in full force till it is modified or reversed in appeal. Pendency of an appeal from the preliminary decree does not operate as a stay of further proceedings in the suit or the passing of the final decree or the execution thereof unless there has been a stay by the appellate Court. This is the view taken by a Bench of the Allahabad High Court in 51 All 640[15] and it has since been affirmed by a Full Bench of the Allahabad High Court in 53 All 283.[16] In both the cases the conclusion was reached after an elaborate examination of the provisions of the Code and the relevant decisions including those of the Privy Council. The same view was taken by the learned Judges of the Patna High Court in 13 Pat 379.[17] The preliminary decree may be reversed in appeal in which case the final decree goes with it. It may be modified or confirmed. In either case if the final decree already obtained has not been executed the decree-holder can have the decree amended by inserting the correct figure as modified in appeal or by the addition of interest at the contract rate up to the date of the appeal or the decree-holder can apply for a fresh final decree. This is the course pointed out by Pandalai, J. in 38 M L W 933.[18]

10. Appa Rao v. Krishna Ayyangar, (1902) 25 Mad 537.
11. Damaraju Narasimha Rau v. T. Ganga Ram, (1908) 4 M L T 271.
12. Ramaswami Ayyar v. Pakkiri Pathar, A I R 1934 Mad 65=147 I C 1179=66 M L J 24=38 M L W 946.
13. Jowad Hussain v. Gendan Singh, A I R 1926 P C 93=98 I C 499 = 53 I A 197 = 6 Pat 24 (P C).
14. Fitzholmes v. Bank of Upper India, A I R 1927 P C 25=100 I C 22=54 I A 52=8 Lah 253 (P C).
15. Khairunnissa Bibi v. Oudh Commercial Bank Ltd., A I R 1929 All 287 = 119 I C 510=51 All 640=1929 A L J 480.
16. Satprakash v. Bahal Rai, A I R 1931 All 386=135 I C 550=53 All 283=1931 A L J 508 (F B).
17. Ishwari Prasad Singh v. Raghubanslal, A I R 1934 Pat 225 = 149 I C 40 = 13 Pat 379.
18. Subramania Ayyar v. Bomer Cooty Haji, A I R 1933 Mad 870=148 I C 1149=38 M L W 933.

If the decree is being executed there is in my opinion nothing to preclude the execution application being amended as in the case of any decree which is being executed if modified in appeal. If it is a case of a mere affirmance of the decree it is open to the decree-holder to waive the benefit of the interest at the contract rate up to the date of the appeal and he can, if he chooses, have the original decree executed as it stands. There is nothing in law to prevent him from doing so and it is not possible to understand how a decree which was valid and operative ceases to be so by the mere fact that the preliminary decree on which the final decree was passed was confirmed in appeal. In 51 All 640,[15] the final decree in a suit on a mortgage passed during the pendency of an appeal from the preliminary decree which was eventually affirmed by the Court of appeal was held to be valid and binding on the parties and capable of execution. It seems to me that this is the correct view to take under the law as it stands. There is nothing in the decisions of the Privy Council against this view. Both in 6 Pat 24[13] and 8 Lah 253[14] there was no final decree passed during the pendency of the appeal against the preliminary decree. Mr. Kuttikrishna Menon relied very strongly on the observations of Banerji, J. in 39 All 641[19] which were approved by the Privy Council in 6 Pat 24.[13] The observations are to the effect that the rule "contemplates the passing of only one final decree in a suit for sale upon a mortgage". Both in 6 Pat 24[13] and 8 Lah 253[14] the question that was considered was one of limitation for an application for a final decree. Their Lordships observed that the limitation ran only from the date of the preliminary decree which was confirmed on appeal and which was the only decree in the cause on which the final decree could be passed. Their Lordships were not dealing with the question as to what should happen if a final decree as required by the Code was passed during the pendency of the appeal. In 39 All 641[19] also there was no final decree passed during the pendency of an appeal against the preliminary decree and the observations of Banerji, J. therein were explained by the Full Bench of the Allahabad High Court in 53 All 283[16] at p. 288 thus :

> We are of opinion that the expression "it is impossible to hold that there can be more final decrees than one in a suit for sale upon a mortgage" must mean that on the date when Gajadhar Singh presented his application praying for the final decree to be passed, there could not be more than one final decree, and as the preliminary decree of the trial Court was superseded by the decree passed in appeal, the trial Court could not possibly have made final the original preliminary decree which has ceased to exist.

No authority has been cited before me to show that it is obligatory to apply for a fresh final decree. I am therefore of the opinion that it was competent to the plaintiffs to execute the final decree obtained by them as it stood. In the result, I allow the appeal with costs. (Leave granted).

C.R.K./K.B. *Appeal allowed.*

19. Gajadhar Singh v. Kishan Jivan Lal, A I R 1917 All 163 = 42 I C 93 = 39 All 641 = 15 A L J 734 (S B).

A. I. R. 1937 Madras 424

VARADACHARIAR AND BURN, JJ.

Km. Kr. Km. Kuppan Chettiar and *others* — Appellants.

v.

Masa Goundan and *others* — Respondents.

Second Appeal No. 1120 of 1932, Decided on 14th December 1936, against decree of Sub-Judge, Coimbatore, in A. S. No. 8 of 1932.

Hindu Law—Debts—Son's liability—Partition of joint family—Subsequent decree against father personally—Property of sons cannot be attached in execution of decree as father has no disposing power over it under S. 60, Civil P. C.

Even if a partition is entered upon in order to defeat the claims of creditors, nevertheless, provided that it is a genuine partition, division of status takes place and the power of the father to sell the shares of the sons is brought to an end. [P 427 C 1]

Where therefore a decree is passed against the father personally after the partition, the property of the sons cannot be attached in execution, as under S. 60, Civil P. C., the father has no disposing power over the property of the sons. [P 426 C 2 ; P 427 C 1]

R. Gopalaswamy Iyengar — for Appellants.

B. Somayya and *D. R. Krishna Rao* — for Respondents.

Varadachariar, J.—This second appeal arises out of a suit instituted by the legal representatives of a decree-holder to get a claim order set aside. The father of the plaintiffs obtained a money decree against

defendant 1 on 17th September 1926 on three promissory notes executed by defendant 1, Exs. D, D-1 and D-2; between the dates of Exs. D and D-1 a partition arrangement was entered into between defendant 1 and his sons, defendants 2 to 4: *vide* Ex. V dated 13th October 1925. It is alleged that the plaintiffs' father was not aware of this partition and so happened to make further advances to defendant 1 under Exs. D-1 and D-2 in the course of November and December 1925. The suit, O. S. No. 1400 of 1926, was instituted for the recovery of money due under these three promissory notes but defendant 1 alone was impleaded as defendant thereto and a decree was obtained in due course. When the plaintiffs proceeded to attach certain properties in execution of this money decree, defendants 2 to 5 came forward with a claim petition and prayed that the properties which had fallen to their shares under Ex. V should be released from attachment. As the properties were accordingly released, the plaintiffs filed this suit to obtain a declaration that they are entitled to attach the properties which defendants 2 to 5 claimed to have fallen to them in the partition.

The question for determination is whether, in spite of the partition evidenced by Ex. V, the shares taken by defendants 2 to 5 are liable to be proceeded against in execution of the money decree obtained against the father alone. I have dealt with this question at some length in a judgment recently delivered by me in S. A. No. 504 of 1932 and I do not propose to repeat what has been said there. I shall only add that the case for the decree-holder was much stronger in that second appeal than in the present instance because in that case I proceeded on the footing that the partition was entered into with a view to defeat the creditor. Whatever may be the rights under the Hindu law of a father's creditor to secure satisfaction of the debts due by the father from the sons' shares in the joint family, the question arising for determination in this second appeal has to be decided with reference to the language of S. 60, Civil P. C. In order that properties may be liable to attachment in execution, it must be shown that they either belong to the judgment-debtor or that the judgment-debtor has a disposing power over the properties or their profits, which power he may exercise for his own benefit.

It is well settled and the proposition has now been placed beyond doubt by the observations of their Lordships of the Judicial Committee in 71 M L J 812,[1] that the father's power of sale for his debts exists only so long as the joint family remains undivided. Their reference with approval to the decision of this Court in 51 Mad 417,[2] shows that even a division in status will suffice to put an end to this power. It would therefore follow that after a division in status the father's creditor cannot any more than the Official Assignee, claim that the property is saleable by the father and therefore attachable by himself. That the position is different as regards the creditor's remedy by independent suit against the sons has been recognized by the judgment of a Full Bench of this Court in 51 Mad 361.[3] Having regard to this well understood distinction between the creditor's remedy in execution and the creditor's remedy by a separate suit, we are with due respect unable to follow the observations which were cited to us from certain decisions of the other High Courts, which either ignore this distinction or proceed on a basis different from the Full Bench decision in 51 Mad 361[3] and hold that after a bona fide partition the father's creditor will not even have a right of suit against the sons.

In the above view, it seems to me unnecessary to consider how far the contention on the one side or the other as to whether the partition in this case can be described as bona fide within the meaning of the authorities is tenable. In my judgment in S. A. No. 504 of 1932 I have endeavoured to show that the expression 'bona fide partition' has been used by different learned Judges in different senses. If, as recognized by their Lordships of the Judicial Committee in the recent case, the father's power to sell is at an end once there is a genuine partition, it does not seem to me material for the purpose of execution proceedings to consider whether the partition is bona fide or not, in the sense that it has made sufficient provision for

1. Sat Narain v. Sri Kishen Das, A I R 1936 P C 277=164 I C 6=63 I A 384=17 Lah 644=71 M L J 812 (P C).
2. *In re* Baluswami Iyer, A I R 1928 Mad 735=112 I C 541=51 Mad 417=55 M L J 175 (F B).
3. Subramania Iyer v. Sabapathy Ayyar, A I R 1928 Mad 657=110 I C 141=51 Mad 361=54 M L J 726 (F B).

the discharge of the father's debts. Their Lordships, no doubt, recognize that in a suit for partition it is proper that the Court should make provision for the discharge of the father's debts and that the remaining property alone should form the subject matter of division between the coparceners. But it nevertheless seems to me too much to say that, except in cases where the father's debts are specifically referred to and provided for in a partition deed, the partition deed cannot be regarded as a bona fide partition arrangement. In the present case, the finding of the lower appellate Court is not merely that the partition was not nominal but that the plaintiffs had not shown that the share allotted to defendant 1 was not enough for the discharge of his debts subsisting at the time of the partition and for his maintenance. There are, no doubt, dicta in some of the cases which go so far as to lay down that, unless the partition not merely makes provision for the discharge of the existing debts but allots in addition a share to the father equal to the shares allotted to the sons, it should not be regarded as a bona fide partition. As at present advised, I am unable to concur in that view. But, having regard to the limited scope of the question to be determined in this second appeal, it seems to me unnecessary to express any final opinion on that question.

Some of the cases in the other High Courts draw a distinction between a partition which takes place after the money decree had been obtained against the father and a partition which takes place before the money decree. In that connection, I may point out that in the present case the partition took place nearly a year before the passing of the decree in the money suit and that the suit comprised claims under two promissory notes in respect of which moneys were advanced only after the partition. It is only the claim under Ex. D, a promissory note for Rs. 500 that had accrued due before the partition. It does not seem to be material whether the plaintiff's father was or was not aware of the partition. Both the Courts have found that there was no particular attempt to keep the partition concealed from the creditors and we find that the partition deed was presented for registration the very next day after execution. I am not sure if it is possible to split up a decree like the one obtained by the plaintiff's father in this case and give the decree-holder a right of execution against the sons' shares in respect of so much of it as may represent the claim under Ex. D which alone was a pre-partition debt. But that question also is immaterial in the view I have taken. The lower appellate Court was, in my opinion, right in dismissing the plaintiff's suit.

A further point was raised before us that at least in respect of the properties comprised in Sch. D to the partition deed, the plaintiffs must be entitled to execute the decree obtained by their father. I am unable to accede to this contention. It has, no doubt, been held that the claim which a wife has under the Hindu law for maintenance against her husband cannot take precedence over the claims of his creditors, and the same principle has been applied to a widow's claim for maintenance against her husband's estate. But that is not exactly the position here. I am not satisfied that the learned Counsel for the appellant was correct in the contention that, even when a partition takes place in a joint Hindu family, the Hindu law does not permit of a provision being made by allotment of property for the maintenance of the wife and for the marriage of the daughters as long as the father is alive. The wife has, no doubt, a personal claim for maintenance against her husband independently of the possession of any property, but that does not exclude the liability of the co-parcenary property to provide for her maintenance, at any rate when the whole family property is made the subject of a partition between the father and the sons. In the present case the allotment has been made not merely for the benefit of the wife and the daughters but also with a further provision that the properties so allotted to them should be divided after their lifetime by the sons. Applying the test involved in the language of S. 60, Civil P. C., it is impossible to hold that the father any longer continued to have the power of disposing of the property that was allotted to his wife and daughters with remainder over to his sons. Mr. Gopalaswamy Iyengar finally asks that the suit may at least be permitted to be treated as a suit to recover money from the sons in respect of the claim due under the promissory note, Ex. D. We regret we are unable to accede even to this

prayer. It will be wholly changing the nature of the suit, and prima facie the suit has been instituted more than three years after the date of Ex. D. We do not feel that we are justified in allowing the change on the basis of the claim without further information clearly available from the record that the money claim would not be barred by limitation. The result is that the second appeal fails and is dismissed with costs.

Burn, J.—I agree that the second appeal must be dismissed with costs, and I have very little to add. The finding is clear in this case that the partition was a genuine partition, a real transaction and not a mere sham. And that being so, it is clear that it put an end to the joint family in which defendant 1 was the father. The motive which was behind this partition is, I think, irrelevant. It follows from the decision in 51 Mad 417[2] (in which it was clear that the partition suit was filed on behalf of the minor sons in order to defeat the claim of the Official Assignee who wished to exercise the father's power of disposal of his minor sons' shares) that, even if a partition is entered upon in order to defeat the claims of creditors, nevertheless, provided that it is a genuine partition, division of status takes place, and the power of the father to sell the shares of the sons is brought to an end. If that be so, there can be no possibility of the decree-holder pursuing the shares of the sons in the execution of the decree obtained against the father alone.

C.R.K./S.C. *Appeal dismissed.*

A. I. R. 1937 Madras 427

VENKATARAMANA RAO, J.

Viyathan Mahadevi styled Kozhikote Kishakke Kovilagath Valia Thamburatti and *another* — Appellants.

v.

Punnappale Koyimmar Kurikkal's son Aydross Kurikkal and *another* — Respondents.

Second Appeal No. 1853 of 1931, Decided on 20th November 1936, against decree of Sub.Judge, South Malabar, Calicut, in A. S. No. 200 of 1930.

Malabar Compensation for Tenants' Improvements Act (1 of 1900), S. 19 — Kychit containing provision to pay full value of trees cut is penal and against spirit of S. 19 —Only reasonable compensation can be given.

The provision for the payment of the full value of the trees cut by a tenant contained in a kychit is penal and contrary to S. 19, Malabar Compensation for Tenants' Improvements Act. The landlord is entitled only to reasonable compensation : *A I R 1923 Mad 238* and *S. A. No. 249 of 1929, Dissent.*; *A I R 1917 Mad 162 (F B), Expl.*

[P 429 C 2]

K. P. Ramakrishna Iyer and *P. R. Manavikraman Raja*—for Applts.

N. R. Sesha Iyer — for Respondents.

Judgment.—The question in this second appeal is whether the plaintiff who is a jenmi is entitled to recover the value of certain trees cut by the defendant-tenant. The claim is made in virtue of a clause in the kychit Ex. A. The clause runs thus :

> If I cut trees such as veeti, teak, jack, etc., from the parambas without obtaining the written consent of the kovilagam, I shall be answerable for the costs of such trees and shall surrender the properties irrespective of the 12 years' term if the kovilagam demands it.

The main defence is that the said clause is penal and unenforceable. It was found by the District Munsif that the kovilagam of the plaintiff was not in possession of the land demised for over 100 years and the trees which are cut were aged between 10 and 20 years. He further found that the trees were of spontaneous growth grown after the demise to the defendant, that they were tended and reared by the defendant and that they really constituted improvements within the meaning of the Malabar Compensation for Tenants' Improvements Act. It is not disputed by Mr. Ramakrishna Iyer on behalf of the plaintiff that they would be improvements within the meaning of the Act. The District Munsif held that the cutting was for the purpose of making other improvements on the land demised and gave only nominal damages at the rate of eight annas per tree. On appeal the learned Subordinate Judge was of the opinion that the clause contravened S. 19 of the Act, but gave one-fourth of the value of the trees as compensation to the plaintiff. He did not give a finding on the question whether the cutting of the trees was an improvement. In view of certain decisions of this Court I called for a finding on two questions namely : (1) whether the cutting of the trees in question is itself an act of improvement within the meaning of the Malabar Compensation for Tenants' Improvements Act; and (2) whether the cutting of the trees was for the purpose of building farm houses or making any other improvements on the holding within the meaning of the

Act. The learned Subordinate Judge answered both the questions in the negative. Mr. Ramakrishna Iyer contends that the plaintiff is entitled to the full value of the improvements in view of the said findings and relies on two decisions of this Court, one of Ramesam, J. reported in 16 M L W 310[1] and another of Walsh, J. in S. A. No. 249 of 1929. Those decisions do support him. But it is contended on behalf of the defendant by Mr. N. R. Sesha Iyer that the said two decisions are opposed to the decision of the Full Bench in 40 Mad 603,[2] and should not be followed. In 40 Mad 603[2] a similar claim was advanced. The suit therein was for the full value of the trees based upon a clause in the lease which is almost identical with the clause in question and ran thus :

> The teak, rose-wood, jack and such kinds of trees which now exist, and may in future be produced in the properties mentioned in the schedule, are not to be cut down and removed without the permission of the State and without paying the kuttikanam, but if they are so cut and removed, I am liable for paying up either the fine imposed by the State or the value of the trees.

It will thus be seen that the clause related to two sets of trees : (1) trees which existed at the date of the lease; and (2) trees which may be produced in future. Though the claim was made in the suit for the full value of the trees, in second appeal it was limited to the payment of kuttikanam fee. Even then the question was raised as to the legality of the kuttikanam fee and whether the provision was not obnoxious to the Tenants' Improvements Act. The learned Judges who made the order of reference were divided in their opinion. Coutts-Trotter, J. took the view that the landlord was not entitled to claim kuttikanam fee and he observed thus :

> I see no answer to the arguments that to make the tenant's right to carry out an improvement depends upon his making a payment to his landlord is of necessity to put a limitation upon that right.

Seshagiri Iyer, J. took a different view. According to him the provision for the demand of a moderate fee would not limit or affect the right of a tenant to make improvements upon the property. But he was distinctly of opinion that the payment of damages that may be fixed by the landlord or the value of trees would undoubtedly be penal in its character. The question referred to the Full Bench was general, namely :

> Whether a provision in a Malabar lease that a tenant shall pay kuttikanam or some fee to his landlord in respect of trees cut down is contrary to the provisions of S. 10, Malabar Compensation for Tenants' Improvements Act.

The Full Bench dealt with the question on the footing that the cutting was not an improvement (*vide* Abdur Rahim, J. at p. 609 and Phillips, J. at p. 610). Wallis, C. J. thought that the payment of kuttikanam fee was not open to objection as limiting the tenant's rights to plant trees, still less his right to cut trees by way of clearance. He answered the reference thus :

> A stipulation in a Malabar lease for the payment of kuttikanam to the landlord in respect of trees cut down is not contrary to the provisions of S. 19 of the Act.

In this opinion both Oldfield and Srinivasa Iyengar, JJ. concurred. Abdur Rahim, J. thought that even if the cutting was an improvement the payment demanded would not be unreasonable and can be allowed. Phillips, J. dealt with the question thus :

> If a tenant plants a tree he is not bound to cut it down before the end of the tenancy. If it is in existence at the end of the tenancy, he is entitled to compensation, but not otherwise, and if he chooses to enjoy the benefit of the tree by cutting it down during the tenancy, no question of compensation arises. . . . . .If the tenant cuts down a tree he gets the full value of it less the fee imposed, but as he need not cut down the tree the fee imposed can in no way prevent him from growing it except possibly when the fee is unreasonably large.

Having regard to the terms of the reference and the answer of the majority of the learned Judges the ratio of the Full Bench decision appears to be that even in cases where the cutting of a tree is not an improvement whether the trees were planted by the landlord or of spontaneous growth, it will be open to the landlord to charge a moderate fee and such a provision will not be obnoxious to S. 19 of the Act, but if the fee is unreasonably large, it would certainly contravene the provisions of the Act. But on a reference to the printed papers in the case I find that both the District Munsif and the District Judge in the Courts below dealt with that case on the footing that the trees cut were planted by the tenant. So it may be contended that the reference to the Full Bench and the answer given by them

1. Kelu Nair v. Viyathen Mahadevi, A I R 1923 Mad 238=69 I C 546=16 M L W 310.
2. Raja of Cochin v. Kittunni Nair, A I R 1917 Mad 162=38 I C 503=40 Mad 603=32 M L J 295 (F B).

should be confined to the cases of trees planted by the tenant. No doubt the law is clear that in the case of trees planted by the tenant the property therein vests in the tenant, but so far as the trees of spontaneous growth the law is not clear and the opinion seems to be divided and in 32 M L J 541[3] the question was left open. But the Act for the purpose of compensation treats both the trees planted by the tenant and the trees of spontaneous growth grown after the demise on the same footing. If in the one case, i. e., in the case of planting of trees a clause which provides for the payment of the full value of trees would be contrary to the provisions of S. 19 on the ground that it would be a fetter on his right to plant trees and make improvements, I do not see any reason why the same principle should not apply to trees of spontaneous growth as it may be equally said that it would be a fetter on his right to protect and maintain them and thus make improvements within the meaning of the Act. It would seem to me apart from the question of ownership the same principle ought to govern both sets of trees in view of the fact that the principle of compensation provided in the Act has reference to the labour spent by the tenant in either rearing or protecting them in both cases. And thus any provision which would operate to prevent it will be a fetter on his right to make improvements within the meaning of the Act. In 16 M L W 310,[1] Ramesam, J. observes :

> Where the act of felling down the trees is an act of improvement. . . .the imposition of a small Kuzhi Kanam fee does not contravene the provisions of S. 19 of the Act.

For this he relies on the Full Bench decision. He again observes :

> If, on the other hand, the fee imposed is the full value of the trees, it does contravene the provisions of the Act. But if it is not an act of improvement the clause would not contravene the provisions of the Act. [*not verbatim.*]

And he relies on Phillips, J.'s remarks at p. 611. With great respect to the learned Judge I am unable to see how the Full Bench decision or the judgment of Phillips, J. is an authority for this latter proposition which the learned Judge lays down. The Full Bench proceeded on the footing that the cutting was not an improvement. Even then they considered the question whether kuttikanam fee was a reasonable fee or not. In fact the Full Bench decision is an authority for the position that at any rate in the case of trees planted by a tenant even if the cutting is not an improvement, a clause providing for payment of the full value of the trees would be penal, but not a payment of a moderate fee. The observations of Phillips, J. are absolutely clear on the point. He in fact distinctly observes that if the fee is unreasonably large it might be penal. Walsh, J. makes a distinction between the trees of spontaneous growth and the trees planted by the tenant. He observes :

> It is not necessary to say whether such a contract with regard to trees grown by the tenant himself would be valid. In the present case, the trees are all of spontaneous growth.

And he then relies on the remarks of Phillips, J. as supporting his view that the tenant is entitled to payment of the full value of the trees. I have already shown what the view of Phillips, J. is. I do not see how Phillips, J. can be said to be laying down a principle in support of the view Walsh, J. was taking. I therefore respectfully dissent from the decision in 16 M L W 310[1] and S. A. No. 249 of 1929 and hold that the provision for the payment of the full value of the trees in the kychit in question is penal and contrary to S. 19, Malabar Compensation for Tenants' Improvements Act. The plaintiff is entitled only to reasonable compensation and that awarded by the lower Court is reasonable. In the result the second appeal fails and is dismissed. Mr. Ramakrishna Iyer says that his client preferred the appeal in view of the said two decisions which took the view he contended for and therefore this is not a matter for allowing costs so far as this second appeal is concerned. I therefore direct each party to bear his own costs in this second appeal. Leave granted.

C.R.K./B.D. *Appeal dismissed.*

3. Narayani Ammal v. Kunchukutti Amma, A I R 1918 Mad 1115=40 I C 247=32 M L J 541.

A. I. R. 1937 Madras 429

VENKATARAMANA RAO, J.

Roshan Chinna Minulla Hussain Sahib — Defendant — Petitioner.

v.

Municipal Council, Adoni — Plaintiff — Respondent.

Civil Revn. No. 619 of 1935, Decided on 30th November 1936, from decree of Dist. Munsif, Bellary, in S. C. No. 255 of 1934.

Madras District Municipalities Act (5 of 1920), S. 345 and Sch. IV, R. 30—Limitation for suit to recover assessment dues commences from date on which suit could be first instituted—R. 30 of Sch. IV does not apply to a suit.

The period of limitation for a suit under S. 345, Madras District Municipalities Act, for recovery of assessment dues, commences from the date when the suit might have been first instituted and not after the expiry of 15 days from the service of the bill demanding payment, as the right to sue for recovery of assessment is not affected by provisions of R. 30 of Sch. IV of the Act. [P 430 C 1, 2]

K. Srinivasa Rao — for Petitioner.

D. R. Krishna Rao — for Respondent.

Order. — Two questions have been argued by Mr. Srinivasa Rao in this Revision Petition (1) whether the claim for assessment by the Municipal Council for the year 1930.31 is barred by limitation and (2) whether the claim for the subsequent years 1931.32 and 1932.33 is illegal on the ground that the land is agricultural land. The lower Court held that the claim was not barred by limitation on the ground that notice of demand was served on 18th March 1931 and the suit was instituted within three years from the said date. The learned Judge took the view that under S. 345 the period of three years runs from the date on which distraint might first have been made. It seems to me that this view is unsound. Under S. 86, District Municipalities Act, which governs this case the property tax shall be paid by the owner of the assessed premises within 30 days after the commencement of the half year. So under this section the petitioner should have paid the amount due for the first half year within 1st May 1930 and the amount due for the second half year within 1st November 1930. Under S. 345 the period of limitation for a suit to recover the said sum is three years from the date when a suit might first have been instituted. In this case a suit might first have been instituted on 1st May 1930 or 1st November 1930 and three years having elapsed from that date the claim is admittedly barred by limitation. Mr. Krishna Rao contends that under R. 30 the limitation really commences after the expiry of 15 days from the service of the bill demanding payment. In my opinion that rule really does not apply to the case of a suit. R. 29 says :

> Where any tax not being a tax in respect of which a notice has to be served under Ss. 95, 102 or 108 . . . . is due from any person the Chairman shall serve upon such person a bill for the sum due before he proceeds to enforce the provisions of R. 30.

The service of a bill is therefore necessary for the enforcement of the provisions of R. 30. Turning to R. 30 it will be seen that Cl. (1) of that rule provides for distraint and Cl. (2) provides for a case of prosecution. It is only in the case of a distraint the service of a bill is a condition precedent. Similarly in the case of a prosecution it should be shown that a sufficient distraint of the defaulter's property was impracticable. So far as the suit is concerned, the only provision in the rule is this :

> Nothing herein contained shall preclude the Council from suing in a civil Court for any tax due to it under the Act.

This provision was introduced *abundanti cantela* for the purpose of indicating that the right of suit is not affected by the provisions of this rule. I am therefore of opinion that the claim for the recovery of assessment for the year 1930.31 is barred by limitation. So far as the second question is concerned, it depends upon the fact whether the land is agricultural land. The learned District Munsif negatived the defendant's claim on the ground that there was no evidence that during the years of assessment the land was used as agricultural land and he also relied upon P. W. 1 in support of his conclusion. It seems to me the learned Judge is wrong. There is evidence afforded by Exs. F and II wherein it is distinctly indicated that the land was used as agricultural land from Fasli 1332, and P. W. 1 in his evidence clearly says that he does not know anything about the matter. On the evidence on record the land must be treated as agricultural land during the years under assessment. I therefore reverse the decision of the learned Judge even in regard to this question. In the result the Civil Revision Petition is allowed and the plaintiff's suit dismissed with costs throughout.

C.R.K./B.D. *Petition allowed.*

A. I. R. 1937 Madras 431

VENKATARAMANA RAO, J.

Nallajerla Satyavati and *others* — Petitioners.

v.

Vijjapu Pallaya — Opposite Party.

Civil Revn. No. 798 of 1934, Decided on 10th November 1936, from order of Sub-Judge, Vizagapatam, D/- 23rd March 1934.

(a) Stamp Act (1899), S. 36 — Document once admitted cannot subsequently be rejected as insufficiently stamped even though wrongly admitted at first.

Where a document is admitted overruling objection as to its admissibility, it is enough admission within meaning of S. 36, Stamp Act, and the Court cannot subsequently reject it as insufficiently stamped though wrongly admitted at first. S. 36 will also apply when secondary evidence of an instrument not duly stamped has been wrongly admitted: *Case law discussed.* [P 432 C 2]

(b) Civil P. C. (1908), O. 13, R. 3 — Rule is subject to S. 36, Stamp Act.

Order 13, R. 3, Civil P. C., must be taken subject to the provisions of S. 36, Stamp Act, which is mandatory. Once a document is admitted in evidence no objection as regards insufficiency of stamp can be taken and the provision in R. 3, O. 13, Civil P. C., must yield to S. 36, Stamp Act. [P 432 C 2]

P. Somasundaram and *Kasturi Seshagiri Rao* — for Petitioners.

Advocate-General, N. Govindarajachari & Vasudeva Rao—for Opposite Party.

Order.—This is a Civil Revision Petition to revise the order of the learned Subordinate Judge of Vizagapatam rejecting a document, Ex. G, in the case as inadmissible on the ground that it was insufficiently stamped in supersession of a prior order admitting it on 7th September 1934. The suit was filed by the plaintiffs in O. S. No. 26 of 1933 for recovery of certain sums of money due to them from defendants 1 to 3 in the case. It was their case that this matter was referred to arbitration and that the arbitrator was also inquiring into the claims relating to the partition between defendants 1 to 3. He delivered an award on 12th April 1930 in and by which he decreed certain sums as payable by defendants 1 to 3 and the claim was based on the award. In the written statement filed by defendant 1 it was not alleged that the document was insufficiently stamped, and that the suit cannot be based thereon. When P. W. 1 was being examined objection was taken to its admissibility. It is the case of defendant 2 and I think it is also the case of the other defendants, that this specific objection as to insufficiency of stamp was taken along with the objection regarding want of registration. In a way this is also supported by the plaintiffs, but the learned Judge overruled the objection of the defendants and admitted it by marking it as Ex. G, and his order runs as follows:

> Exhibit G is a copy of the award engrossed on stamp paper. It is the case for plaintiffs that the original award engrossed upon a stamped paper was stolen fraudulently by defendant 2 and that it could not be registered on account of the fraud committed by defendant 2. Moreover the award so far as these plaintiffs are concerned relates to moveable properties. Objection is therefore overruled.

It does not appear from the order whether the learned Judge was overruling both the objections, namely, the objection as to insufficiency of stamp and the objection as to registration. But the learned Judge in spite of what the parties have stated says in his judgment that so far as his recollection goes he did not deal with the question of the objection relating to insufficiency of stamp. The question is, has he got jurisdiction to upset the order already passed by him? According to the plain language of S. 36, Stamp Act, once a document is admitted by the Court in evidence it has no jurisdiction to reject it on the ground that it was not duly stamped at any later stage of the suit. As observed by Rankin, C. J. in 51 C L J 569[1] at p. 570:

> Under S. 36 it matters nothing whether it was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection.

It is also the view taken in 6 Pat 765.[2] In our High Court Madhavan Nair, J. took this view. In the case which is reported in A I R 1929 Mad 622,[3] a suit was filed upon a promissory note which was insufficiently stamped. Objection was taken in the written statement that it was insufficiently stamped, but no issue was framed on that matter and the document was admitted in evidence. In the appeal the Subordinate Judge raised an issue and decided the matter adversely to the plaintiff. In revision the learned Judge, Madhavan Nair, set aside the order holding that the Subordinate Judge had no jurisdiction to go into matter once a document had

1. Nirode Basini v. Sital Chandra, A I R 1930 Cal 577=128 I C 187=51 C L J 569.
2. Jagdip Singh v. Firangi Singh, A I R 1928 Pat 155=106 I C 653=6 Pat 765.
3. Venkateswara Iyer v. Ramanatha Deekshitar, A I R 1929 Mad 622=119 I C 472.

been admitted in evidence under S. 36, Stamp Act. He observes thus:

It was admitted in evidence in the ordinary course without any objection by the Court of first instance and therefore under S. 36, Stamp Act, it was not open to the defendant in the appellate Court to question its admissibility on the ground that it had not been properly stamped.

This view has been since followed in A I R 1933 All 821.[4] But the learned Advocate-General contends that under S. 36 the admission of a document in evidence must be after a consideration of the specific objection relating to want or insufficiency of stamp, and he relies very strongly on the observations of Chandavarkar, J. in 12 Bom L R 466[5] to the following effect:

'Admitted in evidence' means the act of letting the document in as part of the evidence; but it must be letting in as a result of judicial determination of the question whether it can be admitted in evidence or not for want of stamp.

With respect to the learned Judge I do not see any warrant for introducing this limitation and qualifying the plain language of S. 36, but the learned Judge himself explains what he means by "judicial determination of the question". He says:

In other words, the Court admitting it must have applied its mind consciously to the question whether the document is admissible or not. It may of course happen in some cases that a document, which is not admissible for want of stamp, is allowed by the Court to go in, the question of stamp escaping its notice as well as the attention of the parties. In such cases the admission is a judicial determination of the question, because the Court let in the document on its view that there was nothing against its admission.

This seems to indicate that if a document had been admitted without objection there was a judicial determination of the question and the document must be deemed to have been admitted in evidence. I see no difference between this view and the views taken by Rankin, C. J. and Madhavan Nair, J. The observations of Chandavarkar, J. on which the learned Advocate-General relied must be understood with reference to the facts of the particular case with which the learned Judge was dealing. In that case there was an issue raised as to the insufficiency of stamp but the consideration of the question was postponed and pending the determination of that question the document was marked as an exhibit. Therefore the document could not be deemed to have been admitted in evidence within the meaning of S. 36. The same was the case in 42 M L W 574[6] decided by Pandrang Row, J. and in A I R 1933 Lah 271,[7] decided by the Lahore Court. So in all these cases there was no admission of the document in evidence within the meaning of the said section. Again, reliance was placed by the learned Advocate-General on Rr. 3 and 4 of O. 13, Civil P. C. R. 3 says that:

The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

But the Rule must be taken subject to the provisions of S. 36, Stamp Act, which is mandatory. Once a document is admitted in evidence no objection as regards insufficiency of stamp can be taken and the provision in R. 3, O. 13 must yield to this. Again, the case in 53 Mad 137[8] was relied on. According to the said decision "a mere mechanical act of endorsement is not sufficient to constitute admission in evidence". In fact, Phillips, J. says that:

Once it has been admitted in evidence, even in a subsequent stage of the same suit, it is clear that, under that section, objection could not be taken when there had been such admission. What has to be determined in each case is whether there has been an 'admission' or not.

Therefore there is nothing in this decision which runs counter to the view I have already stated. The question is whether the document has been admitted in evidence and not whether it was admitted after a special objection relating to the sufficiency of stamp was taken and determined. In this case objection was taken with regard to its admissibility. I shall assume only with reference to registration and not to want of stamp. But the learned Judge overruled the objection and admitted the document in evidence. That is quite enough admission within the meaning of S. 36, Stamp Act. I am therefore of opinion that the learned Judge had no jurisdiction to go behind his order admitting the document. S. 36 will also apply when secondary evidence of an instrument not duly stamped has been wrongly admitted. I therefore set aside the order of the learned Subordinate Judge

4. Noor Ahmad v. Irshad Ghaus, A I R 1933 All 821=147 I C 205=56 All 131.
5. Chunilal Tulsiram v. Mulabai, (1910) 12 Bom L R 466=6 I C 903.
6. Abdul Wahab Saheb v. Kanaka Anjaneyalu, A I R 1935 Mad 888=159 I C 23=42 M L W 574.
7. Jaganath v. Mt. Chauli, A I R 1933 Lah 271 =142 I C 535=34 P L R 417.
8. Venkanna v. Parasuram, A I R 1929 Mad 522 =120 I C 879=56 M L J 633=53 Mad 137.

and allow this Civil Revision Petition with costs both here and in the Court below.

C.R.K./S.C. *Revision allowed.*

A. I. R. 1937 Madras 433

VENKATARAMANA RAO, J.

Vakkalagadda Venkata Rama Lakshmayya — Petitioner.

v.

Parepalli Subba Rao and *others* — Opposite Parties.

Civil Revn. Petn. No. 931 of 1935, Decided on 14th December 1936, from decree of Dist. Court, Masulipatam, in C. M. A. No. 37 of 1934.

(a) Provincial Insolvency Act (1920), S. 9 (1) (c)—Limitation—Insolvency petition must be filed within three months from act of insolvency—Rule is absolute.

If insolvency petition is to be filed on the basis of an act of insolvency, it must be filed within three months from the date of the commission of the act of insolvency. This rule is absolute: *A I R 1935 Mad 857, Foll.* [P 433 C 2]

(b) Provincial Insolvency Act (1920), S. 6, Cls. (e) and (h)—Scope—Act makes no distinction between decree on mortgage and decree on charge antecedent to suit—Expression "in execution of decree for payment of money" in S. 6 (e) and (h) means decree executable by arrest of person or against general estate of judgment debtor—Decree based on mortgage or charge is executable only against property hypothecated and not against person or general estate of judgment debtor—Decree based on mortgage or charge is not therefore decree for payment of money within meaning of S. 6 (e) and (h).

The Provincial Insolvency Act makes no distinction between a decree on a mortgage and a decree on a charge when such charge is antecedent to the suit, e. g., charge created by will and not a charge created for the first time by the decree. The procedure that is followed for a decree on a charge is the same as in the case of a decree on a mortgage. But a decree on the footing of a mortgage or charge would not be a decree for the payment of money within the meaning of S. 6 (e) and (h), Provincial Insolvency Act. There is a distinction between decree based on a purely personal claim and a decree based upon a mortgage or charge antecedent to the suit. In the one case the essential relief claimed in the suit would be for a personal relief and in the other the essential relief would be for a sale of the property. So that what is contemplated by the expression 'in execution of the decree for the payment of money' is a decree capable of execution by the arrest of the person or against the general estate of the person against whom the decree is passed. Where a particular property is hypothecated for a debt either by way of mortgage or charge, the relief can only be against that particular property and not against the general estate. In such a case the decree that is passed though in one sense is for the realization of the money secured by the mortgage or charge will not be a decree for the payment of money because it is not capable of enforcement in the first instance against the person or the general estate until the property which has been secured by the mortgage or charge is exhausted. [P 434 C 1]

A decree therefore based on a mortgage or a charge antecedent to the suit is not a decree for payment of money within the meaning of S. 6, Cls. (e) and (h) of the Act and a sale in execution thereof will not be an act of insolvency: *14 C L J 639* and *A I R 1924 Mad 901, Rel. on.* [P 434 C 2]

P. Satyanarayana Rao—for Petitioner.

P. Subba Rao — for Opposite Parties.

Order.—This is a petition to revise an order of the learned District Judge of Masulipatam which confirmed an order of the learned Subordinate Judge of Bezwada adjudicating the petitioner an insolvent. The petition for adjudication was filed by the respondents-creditors on 4th July 1932. Two main acts of insolvency were relied on in support of the application, viz. (1) a compromise decree suffered by the petitioner in and by which a charge was created over certain properties belonging to the petitioner on 5th February 1932; (2) the petitioner allowed his immoveable property to be sold in execution of a decree dated 13th June 1932 on the footing of a charge created in favour of one Nagaratnammal. So far as the first alleged act of insolvency is concerned, it is admittedly more than three months prior to the date of the presentation of the petition to adjudge the petitioner an insolvent. The view that formerly prevailed that where the application was made on the re-opening day of the Court, though the alienation was more than three months prior to the date of presentation of the application it will still be available as an act of insolvency is no longer law. It has now been declared by the Full Bench in 58 Mad 794[1] that the period of three months must be calculated from the date of commission of act of insolvency and it is an absolute rule. The first alleged act of insolvency is therefore of no avail.

The next question is whether the sale of the property in execution of the decree dated 13th June 1932 will fall within the meaning of S 6 (e), Provincial Insolvency Act. Both the lower Courts have sought to make a distinction between cases where a decree directs a sale on the footing of a mortgage and where a decree directs a sale

1. Chenchuramana v. Arunachalam, A I R 1935 Mad 857=158 I C 1=58 Mad 794=69 M L J 283 (F B).

on the footing of a charge. In my opinion this distinction does not seem to be sound especially in cases where the charge is not created for the first time by the decree. In this case under a will the said Nagaratnammal was given a charge for the annuity in her favour. The suit (O. S. 281 of 1931) itself was to enforce the charge created by the said will ; the decree itself was passed under O. 34, R. 15, Civil P. C., which makes the procedure followed in the case of mortgage decree applicable to decrees passed on the footing of a charge. So far as the Provincial Insolvency Act is concerned, a mortgage and a charge are put on the same footing, but the question still remains whether the decree in question can be held to be a decree for payment of money within the meaning of S. 6 (e), Provincial Insolvency Act. It will be noticed that the expression "in execution of the decree for the payment of money" occurs both in Cls. (e) and (h) of S. 6. This seems to connote that a decree on the footing of a mortgage or charge would not be a decree for the payment of money within the meaning of the said two Clauses. There is a distinction between a decree based upon a purely personal claim and a decree based upon a mortgage or charge antecedent to the suit. In the one case the essential relief claimed in the suit would be for a personal relief and in the other essential relief would be for a sale of the property. So that, what is contemplated by the expression "in execution of the decree for the payment of money" is a decree capable of execution by the arrest of the person or against the general estate of the person against whom the decree is passed. Where a particular property is hypothecated for a debt either by way of mortgage or charge the relief can only be against that particular property and not against the general estate. In such cases the decree that is passed though in one sense is for the realization of the money secured by the mortgage or charge will not be a decree for the payment of money because it is not capable of enforcement in the first instance against the person or the general estate until the property which has been secured by the mortgage or charge is exhausted. Mcokerjee, J. in 14 C L J 639[2] in discussing whether a mortgage decree for sale is a decree for payment of money within the meaning of S. 232 of the old Code corresponding to O. 21, R. 16 of the present Code points out the distinction between a decree for payment of money and a decree for sale on the footing of a mortgage. He says "where there is a decree for payment of money it must be taken to be a decree for payment of money personally," the word personally being used in the sense which I have explained above, i.e., enforcible by the arrest of the person or against the general estate. The learned Judge held in that case that a mortgage decree for sale is in substance a decree for sale of the mortgaged property and not for payment of money. This view was accepted as sound by the decisions of our High Court in 47 Mad 948[3] and 49 Mad 508.[4] I am therefore of opinion that the decree for sale passed on 13th June 1932 is not a decree for payment of money within the meaning of S. 6 (e) and that the sale in execution thereof will not be an act of insolvency on which an application for adjudication can be founded. The Civil Revision Petition is accordingly allowed with costs here and in the Courts below.

C.R.K./K.B. *Petition allowed.*

2. Laldhari Singh v. Manager, Court of Wards, Bhapatpura Estate, (1911) 14 C L J 639=12 I C 70=16 C W N 332.

3. Rajaratna Naidu v. Ramachandra Naidu, A I R 1924 Mad 901=82 I C 948=47 M L J 434=97 Mad 948.

4. Chidambara Thevar v. Subbarayar, A I R 1926 Mad 623=93 I C 58=51 M L J 139=49 Mad 508.

* A. I. R. 1937 Madras 434

KING, J.

Maruthappan Servai and *another* — Appellants.

v.

Niraikulathan Servai and *others* — Respondents.

Second Appeal No. 106 of 1933, Decided on 26th November 1936, against decree of Sub-Judge, Tuticorin, in A. S. No. 24 of 1931.

*** Hindu Law — Alienation — Necessity — Mortgage of joint family property for obtaining money for purpose of assisting prosecution of person accused of murder of member of family — Money borrowed is not for family necessity and such debt is not binding on family.**

In the ordinary sense of the word 'necessity' it is not necessary and never can be necessary to spend money in order to assist in the prosecution of a person accused of the murder of a member of one's family. To have that person convicted and even hanged can do the family no good ; it

cannot restore the murdered man to life; it cannot be said to affect the finances of the family or even its prestige. The money borrowed for such a purpose is not for family necessity and is not therefore binding on the family: *A I R 1923 Lah 660, Ref.*; *AIR 1934 Mad 169, Disting.*
[P 435 C 2; P 436 C 1]

K. Raja Iyer — for Appellants.

S. Ramaswamy Iyer—for Respondents.

Judgment. — This is a suit brought upon a mortgage deed of 1920 by the mortgagee to enforce his mortgage. The mortgagor is defendant 1. The other defendants are his two grandsons, defendants 2 and 3. In the mortgage deed the property is described as belonging to the mortgagor himself, but it has been found by the Court of first instance that the property mortgaged was really the joint family property of the mortgagor and his grandsons. The purpose for which the money was borrowed was recited to be to pay an advocate who was engaged to assist the police in prosecuting a man, accused of having murdered defendant 1's son, who was also the father of defendants 2 and 3. Both the Courts have held that this was a purpose binding upon the joint family and have given a mortgage decree over the whole of the property, that is to say, including the shares of defendants 2 and 3 as well as the share of defendant 1.

It is contended in this second appeal that this finding is wrong and that the mortgage as a mortgage can be valid only as against the share of defendant 1. The learned advocate for the respondent however argues that the question whether any particular sum of money had been borrowed for family necessity or purpose binding upon the family is a question of fact and that as both the lower Courts have given findings on this question, I am precluded from interfering with those findings in second appeal. I agree that in the main the question whether money had been borrowed for family purpose is a question of fact. I agree also that there is a finding in the present case that money was necessary if a pleader were to be engaged to assist the police, that is to say, that the money was not otherwise available. But it does not seem to me that either of the Courts below have definitely given any positive finding of fact on this point. They are clearly obsessed by the difficulty of the situation. In the ordinary sense of the word it is not necessary and never can be necessary to spend money in order to assist in the prosecution of a person accused of the murder of a member of one's family. To have that person convicted and even hanged can do the family no good; it cannot restore the murdered man to life; it cannot be said to affect the finances of the family or even its prestige. In any case the Courts below have not seriously faced this problem. The District Munsif in giving his finding merely says:

In the absence of decided rulings either way I am inclined to hold that this is an item of expenditure which should bind the family. To hold otherwise would sometimes work grave hardship.

And the learned Subordinate Judge says as follows:

In the present instance the debt in question was incurred for the purpose of finding out and bringing to book the real offender, that is to say, for the vindication of justice. Such an object seems to me proper and lawful and the vindication of justice is as much a necessity as the defence of an accused member of a family.

It seems to me that that finding was given merely as a bare expression of opinion on the part of the learned Subordinate Judge. There is no attempt at showing by any kind of detailed discussion of the circumstances of the family how this benefit is derived or how this necessity arises. I do not, as I have said, consider that these findings, thus hesitatingly expressed, actually amount to findings of fact which preclude me from any interference in second appeal. In support of the lower Court's decision I have been referred to two cases: The first is the one reported in 79 I C 980.[1] There money was borrowed in order to prosecute a case under S. 498, I. P. C. The decision however that it was necessary to incur debts in order to prosecute for an offence under that section is not discussed at any length but is contained in a single sentence:

Debts incurred for a litigation of this nature may, in my opinion, be reasonably regarded as necessary.

The other case is 66 M L J 342.[2] That is clearly distinguishable from the facts of the present case, for there money had been borrowed partly in order to recover title deeds and partly to defend a widow against an unfounded charge of having forged a bond. It has never been doubted that money spent in

1. Anokh Singh v. Sapuran Singh, A I R 1923 Lah 660=79 I C 980.
2. Krishna Iyer v. Muthulakshmi Ammal, A I R 1934 Mad 169=150 I C 1137=66 M L J 342.

defending a member of a family in a criminal charge is a legal necessity. The question here obviously is whether money spent in assisting a particular prosecution which can bring no definite benefit to the family at all, but is undertaken either to satisfy feelings of revenge or feelings of prestige should be considered as legally binding upon all the members of the family. I do not think I can derive very much assistance from either of these two cases. It seems that the matter is one on which authority is practically wanting and one of first impression and taking the words 'necessity' and 'family benefit' in their ordinary sense it seems impossible to hold that the debts incurred in this instance can be binding upon the family. I would therefore set aside the findings of the lower Courts upon this point. The result however is not to dismiss the plaintiff's suit altogether. He can still have mortgage decree against defendant 1's share of the family property; and as against defendants 2 and 3, since the debt incurred is clearly neither illegal nor immoral and they are bound by the doctrine of pious obligation to discharge it, he can have a decree against such of the assets of the family as have come or may come in their hands. I make no order as to costs in this appeal.

C.R.K./S.C. *Order accordingly.*

A. I. R. 1937 Madras 436

VARADACHARIAR, J.

Sandanam Pillai — Appellant.

v.

Somasundaram Chettiar and *others* — Respondents.

Second Appeal No. 1291 of 1932, Decided on 4th November 1936.

(a) Hindu Law—Joint family—Self acquisition—Blending of—Income of joint family property insufficient even for maintenance of family—Earnings of father are not presumed to be from joint family property Mere fact that father has spent portion of his earnings for maintenance of his family does not suggest that he has blended the balance of his income in joint stock.

The law is that where there is a nucleus of joint family property, the onus will no doubt be on the father in the first instance to prove that the acquisition of the properties which he claims to be his separate property was not made out of the income from the joint family property. But where it is clear that the income from the joint family property is not sufficient even for the maintenance of the family, there is no basis for any presumption that the acquisitions must have been made from out of the income of the joint property. A father who earns and spends any portion of his earnings for the maintenance of his family does not lose his control over the balance remaining in his hands. It is only by any overt act of leading to an inference of an intention to abandon his control even over the surplus money in his hands that an intention to throw that portion of his earnings into the joint stock can be held to be established. The onus is on the other member to prove that the father had relinquished his separate rights over his earnings. [P 437 C 1, 2]

(b) Accounts—Non-production— Inference.

The inference from the non-production of accounts can only be drawn in the light of the other circumstances appearing in the case. [P 437 C 2]

L. A. Gopalakrishna Iyer — for Appellant.

Srinivasaraghavan and *Tyagarajan* — for Respondents.

Judgment.—This second appeal arises out of a suit to enforce a mortgage executed by defendants 1 and 2 in plaintiff's favour. The only question for determination in the Second Appeal is whether defendant 1 was entitled to a share in four out of the mortgage items, namely, items 3 and 4 of Karur village and items 1 and 3 of Balambapuram village. It has been found that the four items in question were acquired by defendant 7, the father of the mortgagors, in the years 1897, 1900, 1906 and 1908 in his own name, at a time when defendants 1 and 2 were minors. Defendant 7 contended that they were his self-acquired property and that defendant 1 had no share therein which would pass under the mortgage. The first Court held that defendant 1 had no interest in these items and passed a mortgage decree against defendant 1's share in the other items comprised in the mortgage; but on appeal the learned District Judge held that these items, though acquired by the father, had not been kept separate by him as self-acquired property and that defendant 1 was therefore entitled to a share therein, which must be held to have passed under the mortgage. Defendant 7 has appealed, asserting his claim that these properties are his self-acquisition.

The learned counsel for the respondent has insisted that the lower appellate Court has recorded a finding of fact with which I am not entitled to interfere in second appeal. As I am of opinion that the point of view from which the learned District Judge has approached the consideration of the question is not correct, I cannot accede to this contention of the learned counsel for the respondent. The trial

Court found that though the family of defendant 7 had a nucleus of ancestral property, the income therefrom would not have been sufficient even for the maintenance of the family. It also found that defendant 7 was earning a salary as a clerk in some shop. The evidence and the probabilities indicated that to meet the expenses of the family, defendant 7 must in addition to the income from the family properties have also spent portions of his own salary. These being the facts found by both the Courts, the question is whether on those facts, the properties acquired in defendant 7's name in 1897, 1900, 1906 and 1908 can be treated to be or to have become part of the joint properties of the family. In para. 4 of his judgment, the learned District Judge has referred to the decisions in 50 Cal 439[1] and A I R 1928 Mad 561,[2] as supporting the proposition that the very fact that defendant 7 utilised a portion of his salary for the maintenance of his family is a strong point in favour of the view that he did not intend to keep his salary as his own separate property and that therefore the acquisitions, taking them to have been made out of the surplus of his salary, must also be treated as having been thrown into the joint stock.

I am free to admit that the language in these and certain other decisions is calculated to lend colour to that view. Most of the cases relevant to this question have been discussed in a recent judgment to which I was a party (A. S. 229 of 1932) and I need not go over the ground here again. I take the law to be that where there is a nucleus of joint family property, the onus will no doubt lie on the father in the first instance to prove that the acquisition of the properties which he claims to be his separate property was not made out of the income from the joint family property. But where, as in this case, it is clear that the income from the joint family properties would not have sufficed even for the maintenance of the family, there is no basis for any presumption that the acquisitions must have been made from out of the income of the joint property. As one conversant with Hindu habits and ideas, I cannot accept the proposition that a father who earns can spend any portion of his earnings for the maintenance of his family only under peril of losing his control even over the balance remaining in his hands. It is only by any overt act of leading to an inference of an intention to abandon his control even over the surplus moneys in his hands that an intention to throw that portion of his earnings into the joint stock can be held to be established.

The way in which the lower Court has dealt with the matter practically throws open upon the earning member the obligation of showing that he kept his earnings separate, whereas, as I understand the law, the onus is upon the other party to prove that the earning member had relinquished his separate right over his earnings. As I have already stated, the mere fact that he has spent a portion thereof for the maintenance of his family cannot to a Hindu mind suggest the inference that he did not intend to retain even the balance under his control. In para. 5 the learned Judge refers to the non-production of accounts by defendant 7. It appears that on a previous occasion defendant 7 stated that he kept accounts, whereas he now denies that he kept any accounts. Having regard to the status of defendant 7, I am not by any means certain whether his former statement is more likely to be true than his present statement, but I do not wish to go the length of expressing a dissent from the learned Judge's view on a matter of this kind. Assuming that defendant 7 is suppressing his accounts, it does not necessarily follow that the plaintiff has discharged the onus lying upon him. It is well established that the inference from the non-production of accounts can only be drawn in the light of the other circumstances appearing in the case; and if the income from the joint property would hardly have been sufficient for the maintenance of the family, it does not seem to me that the mere non-production of accounts, from whatever apprehension or motive such a course might have been followed, would warrant the conclusion that these acquisitions by the father must be treated as having been thrown by him into the joint stock. The result is that the second appeal must be allowed and the decree of the first Court restored with costs here and in the lower appellate Court, payable by defendant-respondent 1 Leave granted.

C.R.K./S.C. *Appeal allowed.*

1. Rajani Kanta v. Jaga Mohan, A I R 1923 P C 57=73 I C 252=50 I A 173=50 Cal 439 (P C).
2. Krishnamachariar v. Chellammal, A I R 1928 Mad 561=107 I C 641.

A. I. R. 1937 Madras 438

VARADACHARIAR AND MOCKETT, JJ.

Kizhedath Pappi Amma and *others* — Appellants.

v.

Rama Iyer and *others* — Respondents.

Appeal No. 581 of 1930, Decided on 7th August 1936, against decree of Sub-Judge, Calicut, D/- 3rd January 1930.

(a) Promissory note—Endorsee not proved to be holder in due course is entitled only to such rights as endorser under note has.

Where an endorsee of a promissory note is not proved to be a holder in due course, he is entitled only to such rights as the endorser of the note had. [P 439 C 1]

(b) Malabar Law — Tarwad — Karnavan—Decree against karnavan as such can be executed against tarwad properties—Whether decree against karnavan is as representative of tarwad should be determined from nature of debt and substance of claim—Such question should be considered in suit itself.

A decree obtained against the karnavan as such could be executed against the tarwad properties. Such a decree is more analogous to a decree against a Hindu father, for the junior members have no separate interests or shares in the tarwad property. In determining whether a decree was obtained against a karnavan as representative of the tarwad, Courts have to attach more importance to the nature of the debt and the substance of the claim and not insist upon any particular form of words in the frame of the suit. No useful purpose will be served in such cases by relegating the consideration of the question of the binding character of the debt to the stage of execution proceedings even if this could be legally done or to a separate suit: *Case law referred.* [P 440 C 1]

(c) Promissory Note—Liability under—Pro-note by karnavan—To be in representative capacity, signature as such is not necessary—Only execution in such character should be clearly indicated somewhere in note—Karnavan having no separate property — Some anandravans parties to pro-note — Executant described as karnavan and manager in body but no signature as such—Note held executed in representative capacity (*Obiter*).

Obiter.—In order that a promissory note executed by a karnavan of a Malabar tarwad should be in a representative capacity it is not necessary that the signature should purport to be as karnavan. It is sufficient that execution in the character of karnavan should be clearly indicated somewhere in the note. [P 440 C 2]

A promissory note was executed by a person who was described as the karnavan and manager of the tarwad but the note was not signed by him as such. Further it was found that the executant had little or no separate property of his own and that three of the anandravans were parties to the note:

Held: that the note was executed in a representative capacity especially in view of the fact that in Malabar it is generally believed that if the karnavan and the senior anandravan join in a transaction, it is some guarantee that it is one binding on the tarwad. [P 440 C 2]

(d) Malabar Law — Tarwad—Suit for removal of karnavan—Junior members acting together for some time but falling out among themselves — Money borrowed by some of them for conducting litigation, maintenance, etc., but no proper accounts kept—Suit by creditor praying decree against tarwad—Several members contesting suit—Suit compromised by the then karnavan and some anandravans executing note — Compromise held not bona fide one and so not binding on tarwad—Note held not binding on tarwad.

A suit was filed by all the junior members for removal of their karnavan for mismanagement. For some time all of them acted together but subsequently they fell out among themselves. Money was borrowed by the senior anandravan and others for purposes of litigation and maintenance; but no accounts were kept as to how the money was spent. It was found that all these moneys were borrowed only subsequent to the quarrel among the junior members. In the suit filed by the creditor for his money, he prayed for a decree against the tarwad property and impleaded all the junior members. Several of them contested the suit and the suit was compromised by the anandravan, who was the then karnavan and three of the anandravans:

Held: (i) that the binding character of the debt as against the tarwad should be determined with reference to the nature of the original consideration and that the note debt was not binding on the tarwad; [P 443 C 1, 2]

(ii) that the compromise by which the note was executed was not a bona fide one and not binding on tarwad especially in view of the fact that some of the members had not participated: *A I R 1926 Mad 991, Expl.*; [P 443 C 2]

(iii) that the debt was not for the preservation of the common property: *7 Mad 233* and *A I R 1916 Mad 976, Disting.*; [P 444 C 1]

(iv) that even assuming that junior members might in certain circumstances impose a liability on the tarwad even in respect of their individual borrowings, still as it was not shown what portion of the suit claim could be held to have been borrowed for such purposes, the tarwad was not bound: *A I R 1921 Mad 669* and *21 M L J 87, Disting.* [P 444 C 2]

(e) Civil P. C. (1908), O. 23, R. 3—Dismissal under O. 23 does not amount to adjudication—It precludes only second suit on same cause of action.

A dismissal under O. 23, Civil P. C., does not amount to an adjudication but only precludes the institution of a second suit on the same cause of action. Hence where a suit on a debt praying for a decree against the tarwad is dismissed by a compromise being effected by the execution of a pro-note by the then karnavan and the plaintiff files a suit on the note, the suit on the note is on an independent cause of action and the binding character of the debt on the tarwad can be gone into. [P 443 C 2]

(f) Malabar Law—Tarwad—Claim sustainable against tarwad withdrawn on execution of note by karnavan — Note is binding on tarwad.

Where a suit in which a claim sustainable against a tarwad is withdrawn on the execution of a pro-note by the karnavan in consideration of such withdrawal, the note is binding on the tarwad. [P 444 C 1]

K. Kuttikrishna Menon and *P. Narayana Nair* — for Appellants.

K. P. Ramakrishna Ayyar, *K. S. Raman Menon* and *V. Rajagopalachari*— for Respondents.

Varadachariar, J. — This is an appeal by defendants 6 to 9 against that portion of the lower Court's decree which held the properties of the appellant's tarwad liable to satisfy the plaintiff's claim under a promissory note (Ex. A) executed by defendants 1 to 4 in favour of defendant 5 and endorsed over by him to the plaintiff. The suit was in the first instance instituted against the executants alone; but as defendant 1 was also the karnavan of the tarwad, and as the plaint alleged that the promissory note has been executed for tarwad necessity, the plaint prayed specifically for a direction for payment of the suit debt out of the tarwad properties. Defendant 1 denied the allegation that the note was executed for tarwad necessity. It however appears to have been considered safer to have this question of tarwad necessity raised by some of the other members of the tarwad: the appellants were on their own application added as defendants 6 to 9 and they put the point of tarwad necessity definitely in issue.

Questions were also raised as to whether the endorsement in favour of the plaintiff was supported by consideration and whether the plaintiff was a holder in due course. The lower Court held that in the circumstances a finding on these questions was unnecessary. We do not see how the question of 'holder in due course' would have any bearing on the question as to the liability of the tarwad properties, for that will always depend on proof as to the nature and purpose of the debt. However, we are not satisfied that the plaintiff was a holder in due course and we are of opinion that the plaintiff is entitled only to such rights as defendant 5 had. The point for determination in the appeal is accordingly that raised by the first issue, namely whether the suit pro-note is binding on the tarwad. A contention was advanced before us on behalf of the appellants that even if defendant 5 could have proceeded against the tarwad property for the recovery of the debt evidenced by the suit note, the plaintiff who is merely an endorsee of the note and not an assignee of the original debt, must be limited to the remedy on the note and was entitled to a decree only against the executants. It was also argued that Ex. A had not been executed by defendant 1 in his capacity as karnavan and that reference to him in the body of the note as karnavan and manager of the tarwad, must be taken to be merely descriptive. Lastly, it was said that the suit had been framed only as an action on the promissory note and not as one on the original debt or consideration. These questions do not appear to have been argued before the lower Court; but as they are substantially questions of law, arising on the language of the plaint and the suit note, we allowed them to be argued at some length.

Notwithstanding the principle recognized in 46 Cal 663,[1] the High Courts in India have generally held that in cases not based on mere agency, a promissee's claim under a note is not limited to a personal decree against the executant but may also include relief against the properties of a partnership joint family, or Tarwad which, under the substantive law governing the executant, will be liable for the debt: *see* 44 All 393[2] and the cases there referred to. The narrower view laid down in A I R 1930 Bom 424[3] is not reconcilable with the assumption underlying the recent judgment of the Privy Council in A I R 1934 P C 4,[4] which proceeds on the footing that a promisee from one of several partners may in certain circumstances be entitled to relief against the partnership property. There is an obvious difference between the class of cases dealt with in 44 All 393[2] and cases of agency; in the latter, the undisclosed principal must be held personally liable, if at all, whereas in the former, the plaintiff merely seeks in the

1. Sadasuk Janki Das v. Sir Kishan Pershad, A I R 1918 P C 146=50 I C 216=46 I A 33 =46 Cal 663 (P C).
2. Krishnanand Nath Khare v. Raja Ram Singh, A I R 1922 All 116=66 I C 150 = 44 All 393 =20 A L J 233.
3. Manchersha Ardesar v. Govind Ganesh, A I R 1940 Bom 424=128 IC 43=32 Bom LR 1035.
4. Abdul Majid Khan v. Saraswathi Bai, A I R 1934 P C 4=147 I C 1=61 I A 90=30 N L R 60 (P C).

suit an adjudication that the liability is of such a character that the interests in certain common property, even of persons who are not parties to the note, are liable for the debt. In the case of a Tarwad, it has been held that a decree obtained against the karnavan as such could be executed against the Tarwad properties : *see* 8 Mad 484;[5] 15 Mad 333;[6] *cf.* 27 Mad 375;[7] such a decree is more analogous to a decree against a Hindu father, than to one against one of several undivided brothers dealt with in 8 Mad 208,[8] 40 Bom 329,[9] and 26 Bom L R 497,[10] for the junior members have no separate interests or shares in the Tarwad property.

In determining whether a decree was obtained against a karnavan as representative of the Tarwad, Courts have attached more importance to the nature of the debt and the substance of the claim and have not insisted upon any particular form of words in the frame of the suit. No useful purpose will be served in such cases by relegating the consideration of the question of the binding character of the debt to the stage of execution proceedings even if this could be legally done or to a separate suit. Reliance was placed on the decision 27 M L J 595,[11] in support of the contention that except where the note had been executed in terms making it clear that the karnavan was executing it in his representative capacity, no relief could be had either in the suit or in execution proceedings against Tarwad properties. This decision has been explained in 1915 M W N 217[12] and 37 M L J 369.[13] As pointed out in 39 Mad 915,[14] the Indian Negotiable Instruments Act has in S. 28 specially dealt only with cases of agency and contains no express provision (like that in S. 26, Bills of Exchange Act) in respect of all cases of execution in a 'representative capacity'.

Even in cases of agency, the Indian Act has been held only to require that execution in the character of an agent should be clearly indicated somewhere in the note and it does not insist that the signature should purport to be as of agent. If it were necessary to decide the question, we should be prepared to hold that Ex. A contains sufficient indication that defendant 1 became a party to it in his representative capacity. In coming to a decision on that point, it must be remembered that defendant 1 had little or no separate property of his own, that three of the anandravans were parties to Ex. A, and that in Malabar it is generally believed that if the karnavan and the senior anandravan join in a transaction it is some guarantee that it is one binding on the Tarwad.

In the above view, it is not necessary to discuss the apparent conflict between (1912) M W N 1011,[15] 40 Mad 727[16] and A I R 1934 Mad 350[17] on the one side and 3 M L W 463[18] and 32 M L J 354[19] on the other, as to the rights of an 'endorsee' of a note (as distinguished from a regular assignee) to obtain a decree against the properties of non-executants ; because appellant's learned counsel admitted that if the note had been executed in a 'representative' capacity, the endorsee could also proceed against the executant as a representative of the Tarwad. Nor is there much substance in the objection about the frame of the suit, because the plaint clearly asks for relief against the properties of the Tarwad and it is for this very reason that the appellants intervened in the suit.

For the determination of issue 1, it is necessary to refer at some length to the transactions that led up to the suit note and to the circumstances in which the note was executed. It is common ground

5. Ittiachan v. Vellappan, (1885) 8 Mad 484.
6. Govinda v. Krishnan, (1892) 15 Mad 333.
7. Manakat Velamma v. Ibrahim Lebbe, (1904) 27 Mad 375.
8. Viraragavamma v. Samudrala, (1885) 8 Mad 208.
9. Laxman Nilkant v. Vinayak Keshav, A I R 1916 Bom 262=33 I C 956 = 18 Bom L R 52 =40 Bom 329.
10. Namdev Tukaram v. Vishnu Chintaman, A I R 1924 Bom 395=80 I C 425 = 26 Bom L R 497.
11. Govindan Nair v. Nanu Menon, A I R 1915 Mad 618=26 I C 750=27 M L J 595 (F B).
12. Nachiappa Chetty v. Dakshinamurthy Servai, A I R 1916 Mad 424 = 28 I C 345 = 1915 M W N 217.
13. Thankammal Vayamkar Amma v. Kunhamma, A I R 1919 Mad 370 = 53 I C 878= 37 M L J 369.
14. Padma Krishna Chettiar v. Nagamani Ammal, AIR 1916 Mad 677=30 I C 574=39 Mad 915.
15. Seetharama Chetty v. Seshiah Chetty, (1912) 17 I C 417=1912 M W N 1011.
16. Shanmuganatha Chettiar v. Srinivasa Ayyar, A I R 1917 Mad 105=35 I C 219 = 40 Mad 727=31 M L J 138.
17. Seshayya v. Sanjivarayudu, A I R 1934 Mad 350=150 I C 885=67 M L J 393.
18. Ayyasami Pillai v. Guruswami Naicker, A I R 1917 Mad 653=33 I C 691=3 M L W 463.
19. Nataraja Naicker v. Ayyaswami Pillai, A I R 1917 Mad 61=38 I C 339=32 M L J 354

that for some years prior to 1915, the affairs of the Tarwad had been so mismanaged by the then karnavan Krishna Menon that all the junior members joined in instituting a suit (O. S. No. 47 of 1915, Sub-Court, Calicut) for his removal. It is also admitted that for the expenses of that suit and for maintenance and other necessary expenses of the Tarwad during that time, monies had to be borrowed by the junior members (*cf.* Exs. 14 and 15). It would appear that till about the middle of 1916, all the junior members were united in their attitude against the karnavan. When, in July 1916, the present defendant 1 (Kesava Menon) who was the then seniormost anandravan and plaintiff 1 in O. S. No. 47 of 1915, filed a petition Ex. 11 praying to withdraw the suit on the terms of the karar Ex. 10, the junior members fell out amongst themselves, because the other adult male members and a few of the female members who sided with them objected to the advantages which Kesava Menon sought to secure for himself under the karar and to the favourable terms offered in return therefor to the former karnavan. In particular they took exception to the sole management which Kesava Menon tried to obtain by the karar in contravention of the original understanding that the management should be jointly conducted by Kesava Menon and the next junior anandravan. Numerically, however, far the greater proportion of the members of the Tarwad supported Kesava Menon but they were all female members. On the opposition of the dissentient members to the withdrawal of O. S. No. 47 of 1915, the suit was directed to proceed and was referred to a Panchayat but before the Panchayat could deal with the matter, Krishna Menon died and the suit terminated.

If it were clearly proved that the whole or even a substantial portion of the amount sought to be recovered in this suit had been borrowed at a time when all the junior members of the Tarwad were acting in concert, we should have had little difficulty in holding that the Tarwad properties would be liable for the debt. The learned Subordinate Judge finds, and the evidence certainly leads to the conclusion, that such is not the case here, though it may be that even prior to the date of Ex. 10 defendant 5 had been lending some monies from time to time to the junior members. The present defendants 2 to 4 and another junior member, Sankunni Menon, led the dissentient faction in the Tarwad and when they resolved to continue O. S. No. 47 of 1915, they entered into an arrangement with defendant 5 for financing them for the purpose and also for their other expenses. On 12th August 1916 they executed Ex. 16, a registered bond for Rs. 10,000, in favour of defendant 5, stating that Rupees 5,000 was the amount found due on the taking of accounts in respect of prior advances and that another sum of Rupees 5,000 was to be advanced from time to time by defendant 5. Defendant 5 would have it that these statements are true and that he did advance the second Rs. 5,000 also; and in O. S. No. 55 of 1923 which he filed on that bond, he claimed to recover the full amount as per terms of the bond. He admits that the advances made by him from time to time were entered in a note-book kept by him and the entries were signed by one or other of the borrowing members. But this note-book has not been produced by him either in the present litigation or in O. S. No. 55 of 1923. We are not prepared to accept his explanation that he handed over this note-book to defendant 1 on the execution of Ex. A.

That defendants 2 to 4 must have borrowed some monies from defendant 5 after they had quarrelled with defendant 1 is clear from the evidence of defendant 1 himself and also from Ex. 5, a document executed by defendant 1 in favour of defendant 5, but not completed by registration. We are not prepared to accept defendant 1's explanation that he signed Ex. 5 without reading it. It seems to us that we may safely accept the story set forth by defendants 2 to 4 in Ex. F, the written statement filed by them in O. S. No. 55 of 1923 to the effect that in connexion with Ex. 16 they had altogether received only a sum of Rs 2,118-1-10. We are also prepared to believe that as stated in Ex. F this amount must have been received partly for the expenses of conducting O. S. No. 47 of 1915 after the date of the karar, Ex. 10, partly for the maintenance of the dissentient members of the Tarwad and to some extent for the funeral expenses incurred in connexion with the death of defendant 2's mother. But in the absence of defendant 5's note-book or other reliable evidence giving

details as to the advances, it is not possible to say how much was required or applied for each of the three purposes above referred to. Defendant 1 swears that notwithstanding the disputes between himself and the dissentient members, he paid them the monies required for their maintenance expenses and for the funerals of defendant 2's mother. But as he has not chosen to produce the accounts which he admits he kept, the learned Judge rightly refused to believe his statement.

The above, being in our opinion the true state of facts, the question arises, how far the amounts thus borrowed from defendant 5 by defendants 2 to 4 and Sankunni Menon could be held to be a debt binding on the Tarwad? As both parties found certain arguments on the circumstances attending the execution of Ex. A, it will be convenient to deal with them first. As stated already, O. S. No. 55 of 1923 had been instituted by the present defendant 5 for the recovery of the full amount due under Ex. 16 and as he prayed for a decree against the Tarwad properties, he had impleaded all the members of the Tarwad (more than 50 in number) as party defendants. The present defendant 1 had become karnavan by that time and he was accordingly impleaded as defendant 1 in that capacity. All the members of the Tarwad except the executants of Ex. 16 denied the plaintiff's right to a decree against the Tarwad and also questioned the consideration of Ex. 16. The executants in their written statement already referred to (Ex. F) admitted receipt of a portion of the consideration and alleged that to that extent the document was binding on the Tarwad. On 4th October 1924 a petition (Ex. D) was filed by the plaintiff and defendants 1 to 4 in that suit, stating that the suit had been compromised between them by defendants 1 to 4 executing to the plaintiff a pro-note for Rs. 4,100. This is the note (Ex. A) now sued on. The petition is signed by the then plaintiff and defendants 1 to 4 but it is signed by a vakil who appeared for Sankunni Menon also. Though the petition purported to be one under O. 23, R. 3, Civil P. C., it prayed that the Court may be pleased to record that the suit had been compromised as mentioned in the petition and to strike off the suit from the file. On the same day the Court simply passed an order "suit dismissed".

P. W. 1 swears that, though the compromise petition and Ex. A were signed by only a few of the defendants in that suit, the settlement was in fact agreed to by all the members of the Tarwad. The learned Subordinate Judge was also inclined to believe that this must have been so; and in support of that view he relied on two circumstances (1) that the settlement was arrived at in the presence of Mr. Raman Nair who had been vakil for the Tarwad for several years and (2) that none of the other members objected to the compromise or claimed their costs on the dismissal of the suit. We are not satisfied that this view is correct. It may be assumed that the other members of the Tarwad must have known of the arrangement and the execution of Ex. A. But we find it difficult to believe that if the parties had definitely agreed that the debt should be regarded as binding on the Tarwad, no statement to that effect would have been made in Ex. A or at least in the petition Ex. D. This circumstance assumes importance when it is remembered that all the members of the Tarwad had been impleaded as defendants in the suit and most of them had expressly denied the binding character of the debt if any. It is admitted that the junior members were represented by separate vakils and it is not explained why those vakils did not join in Ex. D, though it may be too much to expect the ladies to join in the execution of the promissory note.

The learned Judge seems to us to have overstressed the importance of the absence of any objection from the other members. If there was a positive statement either in Ex. D or in Ex. A to the effect that the debt had been accepted as binding on the Tarwad, it would be reasonable to draw some inference from the failure of the junior members to take exception to such a recital. But in the absence of any such statement, the junior members might well have been content to allow the matter to remain where it was. Nor does it appear to us proper to stress the point of the knowledge of Raman Nair, the Tarwad vakil, because in that litigation, he was appearing only for defendant 1 and the junior members were represented by other vakils. The concurrence of the anandravans is ordinarily no doubt a matter of significance. But that circumstance is not of much value in this case, because four of them had already undertaken liability

under Ex. 16. There is no doubt about the fact that defendant 1 who had not joined in Ex. 16 undertook the liability by Ex. A and purported to join in it as karnavan and manager of Tarwad. The learned Judge observes that defendant 1 is not an illiterate simpleton who could have been easily induced to enter into a compromise unless he himself was satisfied about its advisability and reasonableness. But defendant 1 has by his conduct ever since the date of the Karar Ex. 10 shown himself so unreliable that we hesitate to attach much importance to his attitude in respect of any transaction. The promissory note which he executed to Krishna Menon, the former Karnavan, was later on contested and held not binding on the Tarwad. He has given an obviously false story about Ex. 5 and notwithstanding his execution of Ex. A he has not hesitated by his written statement and by his evidence in the present suit to repudiate liability therefor. In one portion of the judgment the learned Judge himself observes that :

> With some inducement or other, defendant 5 had been successful in inducing defendant 1 to recognize and admit the validity of Ex. 16 by getting him to execute Ex. 5.

But he does not attempt to state what that inducement might have been. The evidence leaves little room for doubt as to defendant being a mere opportunist. As regards his capacity, defendant 5 himself admits in his evidence that defendant 1 was not considered to be a clever or competent man before he became karnavan, though he would add that after becoming karnavan he has proved himself to be quite capable of managing the affairs of the Tarwad. In these circumstances it does not seem to us possible to hold that the execution of Ex. A or the circumstances attending that transaction have helped to put the liability of the Tarwad on any higher footing than it was prior to the execution of Ex. A. On the other hand, one is almost tempted to draw an adverse inference from the circumstance that when nearly the whole Tarwad had denied its liability in O. S. No. 55 of 1923, the plaintiff in that suit did not take care to put that question beyond reasonable doubt. It seems to us not improbable that he was content to leave that question where it was and was satisfied with the liability which defendant 1 was prepared to undertake as Karnavan. The result is that the binding character of the debt as against the Tarwad has now to be determined with reference to the nature of the original consideration.

The learned Subordinate Judge has in one portion of his judgment relied on the theory of a karnavan's power to enter into a bona fide compromise. We are not satisfied that the circumstances warrant the application of that rule here. For reasons best known to the parties, they did not ask for a decree in terms of the compromise in O. S. No. 55 of 1923, but preferred to have the suit struck off on the execution of Ex. A. It may be the law that the presence of the other members of the Tarwad on the record as parties to the suit does not of itself deprive the karnavan of his representative character (*cf.* 51 M L J 282)[20] or even of his power to compromise the suit. But the non-participation of the other members is undoubtedly a fact to be borne in mind in dealing with the argument of bona fide compromise. The mere fact that the plaintiff in O. S. No. 55 of 1923 gave up a large portion of his claim does not seem to us of much consequence in the absence of the evidence to show that the claim for the larger amount was reasonably well founded.

On behalf of the appellants, Mr. Kutti Krishna Menon put forward an extreme contention that after the dismissal of O.S No. 55 of 1923 it was not open to the plaintiff therein or anyone claiming under him to re-agitate the question of the binding character of the original debt as against the Tarwad. We are unable to accept this contention. A dismissal under O. 23, Civil P. C., does not amount to an adjudication but only precludes the institution of a second suit on the same cause of action. O. S. No. 55 of 1923 was founded on Ex. 16 whereas the present suit is based on Ex. A. It may be possible to argue that if the liability of the Tarwad is only in respect of the original debt and not based either upon Ex. 16 or upon Ex. A, the cause of action is the same for both the suits. But in the view that a karnavan may make the Tarwad liable by entering into a transaction, in his capacity of karnavan it does not seem reasonable to hold that Ex. A does not constitute an independent cause of action.

It was next argued that at the time of the execution of Ex. A a suit against the

20. Vesu v. Kannamma, A I R 1926 Mad 991=97 I C 551=51 M L J 282.

Tarwad on the original debt (as distinct from Ex. 16) had become barred by limitation and that therefore Ex. A could not be held to be binding on the Tarwad as a document executed for Tarwad necessity. Here again, it must be said that if and so far as the claim in O. S. No. 55 of 1923 was sustainable against the Tarwad, a note executed by the karnavan in consideration of the withdrawal of the suit would be binding on the Tarwad, because O. S. No. 55 had been instituted in time according to the terms of the bond Ex. 16.

The decision of this appeal must accordingly turn on the question whether or not the sum of Rs. 2,100 odd which may be taken to have been received under Ex. 16 by defendants 2 to 5 in O. S. No. 55 of 1923 was recoverable from the properties of the Tarwad. It has been argued on behalf of the plaintiff that though this amount was borrowed by junior members and not by the karnavan, the Tarwad properties should be held liable therefor, because even junior members could pledge the credit of the Tarwad in circumstances of necessity such as for the preservation of the Tarwad property or even for their own maintenance, when the karnavan fails to pay for their maintenance. In support of this contention, reliance was placed upon certain observations of Turner, C. J. in 7 Mad 233[21] and of Seshagiri Iyer, J. in 29 M L J 632.[22] We find it difficult to hold that the facts of this case warrant the application of the rule relating to debts incurred for the preservation of the common property. As observed already, the debt now in question must be taken to have been incurred after the date of the karar Ex. 10, and on the materials before us, we are not able to say that the few dissentients who attacked Ex. 10 were attempting to preserve the Tarwad properties rather than the 50 members who wished to bring Ex. 10 into force.

The fact that the pro-note for Rs. 4,000 then executed by the present defendant 1 in favour of the deposed karnavan Krishna Menon was in a later litigation held not binding on the Tarwad does not seem to us decisive on this question. As regards the head of maintenance expenses and funeral charges, we are prepared to assume, for the purpose of this case, that junior members may in certain circumstances impose a liability on the Tarwad even in respect of their individual borrowings. But the plaintiff has not made it possible for us to say what portion of the suit claim could be held to have been borrowed for such purposes. 21 M L J 87[23] and 63 I C 365[24] do not afford us any help in the determination of this case, because the former decision turned on the transferor's right as the holder of a decree relating to the property and the latter turned on the fact of the mortgagor being in de facto management of the common property. The omission of the junior members of the Tarwad (except D. W. 2) to give evidence is of course legitimately open to criticism, but the onus being on the plaintiff, we are unable to hold on the evidence that Ex. A has been shown to be binding on the Tarwad.

The appeal is accordingly allowed and the decree of the lower Court modified by deleting Cl. (2) and by omitting from Cl. (1) the words "and defendant 1 in his capacity as the karnavan and Manager of his Tarwad". The appellants will have the costs of this appeal from respondent 7. In the Court below, defendant 1 could by himself have raised and did raise the question of the liability of the Tarwad and there is room for the surmise of the learned Subordinate Judge that the appellants merely intervened at the instance of defendant 1 and it is the latter that is conducting the suit on their behalf. In these circumstances we do not think it proper to make any order as to the costs of the appellants in the Court below.

C.R.K./K.S. *Appeal allowed.*

21. Kunhammatha v. Kunhi Kutti Ali, (1884) 7 Mad 233.
22. Raja of Arakal v. Churia Kunhi Kannan, A I R 1916 Mad 976=31 I C 482=29 M L J 632.
23. Rama Kurup v. Shekara Kurn, (1911) 21 M L J 87=6 I C 268.
24. Kunhanna Rai v. Manku Chetty, A I R 1921 Mad 669=63 I C 365.

A. I. R. 1937 Madras 444

BEASLEY, C. J. AND STODART, J.

Sambasiva Reddi — Appellant.

v.

Official Receiver, South Arcot — Respondent.

Appeal No. 97 of 1934, Decided on 5th January 1937, against order of Sub-Judge, Cuddallore, D/- 7th December 1933.

Provincial Insolvency Act (1920), Ss. 3 and 5 (2) — Notification by Local Government

investing Subordinate Court with insolvency jurisdiction—Subordinate Court however has no jurisdiction to try insolvency matter originating outside its jurisdiction—Order of District Court transferring petition under S. 53 of the Act to such Subordinate Court is ultra vires.

A Subordinate Court has no jurisdiction whatsoever in insolvency and it is only by reason of S. 3, Provincial Insolvency Act, and Notification issued thereunder, that it gets any jurisdiction. Even where there is such notification investing the Subordinate Court with insolvency jurisdiction, such Court however has no jurisdiction to try any insolvency matter which originates outside the local limits of its jurisdiction. An order of the District Court transferring the petition under S. 53, Insolvency Act, to such Subordinate Court is ultra vires: *A I R 1924 Mad 398, Rel. on.* [P 446 C 1]

T. R. Srinivasan — for Appellant.

S. Annamalai — for Respondent.

Beasley, C. J. — This Civil Miscellaneous Appeal arises from the following circumstances: The Official Receiver of South Arcot presented to the District Court of Cuddallore a petition under Sections 53, 54 and 4, Provincial Insolvency Act, to set aside two mortgages. The learned District Judge transferred that petition to the file of the Subordinate Court of Cuddallore which dealt with the petition and it was declared the two mortgages in question were fraudulent and void as against the Official Receiver under Ss. 53 and 54, Provincial Insolvency Act. Hence this Civil Miscellaneous Appeal. When the matter was first argued before us we took the point that the Subordinate Judge of Cuddallore had no jurisdiction to entertain the petition at all and, as there seemed to be at that time some doubt regarding the local limits of the jurisdiction of that Court and we wished to know how the petition came to be transferred by the District Court to that Subordinate Court, we adjourned the matter requesting the District Judge to report the circumstances in which the Subordinate Judge came to try and decide the petition and also what the insolvency jurisdictions of the District and Sub-Courts are respectively and under what notification of the Government the Sub-Court has been given insolvency jurisdiction. The matter now comes before us on the report of the District Judge at Cuddallore. He reports that the Sub-Court, Cuddallore, was from 1st November 1913, invested with local jurisdiction over the whole of Cuddallore, Chidambaram and Vridhdhachalam taluks of the South Arcot District and that this was by Notification at p. 1796, Part 2 of the Fort St. George Gazette dated 28th October 1913. Then as regards the insolvency jurisdiction he reports as follows:

Under G. O. No. 1731 Law (General), dated 5th June 1924, communicated in High Court's Dis. No. 1254 of 1924 published at p. 651, Part 1 of the Fort St. George Gazette, dated 10th June 1924, all Subordinate Courts in the Presidency were invested with jurisdiction under the Provincial Insolvency Act in respect of all petitions presented by creditors. Ever since then the District Court had been exercising insolvency jurisdiction over the entire District while the Sub-Court was exercising concurrent jurisdiction over the three taluks of Chidambaram, Vridhdhachalam and Cuddallore over which it had territorial jurisdiction.

He adds that his predecessor, in order to give work to the Additional Sub-Judge transferred the petition in question to him and that was how the Sub-Court came to hear and decide the petition. The question is whether the District Judge had any power to transfer this petition to the Subordinate Judge of Cuddallore. It is common ground that this insolvency was outside the territorial jurisdiction of that Sub-Court, that is to say, it originated in some place outside the local limits of the jurisdiction of that Court. The question therefore is whether the Provincial Insolvency Act gives any power to the Local Government by Notification to give jurisdiction to a Subordinate Court which otherwise and apart from the Notification has no insolvency jurisdiction whatsoever, to deal with and dispose of insolvency matters which originate in some place which is not within the local limits of the jurisdiction of that Court. The Notification in question was issued under S. 3, Provincial Insolvency Act, which reads as follows:

The District Courts shall be the Courts having jurisdiction under this Act:

Provided that the Local Government may, by notification in the Local Official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of cases and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act:

In pursuance of the powers given under that section the Local Government issued the notification in question. We have heard a full argument upon this point and our attention has been drawn to a decided case of this Court which seems to us to be directly in point. Quite apart from that authority it seems to us to be quite clear from the words of the section itself

that the Act does not invest a Subordinate Court with jurisdiction to try any insolvency matter which originates outside the local limits of its jurisdiction. The words in the section "shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act" seem to us to be conclusive of this matter. Nevertheless it has been contended on the other side that the words "the local limits of its jurisdiction" apply only to original insolvency matters and that the District Court has power by reason of the Civil Procedure Code to transfer any matter including insolvency matters to a Subordinate Court and S. 5 (2) is invoked in support of this contention. In our view, that subsection affords no assistance because the words there, viz. "subject to the provisions of the Insolvency Act," qualify the whole section. It must be borne in mind that a Subordinate Court has no jurisdiction whatsoever in insolvency and it is only by reason of S. 3 and Notifications issued thereunder that it gets any jurisdiction. If no Notification had been issued by the Local Government, then clearly the Subordinate Court of Cuddallore could not have dealt with insolvency matters at all. This position was clearly indicated in 45 M L J 689,[1] a decision by Spencer and Devadoss, JJ. The headnote of that case is as follows:

Under S. 3, Provincial Insolvency Act, the District Court is the only Court having jurisdiction to deal with creditor's petition in the absence of any notification of the Local Government investing Subordinate Courts with jurisdiction over such class of cases. In a case in which there was no such notification the District Judge's order transferring a petition to the Sub-Court for disposal was *ultra vires*.

We consider this case to be directly in point although, in our view, having regard to the very clear words of S. 3 of the Act, no authority is required For these reasons, we are clearly of the opinion that the order of transfer by the District Judge of this petition to the Sub-Court was ultra vires and that the Sub-Court had no jurisdiction at all to deal with this matter. We have taken this objection ourselves which we consider to be decisive of this appeal and therefore the order before us must be set aside and the District Judge must be directed to take the case on his file and dispose of it according to law. In view of the fact that no objection was taken by the appellant to the jurisdiction of the Sub-Court to entertain the petition and the objection was taken by ourselves, we direct the appellant to bear the costs of this appeal. The Official Receiver will get his costs out of the estate.

C.R.K./S.C. *Order accordingly.*

1. Premchand Indoji v. Gopalappa, A I R 1924 Mad 398=75 I C 876=45 M L J 689.

A. I. R. 1937 Madras 446

VARADACHARIAR, J.

Marwadi Vannaji and *another* — Appellants.

v.

D. H. Ranga Rao and *others* — Respondents.

Second Appeal No. 1176 of 1932, Decided on 8th January 1937, against decree of Dist. Court, Bellary, in A. S. No. 138 of 1931.

Civil P. C. (1908), O. 32, R. 7 — Applicability—Disability applies only to father who is also guardian ad litem of his minor son in suit—Minor not represented in suit by father but by Court guardian — Compromise by father not shown to be prejudicial to interests of minor—O. 32, R. 7 does not apply.

The disability imposed by O. 32, R. 7, Civil P. C., will apply only to a father who is also the guardian ad litem for his minor son in a suit. Where the minor defendant is represented not by the father but by a Court guardian and where no attempt has been made to show that the compromise entered into by the father on behalf of the minor is improper or prejudicial to his interest, the Court is not justified in extending the provisions of O. 32, R. 7, either by analogy or on considerations of policy: *36 Mad 295* and *A I R 1936 Mad 434, Rel. on*; *A I R 1920 Bom 37*; *A I R 1917 Mad 672* and *A I R 1925 All 32, Ref.*

[P 447 C 1, 2; P 448 C 1]

A. Gopalacharlu—for Appellants.

K. Srinivasa Rao—for Respondents.

Judgment—This Second Appeal arises out of a suit for recovery of possession on foot of Ex. A which purports to be a deed of conditional sale executed on 26th February 1929 by defendants 1 to 3 and by defendant 1 as guardian of his minor son, defendant 4. Ex. A was executed in discharge of the amount due to the plaintiff on foot of a mortgage which defendant 1 had already executed to him. On suit brought to enforce that mortgage (O. S. No. 1 of 1926), the Court had held that the mortgage was not *qua* mortgage binding on the shares of the present defendants 3 and 4 in their ancestral property as it had not been given to secure

an antecedent debt. The Court however found that the mortgage was supported by consideration. It also found that the right to apply for a personal decree was not barred by time but the application for a personal decree was directed to be postponed to a later stage, presumably till after the sale of the shares of defendants 1 and 2 as directed by the mortgage decree. Ex. A was executed at a time when some of the properties had been sold in execution of that mortgage decree and an application to set aside that sale under O. 21, R. 90 was pending. No serious attempt has been made to show that on the merits the transaction evidenced by Ex. A was improper or prejudicial to the interests of the family or to the interests of defendant 4. It appears that on the execution of Ex. A the decree in O. S. No. 1 of 1926 was treated as discharged. An objection taken in this suit on the ground that satisfaction has not been formally entered up has rightly been disregarded by the Courts below.

Though Ex. A purports to be in terms of a sale and the plaintiff filed the suit as one for possession, the trial Court treated Ex. A as constituting a mortgage by conditional sale and accordingly gave only a decree for foreclosure. Defendant 4 appealed and claimed that his share should be excluded on the ground that Ex A was not binding on his share. The learned District Judge has acceded to that contention because he was of opinion that the case was really governed by the provisions of or at least the principle underlying O. 32, R. 7, Civil P. C. I am not able to agree in this view. I may at the outset observe that the learned District Judge is not correct in stating that defendant 4 was exonerated by the decree in O. S. No. 1 of 1926. All that was held was that the mortgage *qua* mortgage was not binding on the minor, but the plea that there was no consideration for the mortgage had been overruled and there was no suggestion that the debt, if true, was illegal or immoral. It is common knowledge that in circumstances of that kind, it is usual to pass a decree even against the minor sons of the mortgagor to the extent of a money decree against their interests in the joint family property. In this case however for some reason or other, the application for the money decree, though filed even before the mortgage decree was passed, appears to have been by consent of parties postponed to be dealt with at a later stage. These facts certainly do not amount to an exoneration of defendant 4 from liability for the debt. That is why, as I stated already, there is no serious suggestion that Ex. A is an improper transaction on its own merits.

The learned District Judge's view that Ex. A must be held bad as contravening the provisions of O. 32, R. 7, Civil P. C., is not supported by the language used by the Privy Council in 36 Mad 295[1] at p. 303. The disability imposed by that rule will apply only to a father who is also the guardian ad litem for his minor son. But in the present case defendant 4 was represented not by the father but by a Court guardian. This distinction has been pointed out in a recent judgment of this Court in 70 M L J 700[2] where some of the cases cited before me on behalf of the respondents have also been noticed. It may be that, where the Court has reason to think that a person who is not formally on record as guardian ad litem had entered into a transaction on behalf of the minor only with a view to circumvent the provisions of O. 32, R. 7, the Court will not allow such circumvention or at any rate take particular care to scrutinize the transaction. In 44 Bom 574[3] one of the learned Judges rightly laid some stress on the fact that the transaction entered into by the natural guardian was the very one which had been submitted to the Court for sanction by the guardian ad litem but not sanctioned by the Court. It may also be conceded that for the purposes of the very litigation in which the minor is a party the Court which is seized of that litigation will not record any compromise entered into by a person other than the minor's guardian ad litem. That is the principle underlying the decision in 39 Mad 853.[4] The decision in A I R 1925 All 32[5] is based on the fact that the pater-

1. Ganesha Row v. Tuljaram Row, (1913) 36 Mad 295=19 I C 515=40 I A 132=25 M L J 150 (P C).
2. Administrator-General, Madras v. Radhakrishna Chettiar, A I R 1936 Mad 434=161 I C 969=70 M L J 700.
3. Gur Mallapra v. Mallappa Martanadappa, A I R 1920 Bom 37=57 I C 417=44 Bom 574=22 Bom L R 725.
4. Vijayaramayya v. Venkatasubba Rao, A I R 1917 Mad 672=32 I C 881=39 Mad 853=30 M L J 465.
5. Santu v. Abbainandam, A I R 1925 All 32=81 I C 297.

nal uncle who purported to enter into a compromise on behalf of a minor did so, not by virtue of his authority as natural guardian of the minor but only on behalf of the guardian ad litem who was another nephew of his. I do not think there is any justification for extending the provisions of O. 32, R. 7, Civil P. C., by analogy or on considerations of policy. This Second Appeal must therefore be allowed and the decree of the first Court restored with costs here and in the lower appellate Court. In the circumstances, time for redemption will be extended by four months.

C.R.K./K.B. *Appeal allowed.*

A. I. R. 1937 Madras 448

PANDRANG ROW, J.

D. N. Venkatanarayana Ayyar — Petitioner.

v.

Emperor — Opposite Party.

Criminal Revn. Case No. 582 and Cri. Revn. Petn. No. 534 of 1936, Decided on 15th January 1937, from judgment of Sub-Divisional Magistrate, Trichinopoly, in C. A. No. 1 of 1936.

(a) Madras Prevention of Food Adulteration Act (3 of 1918), S. 6 (2)—Prosecution for offence under S. 5 (1) — No time limit for making application under S. 6 (2) is fixed, except natural limit of pronouncement of judgment — Accused (employer) can make application under S 6 (2) even after closing of prosecution case—If Magistrate refuses such application as being too late and convicts accused, trial is not according to law.

Section 6 (2), Madras Prevention of Food Adulteration Act, which gives the employer (accused) a peculiar privilege does not specify that the privilege must be claimed at any particular point of the trial or that it should be claimed before the prosecution closes its case. It is a special privilege given by law and as there is no limit of time fixed for claiming the privilege except the natural limit of pronouncement of judgment in the case, the employer (accused) can claim the privilege at any stage of the trial. [P 448 C 2]

If therefore an accused (employer) who is prosecuted under S. 5 (1) of the Act, makes an application under S. 6 (2) after the closing of the prosecution case and the Magistrate rejects it as being too late and convicts the accused, the trial is not one according to law. [P 448 C 2]

(b) Criminal Trial— De novo trial—It gives to accused right to re-summon and re-hear witnesses— All other proceedings in trial are not wiped out by exercising such privilege.

A *de novo* trial is not strictly speaking a new or fresh trial. It means that the accused has the right to have all or any of the witnesses re-summoned and re-heard by the new Magistrate; it does not mean that when the accused claims this privilege of re-summoning and re-hearing the witnesses, what had taken place before is completely wiped out or that he should renew every application which he had made before he claimed that privilege. [P 448 C 2; P 449 C 1]

G. Gopalaswamy — for Petitioner.

Public Prosecutor — for the Crown.

Order.—The petitioner in this case is a coffee-hotel-keeper at Trichinopoly, who has been convicted of an offence punishable under S. 5 (1), Madras Prevention of Food Adulteration Act, 1918. The offence is said to have been committed in respect of the sale of milk on 27th June 1935 by a servant boy employed in the coffee-hotel and not by the petitioner himself, though, according to the prosecution, the petitioner was present when the milk was served to the Sanitary Inspector. One of the main defences in both the Courts below was that the servant boy sold the milk contrary to his master's orders and without his consent. In support of this defence he made an application under S. 6, sub-s. 2 of the Act which provides that:

> Where an employer is charged with an offence under the Act he shall be entitled on application duly made by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing, etc.

This application was rejected by the trying Magistrate apparently on the ground that it was made only after the prosecution had closed its case and when the accused was himself being examined as to his defence. The reason given for this rejection of the application is obviously not a good one, for S. 6 (2) which gives the employer (accused) this peculiar privilege does not specify that the privilege must be claimed at any particular point of the trial or that it should be claimed before the prosecution closes its case. It is a special privilege given by law and as there is no limit of time fixed for claiming the privilege except the natural limit of pronouncement of judgment in the case, it must be held that the employer (accused) can claim the privilege at any stage of the trial. This point was raised in both the Courts below but the appellate Magistrate was of opinion that the accused had nobody to blame but himself because he did not renew his application under S. 6 (2) of the Act before the Magistrate who actually heard the case *de novo* at his instance. What is called a trial *de novo* is not strictly speaking a

new or fresh trial. All that it means is that the accused has the right to have all or any of the witnesses re-summoned and re-heard by the new Magistrate. It does not mean that when the accused claims this privilege of re-summoning and re-hearing the witnesses what had taken place before is completely wiped out or that he should renew every application which he had made before he claimed that privilege.

In any case, it appears to me that the trying Magistrate was not right in denying the privilege which was given by law to the petitioner and that the trial has therefore been not according to law. The conviction and sentence must therefore be set aside on this ground alone, namely, that the trial has not been according to law and especially that provision of law which is embodied in S. 6 (2) of the Act in question. In view of the nature of the case and the fact that the accused petitioner must have already suffered sufficiently in pocket by reason of the appeal and the revision petition, I do not think it is necessary in the interests of justice that there should be a re-trial.

C.R.K./K.B. *Revision allowed.*

A. I. R. 1937 Madras 449

VENKATARAMANA RAO, J.

Vedala Vallabhacharyulu and *another* — Petitioners.

v.

Vedala Rangacharyulu and *others* — Opposite Parties.

Civil Revns. Nos. 667 and 668 of 1936, Decided on 18th December 1936, from order of Dist. Munsif, Masulipatam, D/- 7th May 1936.

Court-fees Act (1870), S. 7 (iv-A)—Setting aside decree—Under will widow having life-interest with vested remainder to plaintiff—Decree against widow personally and against husband's property in her hands in suit on pro-note executed by her—Plaintiff is not bound to sue for cancellation of decree as it does not affect plaintiff's interest under general law or under particular will—Plaintiff is not bound to value his suit under S. 7 (iv-A) when he sues for declaration that decree against widow is collusive and does not affect his interest in property.

There is a distinction between an obligation imposed on a party by a decree and an obligation imposed on a party by the personal law by which he is governed in pursuance of the decree. In the one case he seeks to get rid of the obligation existing under the decree; on the other he is seeking to have it declared that he or his interest in the estate, which is sought to be made liable, cannot be rendered liable under the decree by virtue of the said personal law. In the latter case he is not bound to sue for cancellation of the decree; in the former case he is bound to sue for cancellation. Even if he sues for a bare declaration, it necessarily involves cancellation and the form of the relief he prays for is immaterial.

[P 451 C 1]

Where a widow is given only a life-interest in the property by the will of her husband with a vested remainder for the plaintiff and in a suit on the pro-note executed by her, a decree is passed against her personally and as against the property of her husband in her hands, the plaintiff reversioner is not bound to sue for cancellation of the decree as the decree cannot affect the interests of the plaintiff in the property whether under the general law or under the particular provisions of the will. The plaintiff is not bound to value his suit under S. 7 (iv-A) of the Court-fees Act when he sues for a declaration that the decree obtained against the widow is collusive and does not affect his interest in the property : *A I R 1935 Mad 203*; *A I R 1932 Mad 605*; *A I R 1931 Mad 375* and *A I R 1935 Mad 66, Rel. on* ; *A I R 1935 Mad 671* and *A I R 1935 Mad 863, Disting.*

[P 451 C 2]

P. V. Vallabhacharyulu — for Petitioners.

Govt. Pleader and *P. Satyanarayana Rao* — for Opposite Parties.

Order.—The question involved in this Revision Petition is one of court-fee and for the disposal of the same it is necessary to look into the allegations in the plaint and the substance of the relief claimed. Plaintiff 1 is a divided brother of one Vedala Raghavacharyulu, the husband of defendant 2. Plaintiffs 2 and 3 are the sons of plaintiff 1. Raghavacharyulu died in or about January 1929, leaving him surviving his widow, and by his last will and testament conferred certain rights in his estate on the widow and after her lifetime on the plaintiff. The case of the plaintiffs is that she has only a life-interest and that they have a vested remainder therein. The plaintiffs allege that the testator directed that the debts left by him should be discharged by his widow in a certain manner but she failed to do so, that she in collusion with defendant 1 executed certain promissory notes in his name, some of them purporting to be renewals of debts of her husband, that on the footing of the said promissory notes defendant 1 instituted O. S. No. 230 of 1934 on the file of the District Munsif's Court, Masulipatam, against defendant 2, that the latter allowed an ex parte decree to be passed against her personally and against the assets of the husband in her

hands, that the said decree was a collusive one and could not bind their vested remainder in the properties left by Raghavacharyulu and that the suit properties are being brought to sale and hence they have filed the present action for getting the following relief :

It may be declared that the decree obtained by defendant 1 against defendant 2 in O. S. No. 203 of 1934, of the District Munsif's Court, Masulipatam is a collusive decree and that the said decree does not affect the plaintiffs or the vested remainder interest of the plaintiffs in the properties of the late Raghavacharyulu and that defendant 1 should be restrained by a permanent injunction from bringing to sale in pursuance of the said decree the vested remainder interest of the plaintiffs in the properties of the late Raghavacharyulu.

The learned District Munsif took the view that S. 7 (iv-A), Court-fees Act, would apply to the case and directed court-fees to be paid accordingly. The question is, is this view correct? S. 7 (iv-A) so far as it is material to this case, is as follows :

In a suit for cancellation of a decree for money ..... according to the value of the subject matter of the suit and such value shall be deemed to be ..... if the whole decree is sought to be cancelled ..... the amount for which the decree was passed.

According to the plain language of the section, the essential nature of the relief sought must be for cancellation of the decree for money, i. e., getting rid of an obligation for payment of money imposed by the decree against the party who seeks to get rid of it. The plaintiffs were not parties to the said decree and there is no obligation imposed against them personally or against any property in their hands. Prima facie S. 7 (iv-A) will not apply, but it is contended that the language of the clause is general, that the decree is against the estate and that the prayer for declaration necessarily involves the cancellation of the decree, and the clause in terms will apply. In regard to the argument based on the general language of the section, I would respectfully adopt the observations of Venkatasubba Rao, J. who met a similar contention thus in 58 Mad 448[1] at pp. 449 and 450 :

His contention is ..... that this section (in regard to the decree and instruments of the kind dealt with by it) forbids declaratory suits and enacts that cancellation should always be prayed for. This argument is in my opinion utterly untenable. To declare what the substantive rights of the parties are or to prescribe the modes of enforcing those rights is outside the province of a fiscal enactment like the Court-fees Act.

The same learned Judge had to deal with a case of a son suing to set aside an alienation made by the father or the Official Receiver exercising the right of the father. It was contended before him that the alienation being for an antecedent debt, prima facie bound the son and it was obligatory on the son to set it aside and that S. 7 (iv-A) would apply to such a case. He repelled the contention and observed thus:

It has been held by a Bench of this Court, of which I was a member, in 64 M L J 24[2] that in the case of an alienation by the father it is sufficient to obtain a mere declaration that it is not binding .... in the present case, however, the sale was made for paying off the father's antecedent debts and such a sale is binding upon the son unless he affirmatively proves that the debts are illegal or immoral. It is contended that on that ground the sale in the case in hand is prima facie good and therefore it is the son's duty to have it set aside. I do not think it would be right to import such a distinction in deciding a question of Court-fee—a distinction based upon the onus of proof : 58 Mad 385[3] at pp. 387 and 388.

A similar view was taken by Ramesam, J. in 1930 M W N 509[4] where a minor member of Malabar tarwad sought to set aside a decree against the karnavan, to which he was not a party *eo nomine*. The learned Judge held that a declaration was enough and no cancellation was necessary. This decision was referred to with approval by Reilly and Ananthakrishna Iyer, JJ., in 56 Mad 212[5] and Venkatasubba Rao, J. in 58 Mad 448.[1] Referring to the view of Ramesam, J., observes Reilly, J. thus:

The learned Judge was right in saying that the plaintiffs there had to pray for no more than a declaration that the previous decree was not binding on them and the consequential relief of recovery and that it was not appropriate for them to ask that that decree, to which they had not been parties, should be set aside: 56 Mad 212[5] at p. 215.

Ananthakrishna Ayyar, J. similarly observed thus :

A decree will have full force and binding effect between the parties to the same until it is set aside by the persons who were parties to the same; but persons who were not parties to the decree can only sue for a declaration in respect of their rights in relation to the decree (p. 226).

1. Naghabushanam v. Venkatappayya, AIR 1935 Mad 203=155 I C 948=58 Mad 448=68 M L J 95.
2. Secretary of State v. Lakhanna, A I R 1933 Mad 430=141 I C 80=64 M L J 24.
3. Annamalai v. Krishtappa, A I R 1935 Mad 66 =153 I C 666=67 M L J 858=58 Mad 385.
4. Balakrishnan Nair v. Vishnu Nambudri, A I R 1931 Mad 375=132 I C 129=1930 M W N 509.
5. Venkatasiva Rao v. V. Satyanarayanamurthy, A I R 1932 Mad 605=139 I C 317=63 M L J 764=56 Mad 212.

The principle underlying the above view, as I understand it, is this, namely there is a distinction between an obligation imposed on a party by a decree and an obligation imposed on a party by the personal law by which he is governed in pursuance of the decree. In the one case he seeks to get rid of the obligation existing under the decree; on the other he seeks to have it declared that he or his interest in the estate, which is sought to be made liable, cannot be rendered liable under the decree by virtue of the said personal law. In the latter case he is not bound to sue for cancellation of the decree; in the former case he is bound to sue for cancellation. Even if he sues for a bare declaration, it necessarily involves cancellation and the form of the relief he prays for is immaterial, as pointed out by Reilly, J. in 56 Mad 212.[5] The plaintiffs in this case say that whatever may be the effect of the decree on the interest of the widow, it cannot affect their interest in the estate whether under the general law or under the particular provisions of the will and therefore they are not bound to sue for cancellation of the decree. Mr. Champakesa Ayyengar relied on two cases in support of his contention that persons who were parties to the decree, in seeking a declaration of its validity, are bound to value the relief under S. 7 (iv-A). The first case he relies on is 69 M L J 45.[6] It was a case of a transferee from a party to a decree. There can be no question that what is applicable to a party to a decree will equally apply to a person who derived interest from him in relation to the property affected by the decree, i. e., the legal representative or transferee. The second case relied on is a decision of Venkatasubba Rao, J., reported in 69 M L J 458.[7] The headnote of the said case runs thus:

Where a person sued to set aside certain mortgage deeds and sale deeds executed by his father and for possession of the immoveable properties covered by them, held, that the suit was in substance one for the cancellation of documents securing money or other property having a money value, and the plaint was leviable to court-fee under S. 7 (iv-A) and not S. 7 (v), Court-fees Act, even though the prayer for cancellation was coupled with that for possession.

6. Nemichand Sowcar v. Namberumal Chetty, A I R 1935 Mad 671=158 I C 982=69 M L J 45.

7. Bali Reddi v. Khatipulal Sab, A I R 1935 Mad 863=159 I C 263=59 Mad 240=69 M L J 458.

I tried to send for the papers in the case to ascertain the exact facts on which the decision was based, but no papers were available in the office. From the said headnote it might appear that the learned Judge was laying down exactly the opposite of what he laid down in 58 Mad 385[3] but on a close examination of the judgment, it will be seen that the learned Judge was not considering this question at all. It seems to have been assumed that it was obligatory on the son, if he was questioning the deeds executed by his father, to have them set aside either because the father executed the documents also on behalf of the son or the son was suing as heir of his father in which case S. 7 (iv-A) would apply. I am therefore of the opinion that the plaintiffs are not bound to value the relief under S. 7 (iv-A), Court-fees Act. The order of the lower Court is reversed and this Revision Petition is allowed, but I make no order as to costs.

C. R. P. No. 668 of 1936.

Following the judgment in C. R. P. No. 667 of 1936, this Revision Petition is allowed. But I make no order as to costs.

C.R.K./W.D. *Revision allowed.*

A. I. R. 1937 Madras 451

BEASLEY, C. J. AND HORWILL, J.

Maramittath Theruvil Moothachettiam Veetil Kelu — Appellant.

v.

Kuttiyil Machikandy Chekkara Cheppan and *others* — Respondents.

Letters Patent Appeal No. 97 of 1935, Decided on 10th November 1936, against judgment of Wadsworth, J., D/- 12th September 1935, reported in *A I R 1936 Mad 308.*

(a) Mortgage — Subrogation — Tarwad — Mortgage by karnavan — Assignee of mortgagee executing surrender deed in favour of person claiming to be karnavan of same tarwad — Such person paying off mortgage in bona fide belief of his right to do so — Mortgage is not extinguished—Such person held entitled to subrogation of mortgagee rights.

If a person believes in good faith that he is entitled to redeem the mortgage either under the belief that he is the mortgagor or that he has some other right in the property which would entitle him to redeem, he would be entitled to the rights of the mortgagee by way of subrogation or a like equitable principle. When a person who is not a mortgagor, under a mistaken claim, pays off a mortgage debt, he cannot extinguish it; for

he has no right to do so. The only person who can extinguish the mortgage is the person who is entitled to redeem that mortgage and merge the mortgage in his own rights of mortgagor or mortgagee. [P 453 C 2 ; P 454 C 1]

Where the karnavan of a tarwad executed a usufructuary mortgage and the assignee of the mortgagee executed a surrender deed in favour of a person who claimed to be the karnavan of the same tarwad and such person then paid off the mortgage bona fide believing that he was entitled to do so :

Held : that the payment did not extinguish the mortgage but the person who paid off the mortgage was entitled to be subrogated to the rights of the mortgagee : *Case law discussed.* [P 454 C 1]

(b) Adverse Possession—Mortgagor and mortgagee — Usufructuary mortgage by karnavan of tarwad—Another person claiming himself to be karnavan — Such claimant paying off mortgage bona fide believing his right to do so and taking possession— Claimant is subrogated to mortgagee rights by such payment— Such person's possession is not adverse to mortgagor — Suit for redemption by mortgagor more than 12 years after such possession is not barred — Suit is not barred even under Art. 134, Limitation Act.

A mere assertion by a person in possession of the property when the mortgagor has no immediate right to possession, which is not coupled with some act definitely interfering with the rights of the mortgagor, would not amount to an ouster of the mortgagor which would force him to take some immediate action under pain of losing rights to the property by adverse possession. A mortgagor who has 60 years to redeem cannot be forced to redeem at an earlier date, merely because somebody is asserting some right or putting forward an adverse claim. The correct test applicable in the case where a person claiming to be entitled to the mortgaged property pays off the mortgagee in bona fide belief of his right to do so is whether the possession and acts of the person claiming adversely can be referred to any legal right that he possesses. If so, then the true owner is not bound to sue merely because adverse assertions of title are being made. [P 455 C 2 ; P 456 C 1]

A karnavan of a tarwad executed a usufructuary mortgage. The assignee of the mortgagee executed a surrender deed in favour of a person claiming to be the karnavan of the same tarwad. The claimant paid off the mortgagee bona fide believing in his right to do so and then took possession of the mortgage-property. In a suit for redemption by the mortgagor, it was contended by the rival claimant that inasmuch as the mortgagor knew since long that he claimed to be karnavan of the tarwad, he held that property not merely as one who had acquired rights from the original mortgagee but as full owner thereof, his possession being adverse to that of the mortgagor and that the suit for redemption was barred as being brought more than 12 years after the date of his possession :

Held : that the claimant being entitled to the rights of the mortgagee by subrogation, the mortgagor could not have obtained possession without redemption. The mortgagor was not bound to sue for redemption merely because an adverse claim was put forward by the claimant. The claimant's possession was not adverse to the mortgagor and his suit for redemption was not barred. [P 455 C 2 ; P 456 C 1, 2]

Held also : that the suit was not barred under Art. 134, Lim. Act : *A I R 1929 Mad 81, Disting.* [P 456 C 2]

K. Kuttikrishna Menon—for Appellant.

O. T. G. Nambiar, C. S. Krishnamurthy and *C. Govindan* — for Respondents.

Judgment. — In 1853, the karnavan of the Mootha Chettiam Veetil tarwad executed a usufructuary mortgage-deed in favour of one Kuttiassan. In 1871 the assignee of the mortgagee executed a surrender deed, Ex. 3, in favour of one Chappan, who claimed to be the karnavan of the *M* tarwad. It appears however that two bodies of people claimed to constitute the *M* tarwad and two rival karnavans (the plaintiffs and defendant 1) claimed the equity of redemption of the mortgage on behalf of those two bodies. In the suit it has been established by evidence to the satisfaction of the trial Court and the first appellate Court that the present plaintiff has the rights of the mortgagor and that defendant 1, who actually purported to redeem the mortgage, had no right at all to do so. It has also been established that as long ago as 1878 the plaintiff was aware of the fact that defendant 1 was holding the land, not merely as one who had acquired rights from the original mortgagee, but as the full owner of the property. In second appeal, Wadsworth, J. agreed with the lower appellate Court that although defendant 1 had no right to redeem, his long possession over a period greater than 12 years had established his title to the property by adverse possession. In this Letters Patent appeal, the plaintiff contends that although defendant 1 was eventually found not to be the owner of the equity of redemption, yet his act in paying off the mortgagee entitled him to be subrogated to the rights of the mortgagee, that the plaintiff was not entitled to possession without redeeming the mortgage, and that as the plaintiff was allowed 60 years to redeem the mortgage, his suit was in time.

The principal points raised in this appeal were scarcely discussed at all before our learned brother, and so we have not been given the benefit of his considered finding on the matters argued before us. He was however of opinion that the act of defen-

dant 1 extinguished the mortgage, as it was clear that it was not his intention to keep the mortgage alive, and that as soon as the mortgage was extinguished adverse possession began to run. The first case quoted for this purpose in Second Appeal was A I R 1924 All 834,[1] where this question receives no discussion at all and is disposed of in these few words :

> It cannot be said by their redemption effected by means of the award, they became transferees or assignees of the mortgagee's rights.

There can be no doubt that this statement is correct; but it does not follow that because defendant 1 is not a transferee or assignee of a mortgage right, he is not entitled in equity to be subrogated to those rights. The only other case quoted in second appeal on this point was 38 Mad 903,[2] a case in which a trespasser dispossessed the mortgagee in possession and continued in possession himself, asserting a title adverse to the mortgagor also; and it was held that time began to run against the mortgagor from the time that he came to know that the trespasser was setting up a claim adverse to the mortgagor. Mr. Kuttikrishna Menon for the appellant at first argued that any person who pays off the mortgage is entitled to be subrogated to the rights of the mortgagee; but so wide a proposition has nowhere found support. It is true that in 21 Mad 143,[3] the proposition that a person paying off a mortgage was entitled to be subrogated to the mortgagee's rights was laid down very broadly; but there was no discussion as to the circumstances under which such a right would accrue to a person paying off a mortgage debt. That case was rather an extreme one in which the person who paid off the debt acted fraudulently, and it has nowhere been followed without qualification. 21 Mad 143[3] was approved in 31 Mad 439;[4] but it was pointed out that a trespasser or volunteer was not entitled to the rights of subrogation. That a trespasser or volunteer who pays off the mortgage debt is not entitled to the rights of subrogation has been laid down consistently in a very large number of cases in England, America and India : *see* for example 36 Cal 193,[5] 33 M L W 78[6] and 36 Mad 426;[7] but even in the cases quoted on behalf of defendant 1, it is assumed that if a person believes in good faith that he is entitled to redeem the mortgage, either under the belief that he is the mortgagor or that he has some other right in the property which would entitle him to redeem, he would be entitled to the rights of the mortgagee by way of subrogation or a like equitable principle.

In A I R 1926 P C 109[8], a sale of property took place, and it was found that such a sale was invalid owing to the existence of a prior contract of sale; but it was held by their Lordships that as the purchaser of the property, in the belief that the property belonged to him, redeemed the mortgage, he was entitled to stand in the shoes of the mortgagee whom he had paid off. In 48 All 443,[9] where a purchaser from a manager of a joint Hindu family paid off a simple mortgage but the sale was subsequently set aside by some other members of the family, their Lordships held that the purchaser was entitled in equity to the rights of a usufructuary mortgagee although the mortgage that he redeemed was only a simple mortgage. That the rights of a mortgagee can be acquired by those who purport to obtain the equity of redemption by a void transaction as well as by a voidable one by the principle of subrogation is made clear in A I R 1926 P C 109[8] just quoted and in the judgment of Sundara Ayyar, J. in 36 Mad 426.[7] The question as to how far rights can be acquired in India by subrogation was very fully discussed by this learned Judge. At p. 434, he clearly recognises the rights to subrogation of one claiming under a void or voidable transaction who bona fide believing himself to have a title to the property, discharges an encumbrance on it and claims a charge as against the owner. The argument put

1. Bijai Bahadur v. Parameshwari Ram, A I R 1924 All 834=78 I C 1026.
2. Peria Aiya Ambalam v. Shanmugasundaram, A I R 1914 Mad 334=22 I C 615=38 Mad 903=26 M L J 140 (F B).
3. Syamalarayudu v. Subba Rayudu, (1898) 21 Mad 143.
4. Chamaswami v. Padala Anandu, (1908) 31 Mad 439=18 M L J 306.
5. Gurdeo Singh v. Chandrika Singh, (1909) 36 Cal 193=1 I C 913=5 C L J 611.
6. Pichayappa Chetti v. Govindaraja Mudaly, A I R 1931 Mad 110=130 I C 506=33 M L W 78.
7. Narayana Kutti Goundan v. Pachiammal, (1913) 36 Mad 426=15 I C 206=22 M L J 364.
8. Nasiruddin v. Ahmad Hussain, A I R 1926 P C 109=97 I C 543 (P C).
9. Ramadharan Lonia v. Bhagwan Das Maheshri, A I R 1926 P C 68=95 I C 898=53 I A 142=48 All 443 (P C).

forward before our learned brother that the mortgage became extinguished by the act of defendant 1 seems never to have been accepted, although 9 Cal 961[10] has been quoted to us in support of that proposition. In that case, the person who paid off the mortgage was he who had created it, and the question whether his act extinguished the mortgage or not arose only because he had acted in two capacities, as an owner of the property and as an agent of another to whom the property really belonged.—

Their Lordships held that it must be assumed that when he paid off the mortgage debt he intended to discharge it, i. e., he acted in the capacity in which he had created the mortgage. This in effect means that the mortgage debt was paid off by the mortgagor himself, which, unless an intention to keep alive the mortgage is expressed, causes the mortgage to be extinguished. When a person who is not a mortgagor, under a mistaken claim, pays off a mortgage debt, he cannot extinguish it; for he has no right to do so. The only person who can extinguish a mortgage is the person who is entitled to redeem that mortgage and merge the mortgage in his own rights of mortgagor or mortgagee. Whatever therefore might have been the intention of defendant 1, he did not in fact extinguish the mortgage and was entitled, if he paid off the mortgage in the bona fide belief that he was entitled to do so, to subrogation of the mortgagee's rights. Mr. K. Kuttikrishna Menon contends that the appellant-plaintiff is entitled to succeed whether the transaction was mala fide or bona fide. If it was mala fide, then it was impossible for him to acquire rights adverse to the mortgagor, on the principle that a mortgagee or one who gets into possession through him cannot set up a title adverse to the mortgagor unless he first surrenders the mortgage. In 36 Bom 185,[11] a reversioner, to support his title to property mortgaged by a widow and sister of the last male holder, got into possession from the successors-in-interest to the mortgagee. It was held that even though he set up a paramount title to the property, yet since he had got into possession through the mortgagee, he could not be allowed to claim the property adversely to the mortgagor. In 13 Mad 335,[12] defendant 1 held as a tenant from the plaintiff and had attorned to him; and it was held that defendant 2, who had come into possession by collusion with defendant 1, was precluded from denying the plaintiff's title and was liable to the plaintiff for the rent collected by him from defendant 1. In this case the principle enunciated by Mr. Kuttikrishna Menon is clearly expressed as follows:

> The principle is that he came in by collusion with the tenant who could not deny the landlord's title, and that unless he was also precluded from denying the landlord's title, the tenant would have only to part with the property to another person in order to bring the landlord's right in dispute.

It is not necessary however to pursue the discussion of this point further because we are clearly of opinion that the transaction between the mortgagee and defendant 1 was a bona fide one. We feel that it is not open to defendant 1, who has all along, even before he paid off the mortgage, been claiming the property as his own and leading evidence to show that all his acts were those of a person entitled to the property, to now contend that he was acting mala fide; and there is moreover no justification on the evidence for such a contention. If defendant 1 was subrogated to the rights of the mortgagee, the further question arises whether the plaintiff is barred by limitation from being allowed to redeem. The most authoritative decision of this Court is that of the Full Bench in 38 Mad 903[2]. There, a person trespassed on the property in 1898 and dispossessed a usufructuary mortgagee. In 1908, when he erected some buildings on the land, the mortgagor came to know of the trespass and remonstrated with the trespasser, who denied the mortgagor's rights. It was held that from 1908 the trespasser was holding adversely not merely to the mortgagee who had a right to possession but to the mortgagor also, because he was ousting the mortgagor by erecting the buildings on the property, which only the mortgagor had a right to do. A passage from the judgment of Batty, J. in 27 Bom 43[13] at p. 68, was approved as setting out the law on the question as to how far possession by a trespasser could be held to be adverse to

10. Mohesh Lal v. Bawan Das, (1883) 9 Cal 961=10 I A 62=13 C L R 221 (P C).
11. Hillayya v. Narayanappa Timayya, (1912) 36 Bom 185=12 I C 913=13 Bom L R 1200.
12. Pasupati v. Narayana, (1890) 13 Mad 335.
13. Tarubai v. Venkatrao, (1903) 27 Bom 43=4 Bom L R 721.

the mortgagor when the mortgagor had no right to possession. It is:

No doubt, as long as the mortgagee is in possession, he and all those claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right, as, for instance, his right as heir to represent the original mortgagee, or his right to possession in spite of a third party's lien on the property, then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession, and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether, by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor but to hold in spite of him. In such a case the mortgagor is as effectually and unmistakably displaced as if there had been no mortgage at all. When an ouster takes place in that manner the mortgagor knows that no one is in possession who can represent or continue his possession, or who is entitled preferentially to possession, and therefore he becomes entitled (and it is necessary and his duty, if he does not want his right to be barred) to possession immediately.

In that case, it was found that the mortgagor had no knowledge of the dispossession of the mortgagee and so the latter part of the above passage was an obiter dictum. Batty, J. in his very elaborate judgment, has discussed scores of cases, but we have been unable to find in his judgment any justification for the contention that a mere assertion by a person in possession of the property, when the mortgagor has no immediate right to possession, which is not coupled with some act definitely interfering with the rights of the mortgagor, would amount to an ouster of the mortgagor which would force him to take some immediate action under pain of losing rights to the property by adverse possession. In most of the cases quoted, as in the Full Bench case, 38 Mad 903[2] the mortgagee was ousted from possession, and it was held that such a dispossession would entitle the mortgagor to bring a suit to have the mortgagee restored to possession, and Batty, J. in the passage above quoted states that it is the duty of the mortgagor to do so. In none of the very many cases referred to by Batty, J. does it appear that a person entered into possession of the land with permission of the mortgagee and did nothing more adverse to the mortgagor than assert a title. Although there are a few passages in the judgment of Batty, J. one of which has been quoted above, which might suggest that a mere assertion by a person in possession denying the rights of the mortgagor, amounted to an ouster of the mortgagor, yet in none of the cases was it so held. On the other hand, there are passages in the judgment of Batty, J. which suggest that a mere assertion of title would not be sufficient. For example, at page 65, he says:

And according to the case put by Lord Redesdale in *Hovenden* v. *Lord Annesley*[14] of a tenant disavowing the landlord's title and attorning to another, if the landlord, being apprised of it acquiesces, the possession of his tenant becomes adverse and the Statute of Limitation will run against him. This however would not under the rulings which follow *Womesh Chunder's case*[15] above cited, apply in India apparently in the case of a suit for possession against a trespasser when the owner is not entitled to immediate possession. Thus the owner could have no power to sue for possession, during the currency of an ijara, and time would run against him therefore only on its termination though prior to that he might possibly have had a right to bring a suit for declaration of title, which it would be discretionary with the Court to give or refuse.

After discussing another batch of cases he states at the bottom of page 66:

The result is, as above indicated, if there has been no ouster by 'open and notorious act of taking possession' then the person relying on his possession to defeat title, must show that it was of such a nature, and involved the exercise of rights so irreconcilable with those claimable by the plaintiff, as to give the plaintiff occasion to dispute that possession (or, in other words, that it was such as to give a cause of action or right to sue for possession) throughout the twelve years next preceding suit. The mere existence of the claim without possession, actual or constructive, will not suffice as a bar to a title proved or admitted. And even where there is possession, if it has commenced without any act of dispossession, and is susceptible of explanation by reference to a title not inconsistent with the rights of the person against whom it is set up, or of one holding on behalf of such person or temporarily entitled to exercise his rights there can be no necessity to call that possession in question, unless and until interference with the right of the person against whom it is alleged has been manifested by acts affecting his existing right, or has otherwise been brought to his knowledge.

In a case like the present, it is difficult to see what the plaintiff could have done. As we have found that defendant 1 was entitled by subrogation to the rights of the mortgagee, the plaintiff could not have obtained possession without redemption. It has been argued, that when an adverse claim was put forward the plaintiff was

14. (1806) 2 Sch & Lef 624=9 R R 119.
15. Womesh Chunder v. Raj Narain Roy, (1868) 10 W R 15.

bound to file a suit for redemption; but it seems preposterous that a person who has 60 years to redeem should be forced to redeem at an earlier date, merely because somebody is asserting some right or putting forward an adverse claim. No suit would lie for an injunction. It is true that the plaintiff could have brought a suit for a declaration of his title, which the Court might or might not have granted; but even that would not prevent the running of time against him if an assertion by defendant 1 of his paramount rights amounted to adverse possession. It would therefore appear that the correct test to apply to a case of this kind is whether the possession and acts of the person claiming adversely can be referred to any legal right that he possesses. If so, then the true owner is not bound to sue (indeed he cannot sue except for a declaration) merely because adverse assertions of title are being made.

It has been further argued by Mr. O. T. G. Nambiar that if the defendant acquired a right to be paid off the mortgage debt, such a right as he had was nothing more than a charge on the property. In the two cases quoted in support of his contention one mortgagor redeemed the mortgage, and it was held that after twelve years' possession adverse to the joint mortgagor, the right of the joint mortgagor became barred. S. 95, T. P. Act, gives a mortgagor who pays off the entire mortgage debt only a charge on the property against a co-mortgagor, and so obviously such a charge would not be the same as the rights of a mortgagee by subrogation. Mr. O. T. G. Nambiar has been unable to refer us to any case in which it has been held that anyone who has acquired the rights of a mortgagee by subrogation or similar equitable principle acquired only a charge. Mr. Nambiar has also referred us to 49 Mad 29[16] in which a mortgagee purported to transfer not merely his mortgage rights but the full rights of ownership. It was there held that the transferee immediately began to hold the property adversely to the mortgagor and that the rights of the mortgagor against the mortgagee were barred after twelve years. The reason for this is clear from Art. 134, Limitation Act, which states that where a mortgagee or a trustee in breach of his trust purports to transfer the property to another person, the period of limitation is twelve years from the date of the transfer. A transfer of a mortgage has here been assimilated to a breach of trust, and time begins to run even when the mortgagor has no knowledge of the transfer. Obviously that decision has no application to a case like the present and can be applied only to cases which are hit by Art. 134, Limitation Act. We therefore hold that the claim of the plaintiff is not barred by limitation.

Another point seems to have been raised by defendant 1 in Second Appeal, which our learned brother found it unnecessary to consider, in his view of the effect of the transaction between defendant 1 and the mortgagee. Defendant 1 claimed that the plaintiff was not entitled to redeem the kanom or first mortgage without also redeeming the second mortgage. Wadsworth, J. however held that this argument was not sustainable; and Mr. Nambiar has not raised the contention in this appeal that in any event the plaintiff could not succeed, even though we hold that defendant 1 was subrogated to the rights of the mortgagee and the plaintiff's suit to redeem is in time. In the result we allow the appeal; but in view of the fact that no attempt was made to argue the case fully before our learned brother and the case here argued has been on entirely different grounds, we order both parties to bear their own costs both in this appeal and in Second Appeal. The respondents will bear their own costs and those of the appellant in the lower appellate Court. The suit is remanded to the trial Court for the passing of a suitable decree after taking account of the improvements.

C.R.K./W.D. *Case remanded.*

16. Rukku Shetty v. Ramachandrayya, AIR 1929 Mad 81=92 I C 342=49 Mad 29=49 M L J 634.

A. I. R. 1937 Madras 456

PANDRANG ROW, J.

K. V. Srinivasa Iyengar and *another*— Petitioners.

v.

Hindu Religious Endowments Board, Madras and *others* — Opposite Parties.

Civil Misc. Petns. Nos. 4751 and 4680 of 1936, Decided on 15th December 1936.

(a) Madras Hindu Religious Endowments Act (2 of 1927 as amended by Act 12 of 1935), Ch. 6-A—Board cannot modify scheme framed by Court until notification is complete.

Till the Notification under Ch. 6-A of the Act is complete, the Board has no power to modify or alter the scheme framed by the Court. [P 457 C 2]

(b) Certiorari—Writ of — Writ lies only in respect of judicial acts — Judicial acts explained—Order of Board of Commissioners under S. 18, Madras Religious Endowments Act, regarding stopping of election of trustee and continuance in office of any trustee—Order is administrative and not judicial — Writ of certiorari does not lie.

Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the High Court. If there is no duty imposed by law to decide anything after weighing the material put by both parties, the order passed cannot be regarded as a judicial one. [P 457 C 2; P 458 C 1]

The Board of Commissioners did not intend and indeed had not the power to decide anything judicially as regards the stopping of any election of trustee or the continuance in office of any trustee whose term had expired, but still passed orders to that effect :

Held **: that the orders were passed in the exercise of the general powers of superintendence and control vested in the Board by S. 18 of Madras Hindu Religious Endowments Act. The orders were administrative and not judicial. Hence a writ of certiorari did not lie : *A I R 1936 Mad 973, Ref.*; *Rex* v. *Electricity Commissioners*, *(1924) 1 K B 171* and *Rex* v. *London County Council*, *(1931) 2 K B 215*, *Rel. on.* [P 458 C 1, 2]**

K. Bhashyam Ayyanger for *P. R. Srinivasan* — for Petitioners.

P. V. Rajamannar, *K. Subba Rao*, *A. Srirangachariar* and *B. Sitarama Rao* — for Opposite Parties.

Order.— These are petitions presented by two persons, one a member of the Trichinopoly Circle Temple Committee, and the other who is an aspirant for the office of trustee for the Sri Ranganathaswami Temple in Trichinopoly District, for the issue of writ of certiorari in respect of two orders dated 16th October 1936 and 3rd November 1936 respectively made by the Commissioners for the Hindu Religious Endowments Board, Madras. The first order runs as follows :

The Trichinopoly Circle Temple Committee is requested not to fill up the vacancies that may arise on the Board of Trustees of the above temple by efflux of time, pending notification proceedings No. 26 of 1936. The committee is also requested to state the date or dates on which such vacancies are to arise within the period of the next six months.

The subsequent order runs as follows :

In view of the directions in Board's Memo No. Notification 26 of 1936 — 4 dated 16th October 1936 the non-hereditary trustees of the Devasthanam, whose terms of office expire during the pendency of notification proceedings, may continue to function as trustees till the conclusion of the said proceeding.

The notification proceedings referred to in these orders are proceedings taken under Ch. 6-A, Hindu Religious Endowments Act, 2 of 1927, as amended by Act 12 of 1935. The Board were taking proceedings under this Chapter in respect of the temple in question and the proceedings were then pending before the Board. The management of the temple was governed by a scheme framed by Court the details of which are to be found in the case reported in 39 Mad 700.[1] There can be no doubt that till the Notification under Ch. 6-A of the Act is complete, the Board has no power to modify or alter the scheme framed by the Court. This position is not contested by the Board's advocate. It is however contended that the orders in question do not amount to any modification or alteration of the scheme sanctioned by the Court and that the orders in question must be deemed to have been passed with jurisdiction in view of the general powers of superintendence and control vested in the Board by S. 18 of the Act. A preliminary objection was also taken to these petitions on the ground that the orders sought to be brought up on writ of certiorari are administrative orders and do not form judicial acts, in respect of which alone a writ of certiorari will lie. I have had to consider the question as to what is an administrative order as distinguished from a judicial act recently in 71 M L J 588.[2] The general rule laid down by Atkin, L. J. in (1924) 1 K B 171,[3] which was accepted and explained by Slesser, L. J. in (1931) 2 K B 215[4] is to the effect that :

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division.

1. Sitharam Chetty v. Subramania Aiyar, A I R 1917 Mad 551=32 I C 211=39 Mad 700=30 M L J 29.
2. Sri Emberumanar Jeer Swamigal v. Board of Commissioners for the Hindu Religious Endowments, Madras, A I R 1936 Mad 973=166 I C 256=71 M L J 588.
3. Rex v. Electricity Commissioners, (1924) 1 K B 171=93 L J K B 390=130 L T 164=88 J P 13=39 T L R 715=68 S J 188=21 L G R 719.
4. Rex v. London County Council, (1931) 2 K B 215=100 L J K B 760=144 L T 464=95 J P 89=29 L G R 252=75 S J 138=47 T L R 227.

In (1931) 2 K B 215,[4] Slesser, L. J. added that:

> It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition.

In the particular case before me, it is obvious that the Commissioners were not hearing evidence or exercising any judicial functions. There was no proposal and no opposition before them. The wording of the orders and the circumstances which led to the passing of the orders clearly show that they were meant to be passed in an administrative capacity. Even if it be true that these orders may have the effect of prejudicing the rights of private parties, it does not follow that the orders would thereby be necessarily of a judicial nature. Where there is no duty imposed by law to decide anything after weighing the material put by both parties, the order passed cannot be regarded as a judicial one. In this particular case, I have no doubt that the Board did not intend and indeed had not the power to decide anything judicially as regards the stopping of any election of a trustee or the continuance in office of any trustee whose term had expired. The orders were passed in the exercise of the general powers of superintendence and control vested in the Board by S. 18 of the Act. They were addressed to a subordinate body like the Temple Committee, and they do not purport to decide any rights of parties. Even otherwise, I am of opinion that neither of the petitioners has any *locus standi* to apply for a writ of certiorari in respect of the orders in question. The scheme sanctioned by the Court gives the power of electing trustees to the Devasthanam Committee constituted under Act 20 of 1863. There is no such committee in existence and there was no such committee in existence when the Board passed the orders in question. This is conceded as the committee constituted under Act 20 of 1863 ceased to exist as soon as Act 2 of 1927 became law. The present committee, which is known as the Trichinopoly Circle Temple Committee, is not a committee constituted under Act 2 of 1863 but under Act 2 of 1927.

It would thus follow that neither the committee nor any member of it has any right to elect a trustee for the temple in question. In fact, the scheme became impracticable so far as appointment of trustees is concerned after the Temple Committee constituted under Act 20 of 1863 ceased to exist, and if any trustee is to be appointed now, the appointment must be made by the Board in the exercise of its general powers. That the Board has such power and that the exercise of such power is an administrative act has been held by a Bench in *Appeals Nos. 132, 133, 212 and 261 of 1933.*[5] Strictly speaking therefore neither of the petitioners can say that any of his rights have been affected prejudicially by the orders of the Board, and there is no reason why if the petitioner's rights have not been prejudicially affected the discretionary power of issuing a writ of certiorari should be exercised in their favour. It therefore follows that these petitions must fail and they are accordingly dismissed with costs. Vakils fee being fixed at Rs. 50 in each case. (Memo of costs will follow).

C.R.K./B.D. *Petitions dismissed.*

4. (1931) 2 K B 215.

5. Anandacharlu v. Hindu Religious Endowments Board, Appeals Nos. 132, 133, 212 and 261 of 1933.

✻ A. I. R. 1937 Madras 458

VARADACHARIAR, J.

S. Thirumalamuthu Adaviar — Appellant.

v.

Subramania Adaviar (Minor) and *others* — Respondents.

Second Appeal No. 504 of 1932, Decided on 4th November 1936, against decree of Dist. Court, Tinnevelly, in A. S. No. 73 of 1931.

✻ **Hindu Law—Debts — Son's liability—Partition — Pre-partition money decree against father—Partition effected soon after between father and minor sons—Partition found to be with mala fide intention of protecting sons' shares from execution—Minor sons' shares are not liable in execution of decree — Liability of sons' shares does not depend on mala fide intention but whether partition is intended to be operative.**

The attachability of the sons' shares in execution of a decree obtained against the father alone before partition depends upon the power of the father to alienate it at the time the creditor seeks to attach the same. The fact that the partition was intended to defraud creditors can make no difference. If it was intended to be operative and is in law operative, to bring about a division in status between the father and the sons, the father's power of alienating the shares allotted to the sons at such partition must have come to an end and with it the right of the creditor to attach such shares. [P 461 C 1]

Where after the passing of a money decree against the father a partition was effected between the father and sons with the mala fide intention of preventing the decree-holder from executing the decree against the properties that might be allotted to the shares of the minor sons and a suit was brought by minor sons for declaration that the properties allotted to them were not liable to be seized in execution of the decree obtained against the father:

Held*: that the sons were entitled to such declaration and the sons' shares were not liable to attachment: *Case law discussed. [P 459 C 1; P 460 C 1, 2; P 461 C 1]

P. N. Appuswami Ayyar — for Appellant.

S. Rajarama Ayyar — for Respondents.

Judgment.—This second appeal arises out of a suit brought by two minors for a declaration that the properties which according to them fell to their shares at the partition evidenced by Ex. A are not liable to be seized in execution of the decree obtained against their father in S. C. S. No. 831 of 1928 on the file of the Sub-Court of Tinnevelly. The lower appellate Court granted the declaration; hence this appeal by the decree-holder. The partition under Ex. A was effected soon after the passing of the decree in the Small Cause Suit and in such suspicious circumstances that both the lower Courts have taken the view that it must have been brought about for the very purpose of preventing the decree-holder in the Small Cause Suit from executing this decree against the properties that might be allotted to the shares of the minor sons. In that sense, the partition may be said to be fraudulent or mala fide, and I see no reason to differ from that conclusion, though I must point out that that conclusion can be based only upon inferences from the proximity of dates and the fact that, the plaintiffs being minors, there was no other reason for a partition at that particular juncture. No oral evidence has been adduced in this case. The point for determination in the second appeal is, taking the partition to be fraudulent in that sense, has it the effect of precluding the decree-holder from executing his decree against the properties allotted to the shares of the sons in that partition?

So far, as the decisions in this Court go, there can be little doubt that but for the fraudulent purpose of the partition, the decree-holder cannot reach the son's shares in execution of the decree obtained against the father alone. Mr. Appuswami Ayyar has invited my attention to the decisions in the other High Courts which reveal considerable conflict of judicial opinion on the question of the executability of a decree obtained against the father alone as against the shares allotted to his sons at a partition. Some of them proceed on the footing that there is no justification for drawing distinction between liability in a separate suit against the sons and the liability of the shares to be proceeded against in execution of the decree obtained against the father. In some, the decision of a Full Bench of this Court in 51 Mad 361[1] is regarded as warranting the above view, though, with all respect, I would observe that this does not appear to me to be correct. In some cases again, a distinction is drawn between a partition which takes place after the money decree has been obtained against the father and a partition which takes place before the money decree. This distinction is based on the ground that, where the decree is obtained before partition, though execution proceedings may be started after the partition, the father might well be deemed to have been sued in a representative character and that therefore the decree, though in name only against the father, might well be treated as a decree against the sons as well.

It is sufficient for my present purpose to say that it will be difficult to apply this theory of representation when a suit is brought against the father on a promissory note executed by himself. It has often been pointed out that in a suit of that kind, the cause of action against the father is on the note and the cause of action as against the sons is on their Hindu law liability and it is difficult to speak of the father as "representing" the sons in a suit on the promissory note when it will not be open to him to raise defences which will undoubtedly be open to the sons if they had been impleaded in the suit. Another line of authority draws a distinction between cases of bona fide partition and of fraudulent partition, and founding themselves upon the observations in 22 Mad 519,[2] they hold that where the partition is fraudulent the decree obtained against the father may even be executed

1. Subramania Ayyar v. Sabapathy Ayyar, A I R 1928 Mad 657=110 I C 141=51 Mad 361=54 M L J 726 (F B).
2. Krishnaswami Konan v. Ramaswami Ayyar, (1899) 22 Mad 519=9 M L J 127.

against the properties allotted to the sons at such partition. Even if this view could be held to be right, there is considerable difference of opinion in the authorities as to what is exactly meant by the expression, 'fraudulent partition'. If as was held in 37 All 214,[3] the partition is found to be colourable, there should be no difficulty in ignoring it. If on the other hand, it is merely what must be described as a fraud upon creditors, I do not see any justification for holding that for purposes of execution such partition can be ignored.

That the expressions "bona fide partition" and "mala fide partition" have been differently understood by different Judges and on different occasions can be gathered from the observations in 47 Mad 621[4] at 624; 51 All 932[5] at 936, 937 and 946; 50 All 137[6] at 141 and 14 Pat 732.[7] I must also point out that when one speaks of a fraudulent partition brought about by a father with a view to defeat his creditors, two questions may be intended to be comprised in the consequences sought to be deduced therefrom. One is with reference to the possibility of the father allotting to himself a much smaller share than he would be otherwise entitled to. An objection on this score would presumably be one to be dealt with under S. 53, T. P. Act: 68 M L J 157.[8] The other consequence sought to be implied is that the partition should be ignored and the sons treated as if they still continued to be joint with their father. No doubt the observations in 22 Mad 519[2] would seem to support such a contention. But the observation was only made as a reservation in that case and could scarcely be treated as a decision by itself. Dealing with the matter on principle, it is difficult to see how the mere fact that members of a family who are in law entitled to enter a partition at any time they choose, happen to enter into a partition at a time more convenient to a creditor can make it fraudulent in the sense that the creditor can ignore it. The law provides ways in which the creditor can avoid any injurious consequences arising therefrom, namely by impleading the sons in the action that he may bring against the father, because it is now well established by the preponderance of authority in nearly all the Courts that a partition will not defeat the rights of the creditor, though it may have some bearing on the procedure to be followed by him for the realisation of his debt.

Having regard to the above considerations, I do not think I need do more than refer to the cases cited by Mr. Appuswami Ayyar on behalf of the appellant, namely 51 All 932,[5] 14 Lah 399,[9] 14 Pat 732[7] and 6 Luck 497.[10] 52 Bom 376[11] and 71 M L J 518[12] do not help the appellant, because in those cases the person who wanted to get his property exempted from the attachment was a party to the money decree or the question of his liability was raised in the course of the money suit itself. A I R 1929 Mad 898[13] may no doubt appear in favour of the appellant's contention. But rightly or wrongly the learned Judges based their decision on the ground that in that case the objecting sons had been impleaded as parties to the suit against the father though in that suit they were exonerated. It is not for me to canvass the correctness of that decision, but the learned Judges expressly make this circumstance the distinguishing factor when they refer to the observations of Ananthakrishna Ayyar, J. in 51 Mad 361.[1] The view taken in 38 Mad 1120[14] has been consistently followed in this Court to the extent of recognising the distinction between the right of the

3. Indar Pal v. Imperial Bank, A I R 1915 All 126=28 I C 593=37 All 214=13 A L J 211.
4. Jagannatha Rao v. Viswesam, A I R 1924 Mad 682=80 I C 228=47 Mad 621=46 M L J 590.
5. Kishan Sarup v. Brijraj Singh, A I R 1929 All 726=121 I C 257=51 All 932=1929 A L J 941.
6. Gaya Prasad v. Murlidhar, A I R 1927 All 714=104 I C 406=25 A L J 829=50 All 137.
7. Atul Krishna Roy v. Lala Nandanji, A I R 1935 Pat 275=157 I C 53=14 Pat 732=16 P L T 393 (F B).
8. Veerappa Chettiar v. Annamalai Chettiar, A I R 1935 Mad 316=156 I C 439=68 M L J 157.
9. Jawahar Singh v. Parduman Singh, A I R 1933 Lah 116=141 I C 424=14 Lah 399=34 P L R 291.
10. Raghunandan Pershad v. Motiram, A I R 1929 Oudh 406=119 I C 449=6 O W N 689=6 Luck 497 (F B).
11. Annabhat Shankarbhat v. Shivappa Dundappa, A I R 1928 Bom 232=110 I C 269=52 Bom 376=30 Bom L R 539.
12. Suryanarayana v. Viswanadhan, A I R 1936 Mad 956=71 M L J 518.
13. Doraiswami Nadan v. Nagaswami Naicken, A I R 1929 Mad 898=121 I C 863.
14. Kameswaramma v. Venkatasubba Rao, A I R 1914 Mad 328=24 I C 474=38 Mad 1120=27 M L J 112.

creditor to proceed by a separate suit against the sons even after partition and his right to attach the sons' shares in execution of the decree obtained against the father : *cf.* 40 M L W 588[15]; *see also* 68 M L J 157[8] and Appeal 25 of 1932. If, as recognised in 22 Mad 519[2] and 38 Mad 1120,[14] the attachability of the sons' shares depends upon the power of the father to alienate it at the time the creditor seeks to attach the same, it is difficult to see how the fact of the partition being one intended to defraud creditors can make any difference. If it was intended to be operative and is in law operative, to bring about a division in status between the father and the sons, the father's power of alienating the shares allotted to the sons at such partition must have come to an end and with it the right of the creditor to attach such shares.

The question of the bona fides or mala fides of the partition has been referred to in some of the decisions for another reason, namely the suggestion sometimes made that if the partition was bona fide, in the sense that sufficient provision has been made therein even for the discharge of the debts, of the father, the shares allotted to the sons at such partition ought not to be held liable at all in any kind of proceeding for the pre-partition debts of the father. Whether that proposition is well founded or not, that appears to have been the reason for drawing the distinction in some of the cases between bona fide partitions and fraudulent partitions. Except in cases where the mala fide character of the partition is such as to lead the Court to come to the conclusion that the partition was not intended to be operative at all, I am unable to see how the mala fide character bears on the question of the creditor's rights to attach the son's share in execution of a decree obtained against the father alone. I am therefore of opinion that the conclusion of the lower appellate Court is right. The second appeal fails and is dismissed with costs. Leave granted.

C.R.K./K.B. *Appeal dismissed.*

15. Bapiraju v. Sreeramulu, A I R 1934 Mad 662=152 I C 459=40 M L W 588.

A. I. R. 1937 Madras 461

MOCKETT AND LAKSHMANA RAO, JJ.

Chelikani Jagannadharao and *another* — Appellants.

v.

Merla Ramanna and *others* — Respondents.

Appeal No. 482 of 1934, Decided on 16th November 1936, against order of Sub-Judge, Cocanada, D/- 10th September 1934.

Hindu Law — Alienation— Co-parcener— Sale by co-parcener of whole or part of his share in joint family property to another co-parcener — Status of jointness of family is not affected unless there is express intention to be divided with respect to certain property and there is agreement between all co-parceners — It is in effect not higher than sale to stranger — If sale be real, transferee co-parcener is entitled only to property of transferor co-parcener and nothing more.

It is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of the joint undivided family. No express agreement is necessary for this purpose and it depends on the circumstances of each case whether a severance of interest in respect of a part of the joint estate creates a disruption of the family status. The intention to remain joint as to the rest of the estate may be inferred from the conduct of the parties. Under Hindu law a partition may be effected either by agreement between the co-parceners or by an unambiguous declaration of an intention to become divided. The agreement must be between all the co-parceners, and the intention to become divided, should be communicated to all the other co-parceners. Two or more members of an undivided family—be they members of different branches or of one and the same branch of the family—have no legal existence as a separate independent unit, so long as the family remains undivided. The mere fact that a co-parcener makes an alienation does not put an end to the co-parcenary between himself and the other members of the family. The act of alienation only makes definite, the indefinite interest of the alienor. The alienation of his undivided interest in the entire family estate or a portion thereof, by a co-parcener in favour of one or more of the remaining co-parceners does not effect a severance of the alienor from the joint family. The alienation *per se* cannot be held to be an agreement between the members of the family to become divided or expression by the alienor of his intention to separate from and much less a communication thereof to, the remaining members of the family. It is well settled that by agreement between all the co-parceners a severance of interest can be effected between them in respect of the subject matter of the agreement. An agreement between some of several co-parceners cannot bring about that result and on principle the rights of a co-parcener alienee who is not the only other co-parcener cannot be higher than those of a stranger purchaser. [P 471 C 1, 2]

A co-parcener *K* effected a sale of a substantial portion of his share in the joint family property to his brother *D* who was the manager thereof. It was proved that *K* was leading a bad life and in order to put out of his reach the family property the transaction of sale was effected immediately on *K*'s attaining majority. *K* and his wife and two sons continued, even after such sale, to live in the joint family with *D* as manager and they were treated as members of the family. After *K*'s death also his widow and the two sons continued to live with *D*. Though the sale was stated to be for consideration, as being one for payment of debts due by *K* it was found that there were no debts outstanding to any creditor, by *K* and no payment by *D* was proved towards debts mentioned :

Held : that the sale, having been effected in favour of *D* individually, was a nominal transaction entered into in order to save the family properties from being frittered away by *K*. The sale was a mere agreement between two members of the family and it could not have in law the effect of severance. It was a sale simpliciter and did not contain any explicit declaration of an intention on the part of *K* to divide. The subsequent conduct of the parties was such as could not give rise to any such implied intention even. There was not even a communication to all the other coparceners of *K* of his intention to separate. There was therefore no severance between *D* and *K*. The sale, even if it was a real sale, would at the most entitle *D* to properties of *K* conveyed to him by the sale but it would not have the effect of severance between them : *Case law discussed.*

[P 471 C 1, 2 ; P 472 C 1]

Ch. Raghava Rao — for Appellants.

A. Satyanarayana, C. Rama Rao and *K. Bhimasankaran*—for Respondents.

Mockett, J.—This is an appeal against an order passed by the learned Principal Subordinate Judge of Cocanada in an execution application. It will be seen from the genealogical table that originally there were five branches of the family and they may be referred to as the first, second, third, fourth and fifth branches, the appellants' branch being the third. It is only necessary to add that Venkatarayanim Garu had four sons, Ramanarayinum Garu one son and Bhavannarayanim Garu four sons whose names appear as signatories to Ex. H, a power-of-attorney. Respondent 1 by his execution application sought to attach some immoveable property as being the separate property of Dharma Rao, the third branch. The appellants contend that their father Surya Rao alias Kasibabu and his brother Dharma Rao were undivided and that the properties of Dharma Rao devolved on them by survivorship and are not liable for the simple debt of Dharma Rao against whom the respondents have obtained a decree on a promissory note in a suit filed in 1930. The appellants and Dharma Rao's daughter are impleaded as being in possession of the assets of Dharma Rao. Kasibabu died in 1910 and Dharma Rao in 1929. The respondents base their case on Ex. B, a transfer of lands by Kasibabu to Dharma Rao which they contend effects if not a total severance at least a severance so far as the properties thereby transferred are concerned. The appellants reply (whilst denying that Ex. B effects any severance) that at the most a partial severance would have been brought about and that if it were so Dharma Rao subsequently blended these properties with the rest of the joint family property so as to make them part thereof.

They also contend that Ex. B was a nominal document not intended to be acted upon but brought about purely to put the properties out of Kasibabu's reach and thus prevent him from dissipating them (*vide* para. 7 in E. A. No. 772 of 1931). It is convenient to remark here that, although no issue as to blending was framed, the plea was specifically taken in para. 10 of the petition and the necessary materials for considering the plea are on record. I have had the advantage of reading my learned brother's judgment and agree with his conclusions on the facts that Ex. B was a nominal document and that the alternative plea as to blending has been substantiated by the appellants. I do not propose to add anything with regard to those aspects of the case. But in addition to these questions of fact the respondents raise an interesting point of law.

The history of this family appears to be as follows : On 12th February 1897 under Ex. TT-3 it is common ground that the fifth branch separated from the four other branches but leaving them joint. In the schedule to Ex. TT-3 the joint family properties at that time are set out. Historically, Ex. B comes next as it was executed on 22nd March 1900. It is undoubted that in 1900 the first, second, third and fourth branches were undivided. In 1908 under Ex. J-12 an entry in a note book of Dharma Rao, the four branches became divided in status but they continued to live so far as the properties were concerned as tenants in common until 1932 when under Ex. 2 dated 22nd November 1922 the properties of the family were partitioned. These facts are not in controversy. So it will be seen

that, although there was a division in status in 1908 between the four branches, there was no division of property till 1922 and in 1900 there was neither division in status nor division of property. But the respondents contend, and the learned Judge has so held, that Ex. B dated 22nd March 1900 effected a separation. In para. 5 of the counter-petition the respondents plead that :

> Thereafter Dharma Rao became divided. The entire share of the property of Dharma Rao forms his separate property.

The learned Subordinate Judge holds as follows :

> Hence Ex. B in this case virtually effected the separation of Kasibabu. Whatever opinion one may have about its effect on the properties not covered by Ex. B or Ex. C, it is enough to say that, so far as the properties in question are concerned, they belonged to Dharma Rao wholly by virtue of Ex. B and that in respect of them Kasibabu became a separated member and could not have had any rights after 1900.

This finding is difficult to understand when the all-important fact is borne in mind that admittedly in 1900 the four branches were joint. The division therefore of Kasibabu must be from the rest of the family leaving Dharma Rao and the other three branches undivided. But a consideration of the judgment and the argument from the bar seems to suggest that what the respondents had in mind was that there was a separation between Kasibabu and Dharma Rao alone. The niceties of these distinctions have been overlooked in the lower Court. An examination of Ex. B shows that, in the first place, it is in favour of Dharma Rao alone who is described as Kasibabu's elder brother; secondly, that there are no words therein which indicate any intention to divide; thirdly, that it appears to be a form of conveyance pure and simple of one-tenth of the joint properties belonging to the family as described thereunder; and fourthly, the list of the properties omits a large number of items which are contained in the schedule to Ex. TT.3 which is what purports to be a complete list of the joint family property. Mr. Venkatarama Sastri who appears for the respondents conceded that many items are not transferred by Ex. B; for example, the inam of the Jayanti people, plots 4 to 21 on pp. 8 and 9 of the schedule plots 1 to 6 in Yerangudam village on p. 10, and the plot in Garipatnam village on the same page. So Ex. B is a transfer by one member of a branch to another member of the same branch of one-tenth part of his interest in some items of the joint family property. I do not think that at the time of Ex. B Kasibabu had any idea of becoming divided. I think, to put it in simple language, that Kasibabu was at best intending to sell to Dharma Rao the property referred to in Ex. B.

As the case presented to us has largely turned on the legal effect of Ex. B it is necessary to consider the arguments relating to it. No case has been cited before us in which the facts are identical with those in the present case. As I understand Mr. Venkatarama Sastri's argument, it is this : that an alienation by one of several members of a joint family to one other of part of the property effects a division so far as that part of the property is concerned, even though no intimation of it is made to the other members of the joint family; and it must be emphasized that it has never been suggested that Dharma Rao represented the family as a whole. He rests his argument on the principle laid down in 11 M I A 75,[1] 13 M I A 181[2] and certain observations of Sadasiva Ayyar, J. in 39 Mad 159[3] at p. 178. In both the decisions of the Judicial Committee it will be seen that the transfer is made with the consent and knowledge of all the members of the family, that is to say, that if it is shown that the members of an undivided family make among themselves a special agreement that certain specified property shall be the subject of shares, there is a division in status *quoad* the property specified therein, though no actual division is made. To quote Lord Westbury in 11 M I A 75[1] at p. 90 :

> When the members of an undivided family agree among themselves with regard to a particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

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1. Appoovier v. Ramasubba Aiyan, (1866) 11 M I A 75=8 W R P C 1=2 Sar 218=1 Suther 657 (P C)
2. Ramchunder Dutt v. Chunder Coomar Mundul, (1869) 13 MIA 181=2 Sar 507 (P C).
3. Soundararajam v. Arunachalam Chetty, A I R 1916 Mad 1170=33 I C 858=39 Mad 136 & 159=29 M L J 793 & 816 (F B).

In 35 All 80,[4] their Lordships say that what may amount to a separation, or what conduct on the part of some of the members may lead to separation of a joint undivided Hindu family, and convert a joint tenancy into a tenancy-in-common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation; but to have that effect the intention must be unequivocal and clearly expressed. It must be remembered that Lord Westbury in 11 M I A 75[1] at p. 92, had used the English analogy of the joint tenancy and tenancy-in-common, and in that case Lord Westbury goes on to say on the same page :

> Then if there be a conversion of the joint tenancy of an undivided family into a tenancy-in-common of the members of that undivided family the undivided family becomes a divided family with reference to the property, that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a de facto actual division of the subject matter. This may at any time be claimed by virtue of the separate right.

The most recent decision relating to this subject is to be found in 53 Mad 188.[5] At p. 195, Ramesam, J. referring to 25 Mad 690[6] remarks as follows :

> If a member of an undivided family sells the whole of his share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred. . . . . It almost implies that so far as the properties in which the whole or part of the member's share is sold are concerned, he must be regarded as divided from the other members. But where the sale is not to a stranger but to the remaining members of the family the matter becomes much stronger.

The learned Judge then goes on to suggest that the authority of certain observations relating to a stranger purchaser in 39 Mad 265[7] at p. 268 are discounted by the decision of the Judicial Committee in 43 Cal 1031,[8] but with all respect I do not understand how this is so. This latter decision of their Lordships lays down that a mere expression of a desire to divide clearly conveyed to the co-sharers effects a division in status regardless of whether the co-sharers desire it or not, but any subsequent partition can be effected either by agreement, or, in the absence of agreement, by invoking the aid of the Court. I am unable to see how any of the cases cited assists the respondents. The legal effect seems ultimately to come to this, that a sale to a stranger, while not affecting the status of the family gives the stranger a right in a suit for general partition to have the transferor's share given to him, and that a statement of an unequivocal intention to divide which includes the filing of a suit or an agreement *inter se* effects a division in status; but so far as the members of the family are concerned, it would seem that there must be contract by way of expression of intention between the transferor member and the rest of the family. Obviously, as pointed out in the cases now quoted, the intention to divide with regard to a certain part of the property can be evidenced by a sale or an agreement regarding that property between the members of the family. But in this case none of those facts are present.

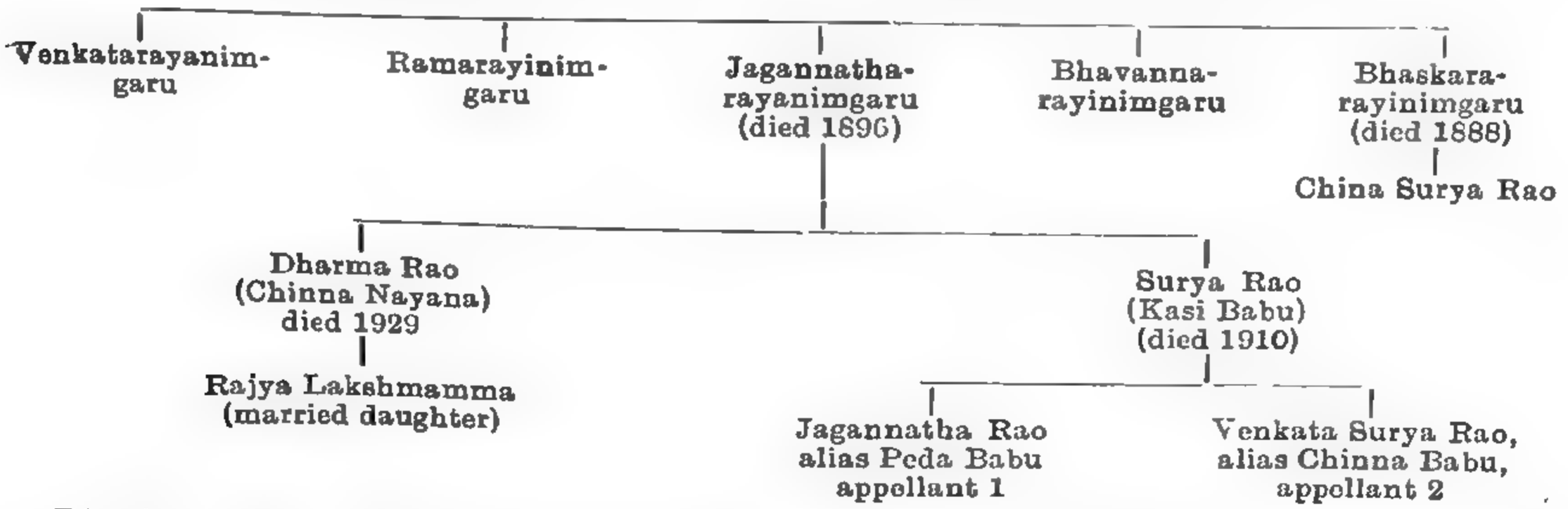
It is nowhere suggested that Kasibabu gave any intimation of anything to the first, second and fourth branches. Ex. B was executed in favour of Dharma Rao and it has been held by Wallis, C. J. and Kumaraswami Sastri, J. in 33 M L J 746,[9] following the decision of the Judicial Committee in 44 I A 159,[10] that the intention must be communicated to the co-sharers. At no time was it suggested until 1908 that Dharma Rao became divided with the other branches. Therefore in 1900 when Ex. B was executed no intimation, express or implied, of any intention was given to any one except Dharma Rao. At the most then it might be said that there was an intention to become divided from Dharma Rao alone leaving presumably Kasibabu joint with the other branches. But as to this it is common ground that in 1900 Dharma Rao was joint with the other branches, and it is not possible to understand how this legal position can be effected. An examination of Ex. 2 shows

4. Suraj Narain v. Iqbal Narain, (1913) 35 All 80=18 I C 30=40 I A 40=16 O C 129 (P C).
5. Lakshumi Achi v. Narayanasami Naicker, A I R 1930 Mad 51=124 I C 497=53 Mad 188=57 M L J 746.
6. A. Venkataramayya v. A. Ramayya, (1902) 25 Mad 690 (F B).
7. Maharaja of Bobbili v. Venkataramanjulu Naidu, A I R 1915 Mad 453=25 I C 585=39 Mad 265=27 M L J 409.
8. Girja Bai v. Sadashiv Dhundiraj, A I R 1916 P C 104=37 I C 321=43 I A 151=43 Cal 1031=12 N L R 113 (P C).
9. K. Ayilamma v. M. Venkataswami, A I R 1919 Mad 1156=43 I C 130=33 M L J 746.
10. Kawal Nain v. Budh Singh, A I R 1917 P C 39=40 I C 286=44 I A 159=39 All 496 (P C).

that the effect of Ex. B was never sought to be worked out, and the third share was confirmed in favour of Dharma Rao on behalf of his branch.

The learned counsel for the appellants has attacked the views of Ramesam, J. expressed in 53 Mad 188,[5] but it must be pointed out that the learned Judge, when remarking that a sale not to a member of the family may make the matter much stronger, is careful to use the words "to the remaining members of the family" and not to one of the remaining members of the family, and it seems to me that he had in mind the statement of Lord Westbury in 11 M I A 75[1] at p. 90, where his Lordship particularly emphasizes the effect of an agreement by members of an undivided family among themselves with regard to a particular property. A conveyance of lands between two parties is as clear an example of an agreement as can be given. I have already indicated my agreement with my learned brother's view that Ex. B was not a document which was intended to have any effect or was acted upon; but if that view should appear to be wrong, then I hold that, even if it gave any rights to Dharma Rao as against Kasibabu, it did not effect a division in status generally or partially between Kasibabu and Dharma Rao. It is to be noted that Dharma Rao does not appear to have ever attempted to enforce any rights against Kasibabu or his heirs. We have had the advantage of hearing a most comprehensive argument from the Bar, but no case—and many have been cited—has been cited establishing the proposition that a conveyance by one to one other of several members of a party only of his undivided share can effect a division as between the transferor and the transferee alone, nor has it, it would seem, ever been sought to be established until now. For the above reasons and for the reasons given by my learned brother with which I concur it follows that this appeal must be allowed with costs throughout.

Lakshmana Rao, J.—The appellants are the sons of Surya Rao alias Kasibabu, the predeceased younger brother of one Chelikani Dharma Rao alias Chinna Nayana, who will hereafter be called Dharma Rao, and the appeal arises out of an application by them to raise the attachment of certain properties in execution of the decree obtained by respondent 1, in O. S. No. 120 of 1930 on the file of the Subordinate Judge of Cocanada against the assets of Dharma Rao in their hands. Respondents 2 and 3 are the married daughter and sister respectively of Dharma Rao, and the question at issue is whether the properties attached are the assets of Dharma Rao or joint family properties which devolve on the appellants by survivorship. The joint family consisted originally of eight brothers, and Jagannatharayanimgaru, the grandfather of the appellants, was the manager. Three of the brothers died without male issue and the pedigree of the surviving brothers who continued joint is given below:



Bhaskararayinamgaru died in 1888 leaving his widow Venkayamma and minor son China Surya Rao, not to mention the female issue. Venkayamma shifted with her children to her parent's house. Jagannatharayanimgaru died in 1896 and Dharma Rao succeeded him as manager. Partition was demanded by Venkayamma on behalf of her minor son in 1897 and by Exs. TT.1 to TT.3 of that year that branch became separated from the other four branches, leaving the latter joint. The share of China Surya Rao in the moveable properties was given to Venkayamma

on his behalf, but the immoveable properties were left in the possession of the four branches, on the understanding that they should pay Rs. 45 per month out of the income of his one-fifth share to Venkayamma on his behalf, and apply the balance towards discharge of his one fifth share of the family debts amounting to Rs. 82,554-13-5. The deeds provide for maintenance of correct accounts, and the arrangement was to continue until the four branches effect a partition among themselves or the minor China Surya Rao attains majority. Two sets of accounts, one for the five branches and the other for the four branches, were maintained thereafter, and Dharma Rao continued in management. Properties were acquired by the four branches subsequently, and Ex. B, the sale deed, was executed by Surya Rao, alias Kasi Babu, who will hereafter be called Kasi Babu, in favour of Dharma Rao on 22nd March 1900 soon after attaining majority conveying his one tenth share in a substantial portion of the family estate including the properties attached. The sale was admittedly in favour of Dharma Rao individually, and not as manager of the four branches, and the consideration is stated to be Rupees 12,500 made up of Rs. 6,500 and 2,000 the vendor's share of the joint family debt and father's debt, undertaken to be discharged by the vendee, Rs. 500, 400, 300 and 1,000, his personal debts and interest thereon amounting to Rs. 150 discharged out of the consideration, Rs. 1,000 received as earnest money, and Rs. 650 paid before the Sub-Registrar.

The document was registered in the house and Kasi Babu continued in the family as before. He was married at the family expense and the four branches continued joint till November 1908 when as appearing from the entry in Ex. J-12 the general note book of Dharma Rao, they became separated in status and mess. Three sets of accounts, were maintained thereafter viz., one for the five branches, one for the four branches, and another called the swantha account of Dharma Rao which according to the appellants is the account of their branch, and Kasi Babu and his family continued with Dharma Rao. The income of the branch from the entire family estate was entered in the swantham account without any distinction being made between the properties conveyed and the other properties, and the household and other expenses of the branch were incurred therefrom. Ex. C, the benami sale deed of his share of the Bharatam or annual allowance payable by the zamindar of Kolanka and another item of family property was obtained from Kasi Babu by Dharma Rao in the name of his maternal uncle Tirupathirayanimgaru on 15th January 1910, and Kasi Babu died soon after leaving a widow and two sons, the appellants. The sales did not exhaust the properties in which Kasi Babu was entitled to a share and the appellants and their mother continued to live with Dharma Rao.

There was a revenue inquiry in 1912 regarding the record of rights in respect of the lands in patta No. 1 of Chitrada village, some of which are included in Ex. B, the sale deed, and in response to the notice issued to the members of the family Mangiah, the agent of the family under Ex. H, the power of attorney dated 27th February 1909, appeared before the Revenue Officer on 31st December 1912. Ex. F, his statement, was recorded by the Revenue Officer, and Mangiah stated that Kasi Babu was a joint sharer in the patta and so the names of his minor sons Dharmaranimgaru and Venkata Surya Rao who were under the protection of their uncle Dharma Rao Garu should be added with Dharma Rao as their guardian. He gave the names of one of the sons incorrectly and Ex. G, the statement, was filed by him on 3rd January 1913 rectifying the error. It is stated therein that the mistake was pointed out by Dharma Rao, and by Ex. SS. 3, the order dated 27th February 1913, the Revenue Officer ordered the inclusion of the names of the appellants with Dharma Rao as their guardian. Nothing further happened till 1922 when by Ex. II, the deed of partition, the immoveable properties specified in Exs. TT-1 to TT-3 which include properties not conveyed under Exs. B and C, were divided by metes and bounds between the five branches, and the third share, which comprises the properties attached, was allotted to Dharma Rao. The deed is silent regarding the appellants who were apparently minors at the time under the protection of Dharma Rao and there are yet other properties to be divided between the four branches. The appellants and their mother continued with Dharma Rao and he died on 28th August 1929 leaving

Ex. III, the will dated 10th March 1927, bequeathing the properties in question to the appellants and other properties to the second respondent.

The case of the appellants is that their father was leading a bad life and Ex. B, the sale deed was brought about lest he should deal with and fritter away his share in the family properties for immoral purposes. There was otherwise no need or occasion for the sale deed, nor was it supported by consideration. It was a nominal transaction, and the properties were treated as family properties throughout. Ex. C the benami sale deed was brought about for the same purpose, as in spite of married life, their father did not improve, and no distinction was at any time made between the properties covered by Exs. B and C, and the other family properties or their income. There never was any division in fact between their father and Dharma Rao nor was any severance effected by Ex. B, the sale deed. Even otherwise the severance brought about would at best be partial and the properties conveyed were blended with the other joint family properties. They would therefore devolve on them by survivorship and are not assets of Dharma Rao.

Respondents 1 and 2 in their counters denied that Ex. B, the sale deed, was a nominal transaction and contended that it effected a complete severance. The properties conveyed became the separate properties of Dharma Rao and they were not treated as family properties thereafter. The alleged blending was false and there was no other family property with which the properties conveyed could be blended. The mess too was not common and the subsequent treatment of Kasi Babu and his family by Dharma Rao was due to natural love and affection. This cannot confer any rights on them and the properties in question were allotted to Dharma Rao in the partition of 1922. They were thus his separate properties and until the will was discovered to be void exception was not taken to the disposition. They are therefore assets of Dharma Rao and would not devolve on the appellants by survivorship.

Respondent 3 did not file any counter and the petition was posted for first hearing to 8th February 1932. The appellants applied on 8th February 1932 for the issue of a commission for the examination of certain witnesses, and the petitions were adjourned to 1st March 1932. The commission was ordered on 1st March 1932 and the main petition was adjourned to 8th April 1932. A large number of documents were filed into Court on behalf of the appellants on 10th March 1932 without notice to the respondents, and the office forwarded them to the Commissioner. Fourteen of them were marked in evidence in spite of objection during the examination of one of the witnesses before the Commissioner, and the decree-holder moved the Court to exclude the documents on the ground that they were not filed before the first hearing. The appellants contended that the procedure relating to suits was not applicable, but the Court ruled otherwise, and ordered that barring 18 documents which by then had been admitted in evidence, the rest will be rejected. The Court was then moved by the appellants to excuse the delay in filing the documents, and a statement was filed by their lawyer that the documents were given to him about a week before the first hearing date, and could not be filed earlier as they had to be sorted and docketted. In view of its decision that the procedure prescribed for suits was applicable, the Court was also requested to frame the necessary issues and the statement of the lawyer of the appellants regarding the delay in filing the documents was not challenged. The documents were ordered to be received subject to proof, and the following points for determination were settled viz., (1) Whether Dharma Rao and his brother were divided; (2) whether the sale deed in Dharma Rao's name was executed nominally; (3) whether the attached properties belonged to the petitioners or are they assets of Dharma Rao; (4) whether the will executed by Dharma Rao was acted upon by the petitioners.

The appellants examined ten witnesses, of whom P. Ws. 1 to 4, an old man of 90, and three gosha ladies were examined before the Commissioner, and so far as is now material P. W. 1, the maternal uncle of the father-in-law of Kasi Babu, speaks to the wayward life of Kasi Babu. The marriage of Kasi Babu was arranged by him at the instance of Dharma Rao and the latter told him in that connexion that the sale deed was nominal. Dharma Rao told him after the marriage that the sale deed had been given to the wife of Kasi Babu, and P. W. 2, respondent 3, adds, that the sale deed was

brought about at the instance of the elders, lest Kasi Babu should convey the property to others. The document was registered in the house and Kasi Babu had to be brought and detained till its registration. The amount paid before the Registrar was taken back by Dharma Rao and the document was delivered through her to P. W. 3, the wife of Kasi Babu, after the marriage. There were no debts of her father to be discharged by her brothers, and P. W. 3, the wife of Kasi Babu, corroborates her regarding the delivery of Ex. B, the sale deed which she produced before the Commissioner. She further swears to the continuance of the common mess and bad life of her husband even after the marriage, and there was according to her no occasion to take any steps, as the right of her husband and children was never disputed. P. W. 4, her mother, supports her generally and P.W. 10 a retired teacher, who has attested Ex. B, the sale deed, says that it is a nominal transaction brought about lest Kasi Babu should alienate his share. P. W. 5, one of the creditors specified in the sale deed, denies having lent any money to Kasi Babu, and adds that Dharma Rao told him that it was a nominal transaction.

The other creditors mentioned in the sale deed are dead, and P. W. 6, the son of the power of attorney agent of the family who was not effectively cross-examined on the point, speaks to the accounts and other documents filed in evidence. P. W. 7, the karnam of Chitrada who has attested Ex. C, the subsequent sale deed says that it was brought about with the same object, and P. W. 9 proves some letters written in that connexion. P. W. 8, appellant 1, swears that he was not aware of Ex. 3, the will, till Dharma Rao's death, and the documents delivered by him to respondent 2 after Dharma Rao's death as per Ex. 1, the receipt, were her properties independently of the will though the receipt says that they were delivered in pursuance of the will. Respondents 1 and 2 examined themselves as D. Ws. 1 and 2, but their evidence was not adverted to. D. W. 1 merely says that Dharma Rao told him that he had a fifth share in the estate and D. W. 2 admits that the documents delivered to her were her properties.

The Subordinate Judge accepted the case of the appellants regarding joint residence but disbelieved it regarding the nature of the sale deeds. There would according to him be no occasion for the sale deeds if the indebtedness of Kasi Babu was not true, and the accounts which do not support the respondents are inconclusive though not fabricated. It was not improbable that Kasi Babu did not want to be saddled with heavy debts and might have liked to have some cash instead of a debt amounting to over Rs. 8,000 or Rs. 9,000 with an off-chance of getting some property left after discharging the debts, and Ex. H, the power of attorney, would have been signed by Kasi Babu if the sale was not genuine. The statement of Manjiah cannot bind Dharma Rao as Ex. H did not authorize the agent to make any statement, and the subsequent treatment of Kasi Babu and his family was probably due to natural love and affection. That no distinction was made in the accounts by Dharma Rao between himself and Kasi Babu, might have been due to his belief that in spite of Ex. B, Kasi Babu was entitled to his share and Ex. B was a real sale supported by consideration. Kasi Babu became divided thereby from Dharma Rao in respect of the properties conveyed thereunder, and the properties conveyed became the self-acquired properties of Dharma Rao. It was not possible to say what idea Dharma Rao had in his mind in dealing with the income of the entire estate without making any distinction and Ex. C the sale deed was also a genuine transaction, though it was taken in the name of Tirupatirayinimgaru. The will was acted upon until it was discovered to be void and the properties attached are assets of Dharma Rao. In the result the Subordinate Judge dismissed the application of the appellants and ordered transmission of the decree to the District Court of West Godavari for execution. Hence this appeal and the initial question for determination is whether Ex. B the sale deed which the respondents contend, effected a severance between Dharma Rao and Kasi Babu, is a nominal transaction. There is no reason to suspect the uncontradicted evidence in the case that Kasi Babu was leading a bad life, and the sale deed came into existence almost immediately after he attained majority. It is unlikely that people would lend money to him during minority, and the accounts whose genuineness admits of no reasonable doubt do not show any payment towards the sale deed, barring stamps and

registration expenses: *vide* Ex. J-1, the entries in the general note book. The accounts therefore bear out the evidence of P. W. 5, one of the creditors mentioned in the sale deed that he did not advance any money to Kasi Babu, and it was not suggested that there were other accounts for the period. There is no evidence regarding the debts stated to be due to the other creditors who are dead, nor do the accounts show a debt of Rs. 4,000 of the father or its discharge by Dharma Rao. The indebtedness of Kasi Babu and his father appears to be a myth, and undue importance cannot be attached to the payment of Rs. 650 before the Sub-Registrar. Such payments are usually made to give an air of reality and the process was gone through though the document was registered in the house. The need for registration in the house is not apparent, and a nominal conveyance would be necessary if Kasi Babu was leading a bad life, and the properties had to be put off his reach. It is therefore difficult to follow the reasoning of the Subordinate Judge that but for the alleged indebtedness there would be no need or occasion for a nominal conveyance, and it was not suggested that there was any pressure for payment of the joint family debts specified in Exs. TT-1 to TT-3. They were not in fact discharged till some years later, and the family estate was considerable. Kasi Babu was rather young at the time to know or bestow any thought on the subject, and the surmise of the Subordinate Judge that probably the young man did not want to be saddled with heavy debts and might have liked to have cash instead of a family debt amounting to over Rs. 8,000 or Rs. 9,000 with an off-chance of getting some property left after discharging the debt is unwarranted.

The transaction if real would leave him very little, and the subsequent conduct of the parties points to the irresistible conclusion that the conveyance was nominal. No distinction was made between the shares of Kasi Babu and the rest in the arrears of rent due in respect of the properties conveyed on the date of sale, and Exs. S, S-3, S-1, T-4, R, R-1 and R-2 show that those arrears were treated as belonging to the five branches in common. Exs. N and O series, the joint accounts of the four branches, not to mention Exs. L and M series, the accounts of the five branches, were continued, and the income of the four branches from all sources including the properties conveyed was dealt with as one fund. The expenses of all the members of the four branches including Kasi Babu were incurred therefrom without any differentiation, *vide* Exs. O, N-50, O-6, O-7 and N-56, and the four branches continued joint till about November 1908 when by agreement they became separated in status and mess. Kasi Babu and his family continued with Dharma Rao, and so far as is material Dharma Rao credited to himself in the common account thereafter one-fourth of the total income of the four branches, from all sources including the bharathams payable by the Maharaja of Pithapuram and proprietor of Kolanka. An account called the swantham account was also opened by him, and no difference was made therein between the income from the several sources including the properties conveyed: *vide* Exs. K and K-1, the entries. The receipts were dealt as a single fund, and Kasi Babu and his family were treated as members of the branch. The household and other expenses of the branch came out of that fund, and as found by the Subordinate Judge, Ex. C, the second sale deed, was obtained benami in the name of Tirupathirayinimgaru in 1910.

The evidence is that Kasi Babu did not improve in spite of his married life and the entries in Ex. J-13, the general note book of Dharma Rao, show that the necessary amount was taken out of the common fund. No difference was made between the income of the properties conveyed and the other properties, and Kasi Babu died soon after. There was then a record of rights enquiry concerning *ex facie* the survey numbers in Patta No. 1 of Chitrada village which includes some of the properties conveyed under Ex. B, the sale deed, and Mangiah, the power of attorney agent, appeared before the revenue officer in response to the notice issued to the members of the family. The revenue officer recorded Ex. F, the statement of Mangiah, and he stated that the names of the appellants, the minor sons of Kasi Babu, should be added in the patta with Dharma Rao as their guardian as Kasi Babu was a joint sharer in the patta. A mistake was made by him regarding the name of appellant 1, and Ex. G shows that it was rectified soon after at the instance of Dharma Rao who was informed about that statement. The names of the

appellants were ordered to be added accordingly, Ex. SS.3 being the order, and the contention that the admission was unauthorized is untenable. Ex. H, the power of attorney, expressly empowers the agent to receive and give replies to yadasts issued in the names of the principals by the Collector or other officers of Government, concerning the affairs of the properties specified therein, and even otherwise the statement was acquiesced in by Dharma Rao who was told about it soon after.

The statement was thus rectified even if it was in excess of the authority of the agent, and realizing this it was suggested in this Court that the enquiry might have related solely to the inam of Jayanti people, item 4 of the Chitrada lands which was not conveyed by the sale deed. The materials on record do not warrant the suggestion, and entries in Exs. N.9 and O regarding the separate payment of quit rent and local cess in respect of the inam of Jayanti people, negative the basis of the suggestion, that the inam was part of the Nimebadi series to which Patta 1 of Chitrada village relates. There cannot be a clearer admission of the right of Kasi Babu to those properties in spite of the conveyance, and considering that appearances have to be kept up till his death, if the object was to put his share off his reach, undue importance cannot be attached to the circumstance that Kasi Babu was not one of the executants of Ex. H, the power of attorney, and the usufructuary mortgage executed, in 1909, *vide* Ex. L-6 for discharging the joint family debts specified in Exs. TT-1 to TT-3. The appellants who were minors would not also be included therein for the same reason, and no distinction was ever made in the accounts between Dharma Rao and the appellants. They were under his protection throughout, and Ex. AA-1, the general accounts, were kept in terms of branches. Exs. K-5 to K-9, the entries in the swantham accounts, show that Dharma Rao dealt with all his receipts for all sources as a single fund, and Ex. CC shows that the jewels of the four branches were divided equally between these branches in 1919. The property released in favour of the Taluk Board by Ex. NN in 1920 was not one of the properties conveyed by Kasi Babu, and Dharma Rao must have represented his branch. The release would otherwise be ineffective, and it is common ground that Dharma Rao continued in management of the immoveable properties of all the branches until 1922, when by Ex. II, the deed of partition, the immoveable properties specified in Exs. TT to TT-3 and another item of property belonging exclusively to the four branches were divided by metes and bounds.

The division was into five equal shares and the third share comprising the properties attached was by draw of lots confirmed in favour of Dharma Rao. The deed is no doubt silent about the appellants but properties not conveyed by Kasi Babu in which they had an interest were also dealt with and unless they too were parties to it, the partition would not be effective. They were apparently minors at the time, and Dharma Rao was the senior member of their branch. He must have represented the branch though it is not so expressed in the deed, and the inclusion of the adult members of the several branches does not mitigate against it. The appellants and their mother continued with Dharma Rao and the accounts were kept as before. Expenditure was incurred without any distinction (*vide* Exs. K-17, K-18 and K-19), and there are still other properties to be divided among the four branches. The income of these properties was also brought into the same account, and barring the recitals in Ex. III, the will, which are not evidence against the appellants there is nothing to indicate that Ex. B was a real transaction. Further the recital, in the will, regarding the bharatam payable by the proprietor of Kolanka is opposed to admitted facts and Dharma Rao had no power to bequeath it. Undue importance cannot therefore be attached to the undisputed integrity of Dharma Rao and the fact that exception was not taken to the will until it was discovered to be void, would not by itself justify a different conclusion. For obvious reasons the plea of estoppel was not pursued in this Court and independently of the direct evidence on this point, which was not accepted by the Subordinate Judge and which we would not accept if it stood by itself, the conclusion is irresistible that Ex. B, the sale deed, was a nominal conveyance. The finding of the Subordinate Judge that it is real transaction cannot therefore be upheld and on the evidence we find that Ex. B, the sale deed, on which the severance between Dharma Rao and Kasi Babu is founded, is a nominal conveyance.

The effect of Ex. B, the sale deed, assuming it to be real, has then to be considered, and in view of the decision of the Privy Council in 16 M L W 639,[11] in which the previous decisions of the Board were considered, it would be idle to contend, that under the Hindu law it is not open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of the joint undivided family. No express agreement is necessary for this purpose and it depends on the circumstances of each case whether a severance of interest in respect of a part of the joint estate creates a disruption of the family status. The intention to remain joint as to the rest of the estate may be inferred from the conduct of the parties, and in the circumstances of this case, it was not seriously contended before us that the severance if any was total and not partial. It is common ground that Exhibits TT.1 to TT.3 left the four branches undivided, and admittedly these branches continued joint until 1908, when by agreement *inter se* in status and mess. There was no cesser of commensality between members of these branches till then, and Kasi Babu and his family continued with Dharma Rao thereafter.

The real question therefore is whether the sale deed effected a severance between Dharma Rao and Kasi Babu in respect of the properties conveyed, and under the Hindu law a partition may be effected either by agreement between the co-parceners or by an unambiguous declaration of an intention to become divided. The agreement must be between all the co-parceners as otherwise it will lead to the inconceivable position, viz., a severance between the parties to the agreement without any disruption between either of them and the other co-parceners, and as pointed out in 33 M L J 746,[9] to have that effect, the intention to become divided should be communicated to all the other co-parceners. Two or more members of an undivided family, be they members of different branches or of one and the same branch of the family, have no legal existence as a separate independent unit, so long as the family remains undivided (*vide* 25 Mad 149[12] at p. 155) and it is common ground that the four branches remained undivided until 1908. The sale-deed was in favour of Dharma Rao individually and not as manager of the family, and, treating it as an agreement, it would be an agreement between two members of a branch of the undivided family, which in law cannot effect any severance. Ex. B is a sale simpliciter with the usual recitals and clauses, and it does not contain any explicit declaration of an intention to become divided. The subsequent conduct of the parties negatives any implied intention, to separate, and it was not suggested that the intention if any was communicated to all the other co-parceners.

There was therefore no severance by communication of an intention to separate, and as laid down in 39 Mad 265[7] which is still good law, the mere fact that a co-parcener makes an alienation does not put an end to the co-parcenary between himself and the other members of the family. The act of alienation only makes definite the indefinite interest of the alienor, (*vide* 53 Mad 1[13] at p. 16) and there is no warrant for holding that an alienation of his undivided interest in the entire family estate or a portion thereof by a co-parcener in favour of one or more of the remaining coparceners effects a severance of the alienor from the joint family. The alienation *per se* cannot be held to be an agreement between the members of the family to become divided or expression by the alienor of his intention to separate from and much less a communication thereof to the remaining members of the family, and as pointed out by the Privy Council in 1 Mad 312[14] at p. 332 the alienor acquires rights in the subject matter of the alienation, notwithstanding the undivided status of the family. The case of an alienation by one co-parcener in favour of the only other or all the other co-parceners as in 53 Mad 188[5] stands on a different footing, and then the alienation would in effect be an agreement between all the co-parceners that particular property should thenceforward be the subject of ownership in a particular manner, and it is well settled

11. Ramalinga Annavi v. Narayana Annavi, A I R 1922 P C 201=68 I C 451=49 I A 168=16 M L W 639=45 Mad 489 (P C).

12. Sudarsanam Maistri v. Narsimhulu Maistri, (1902) 25 Mad 149=11 M L J 353.

13. Narayana Sah v. Sankara Sah, A I R 1929 Mad 865=121 I C 1=53 Mad 1=57 M L J 685 (F B).

14. Sivagnana Tevar v. Periasami, (1876-78) 1 Mad 312=5 I A 61=3 Sar 795=3 Suther 503 (P C).

that by agreement between all the co-parceners a severance of interest can be effected between them in respect of the subject matter of the agreement. An agreement between some of several co-parceners cannot bring about that result and on principle the rights of a co-parcener alienee who is not the only other co-parcener cannot be higher than those of a stranger purchaser. The latter cannot as pointed out in 5 Cal 148[15] and 10 Cal 626[16] resist the claim of the non-alienating co-parceners to the whole of the alienated property, and his only remedy is to enforce his right under the purchase by a suit for general partition. That the non-alienating co-parcener or co-parceners may sue for recovery of the non-alienated share of the alienated property has no bearing on the point and the decree in such suits can only be subject to the result of the suit for general partition which the alienee may institute.

The decision in 34 Mad 269[17] merely extended the right of the sole non-alienating co-parcener to his purchaser and as held in 2 Pat 925[18] one of several non-alienating co-parceners cannot sue the purchaser for his own share of the alienated property. There is no reason why he should not, if an alienation *per se* effects a severance between the members of the family, and it is impossible to hold that Ex. B created a severance of interest between Dharma Rao and Kasi Babu in respect of the properties conveyed. Dharma Rao would, if the sale is real, be entitled to the interest of Kasi Babu in the properties conveyed but the sale deed would not effect any severance between them.

It remains then to consider whether if there was a severance, the properties conveyed were blended with the family properties, and as pointed out in connexion with the nature of the conveyance, at no time was any distinction made between the income of the four branches from the several sources including the properties conveyed. There was one general account for the four branches till 1908, and no distinction was made by Dharma Rao even in the swantham accounts opened by him thereafter. The receipts from all the sources were dealt with as a single fund, and Kasi Babu and his family were treated as members of the joint family. The idea of Dharma Rao in dealing with his receipts as he did is irrelevant and on the materials on record the alleged blending cannot reasonably be doubted. Properties once brought into a common stock cannot be taken out again (*vide* 45 Cal 733[19] at p. 744,) and as found already the third share was allotted to this branch in 1922, though it was confirmed *eo nomine* in favour of Dharma Rao. The properties would therefore devolve on the appellants and they are not assets of Dharma Rao in their hands. In the result the appeal is allowed with costs throughout and the claim of the decree-holder to proceed against the properties as assets of Dharma Rao is disallowed.

C.R.K./K.B. *Appeal allowed.*

15. Suraj Bunsi Koer v. Sheo Prasad Singh, (1880) 5 Cal 148=4 C L R 226=6 I A 88=4 Sar 1 (P C).
16. Hardi Narainshahu v. Ruder Perkash Misseer, (1884) 10 Cal 626=11 I A 26=4 Sar 510 (P C).
17. Iburamsa Rowthan v. Thirumalai Muthuveera, (1911) 34 Mad 269=7 I C 559=20 M L J 743 (F B).
18. Shyam Sunder Rai v. Jagarnath Misra, A I R 1923 Pat 590=74 I C 758=2 Pat 925=5 P L T 193.
19. Radhakant Lal v. Nazma Begum, A I R 1917 P C 128=45 I C 806=45 Cal 733 (P C).

A. I. R. 1937 Madras 472

VARADACHARIAR, J.

Subbaratnam Chettiar — Appellant.

v.

Gunavanthalal Vidyasankar — Respondent.

Second Appeal No. 887 of 1932, Decided on 28th October 1936, against decree of Dist. Court, Trichinopoly, in A. S. No. 333 of 1931.

(a) Practice—Second appeal—Negligence—Certain facts whether amount to negligence or not can be considered in second appeal.

The question, whether on certain facts, what will amount in law to negligence has been made out or not is one which it is open to the Court to consider in second appeal. [P 474 C 1]

(b) Minor—Decree against—Setting aside—Minor can set aside decree against him on ground of his guardian's gross negligence also.

As a matter of law a minor can have a decree set aside not only on the ground of fraud but also on the ground of gross negligence on the part of his guardian: *12 Cal 69, Dissent.*; *A I R 1922 Mad 273*; *A I R 1927 Mad 497*; *A I R 1935 Mad 81*; *A I R 1915 Mad 84* and *A I R 1935 Pat 24, Rel. on*; *A I R 1924 Mad 297* and *A I R 1926 Pat 528, Ref.* and *Expl.* [P 474 C 1]

(c) Hindu Law—Debts—Pro-note by member—Surviving members other than his sons are not his legal representatives so far as joint family property in their hands is concerned—Such members cannot be impleaded.

as maker's legal representatives in suit on pro-note — Objection as to their being so impleaded can be raised—No issue as to binding character of debt on family can be allowed to be raised and dealt with in such suit.

Where a pro-note is executed by a member of a joint Hindu family and maker thereof dies pending suit the surviving members of the joint family are not his legal representatives so far as the property of the family in their hands is concerned, unless they are the sons of the maker. A decree passed against the maker cannot be executed against the shares of the surviving members even if the debt be binding on the family. The surviving members cannot be impleaded in the suit as legal representatives of the maker in a suit on pro-note. Where such surviving members are impleaded as legal representatives of the maker, they can raise in defence an objection as to their being so impleaded. An issue as to the binding character of the pro-note on the family cannot be permitted to be raised and dealt with in such suit: *Case law discussed.* [P 474 C 2; P 475 C 1]

(d) Minor—Suit against minor—Omission to put forward correct defence will constitute gross negligence on part of guardian ad litem.

In a suit against a minor if the guardian ad litem omits to put forward the correct defence when it is clearly available, the omission to put forward correct defence equally with the putting forward of an absurd defence will constitute gross negligence on the part of the guardian ad litem: *A I R 1915 Mad 384, Rel. on.* [P 475 C 2]

T. V. Muthukrishna Aiyar — for Appellant.

T. R. Srinivasa Aiyar for *Watrap Subramania Aiyar*—for Respondent.

Judgment.—This second appeal arises out of a suit brought by the plaintiff for a declaration that the decree in S. C. S. No. 2888 of 1924 on the file of the Small Cause Court, Trichinopoly, is not binding on the plaintiff or the family properties in his hands. The Small Cause suit was instituted on a promissory note executed by the plaintiff's undivided uncle, one Muthukrishna Chettiar who died pending that suit. On his death the plaintiff who was then a minor was impleaded as defendant 2 and all that appears at present is that he was represented by a Court guardian. The decree and the judgment show that the Court guardian engaged a vakil for the minor plaintiff and it was pleaded on his behalf that the deceased defendant 1 was not the managing member of the family and that the debt was incurred by him for immoral purposes. An issue was raised whether the suit pro-note was binding on the family. The Small Cause Judge held that the plaintiff in that suit was entitled to a decree not merely against the assets of the deceased defendant 1 but also against the family properties of both the defendants, because the pro-note had been executed by defendant 1 when he was in management of the family affairs for a debt which was found due on dealings. He added:

Defendant 1 was a ruby merchant and the dealings related to the purchase of rubies. The defendants are a Chetti family which may be presumed to be a trading family. Defendant 1 was a trader in rubies.

In the present suit, the plaintiff alleged that the decree was not binding upon him and the family properties in his hands, on two grounds (1) that he was not properly represented in the Small Cause suit and (2) that his guardian ad litem had been guilty of gross negligence. The objection as to proper representation rests on the circumstance that the plaintiff had been represented by a Court guardian when his mother was alive. The learned District Judge rightly points out that at this time of the day when the records of the Small Cause suit had been destroyed, it is not possible to hold that the plaintiff in the Small Cause suit must have been guilty of fraud in the matter of getting the minor represented by a Court guardian. It is scarcely likely that any Court would in the first instance have appointed a Court guardian. Some steps must have been taken to have somebody else appointed guardian and it is only on failure of these steps that a Court guardian is likely to have been thought of. I am not therefore prepared to interfere with the lower Court's conclusion so far as the first ground is concerned. As regards the second ground, the fact as now concurrently found by both the Courts is that the ruby trade in connection with which the uncle executed the promissory note to the plaintiff in the Small Cause suit was not an ancestral trade but one started by the uncle himself. Both the Courts have also held that on these facts the minor nephew could not have been legally held liable for that debt of the uncle, nor the family property which had come into his hands by survivorship. On these findings, the District Munsif gave a decree in plaintiff's favour, but the learned District Judge set it aside with the following observations:

It has not however been shown that the omission to take this line of defence was due to any culpable negligence on the part of the Court guardian. There is no evidence at all as to what he did and what particular step he took ..... The pleader who appeared for plaintiff has also not

been examined to show from whom and in what circumstances he derived his instructions. In the absence of any positive evidence from him or from plaintiff's mother ..... I consider that this appeal should be allowed.

On behalf of the respondent, Mr. T. R. Srinivasa Aiyar contends that this is a finding of fact which I am not entitled to interfere with; I cannot accede to that contention. I am bound by the facts stated by the learned Judge but the question whether on these facts what will amount in law to negligence has been made out or not is one which it is open to this Court in second appeal to consider. I may also dispose of another contention of Mr. Srinivasa Aiyar, viz., that as a matter of law a minor can have a decree against him set aside only on the ground of fraud and not on the ground of gross negligence on the part of the guardian. There is no doubt something in support of this contention in 12 Cal 69[1] but all the later authorities are against it. It is sufficient to refer to 45 Mad 425;[2] A I R 1927 Mad 497;[3] 67 M L J 927[4] and 27 M L J 486.[5] The passing reference in 47 Mad 79[6] at p. 83 to the decision in 12 Cal 69[1] certainly does not imply dissent from the considered judgment in 45 Mad 425.[2] The decision in 5 Pat 768[7] turned on the express language of S. 258, Chota Nagpur Tenancy Act. That on general principles the Patna High Court has taken the same view as the Madras Court, will be seen from the observations of that Court in A I R 1935 Pat 24[8] at pp. 28 and 29.

Before dealing with the particular ground dealt with in the Courts below I may state that there is one other point which also seems to me to be of some importance in the case, namely, whether the plea of the liability of the family property in the hands of the minor defendant should have been allowed to be raised in the Small Cause Suit at all. As stated already that suit was on a promissory note executed by the minor's paternal uncle and he was the only defendant in the first instance. It is true that a line of authority in this Court beginning from 23 Mad 597[9] makes it permissible for the creditor to include in one and the same suit not merely the claim against the maker of the promissory note but also the claim against the other members of the joint family in respect of the debt represented by the note. But there can be little doubt that such a suit really combines two causes of action and two kinds of liability, namely, that of the maker under the note, and that of the other members under the Hindu law. The authorities bearing upon this question have been considered at some length in a recent judgment in *A. S. No. 89 of 1931*[10] to which I was a party and it is unnecessary to recapitulate them here. There can be no doubt that on the death of the maker the cause of action on the note would have survived only against his legal representative in the strict sense, i. e., his heir at law and not against the surviving members of the joint Hindu family other than sons. In the case of sons the special provision enacted in S. 53, Civil P. C., may introduce a difference. But in the case of the other members of the joint family, the mere fact that they may be equally liable with the maker for the debt will not make them legal representatives of the maker. That they cannot be legal representatives so far as the joint family property in their hands is concerned has been recognized in several cases. It is sufficient to refer to 27 Mad 106;[11] 32 All 404;[12] (1935) 33 A L J 293[13] and 2 Lah 114[14] at pp. 117 and 118.

Cases in this Court have also held that a decree obtained against a member of a joint Hindu family even if it be for a debt binding on the family cannot be executed against the shares of other members of the family unless, they be sons of the

1. Raghubar Dyal Sahu v. Bhikya Lal Misser, (1886) 12 Cal 69.
2. Punnayyah v. Viranna, A I R 1922 Mad 273=70 I C 668=45 Mad 425=42 M L J 429.
3. Joga Rao v. Venkamma, A I R 1927 Mad 497=101 I C 143.
4. Ayya Pillai v. Ayyadurai Goundan, A I R 1935 Mad 81=154 I C 65=67 M L J 927.
5. Subbanna v. Narasamma, A I R 1915 Mad 384=26 I C 16=27 M L J 486.
6. Sellappa Goundan v. Masa Naicken, A I R 1924 Mad 297=76 I C 1018=47 Mad 79=45 M L J 675.
7. Raj Gopal Acharjya v. Upendra Acharjya Goswami, A I R 1926 Pat 528=96 I C 437=5 Pat 768.
8. Kali Charan Singh v. Hirdai Narain, A I R 1935 Pat 24=154 I C 948.
9. Krishna Ayyar v. Krishnaswami Ayyar, (1900) 23 Mad 597.
10. Narayana Rao v. Venkatapayya, *Reported in* A I R 1937 Mad 182.
11. Veerappa Chettiar v. Ramaswami Ayyar, (1904) 27 Mad 106.
12. Gyanendra Nath Basu v. Rani Nihalo Bibi, (1910) 32 All 404=6 I C 38=7 A L J 512.
13. Sumeshar Bind v. Baldeo Sahu, A I R 1935 All 390=157 I C 51=1935 A L J 293.
14. Dwarka Das v. Krishan Kishore, A I R 1921 Lah 34=61 I C 628=73 P L R 1921=2 Lah 114.

judgment-debtor, *cf.* 8 Mad 208;[15] 10 Mad 316;[16] 12 Mad 325[17] and 68 M L J 104.[18] In a recent case in 67 M L J 393[19] it was held by Cornish, J. that in a suit on a promissory note executed by a member of a joint Hindu family the surviving members of the joint family cannot be impleaded as legal representatives. There has been some difference of opinion between a case in this Court in A I R 1930 Mad 575[20] and the decision of the Allahabad High Court in (1935) 33 A L J 293[13] as to whether the possession of separate property by the deceased member of the joint Hindu family and the devolution thereof on a surviving member of a joint Hindu family should be proved in the first instance even before the surviving member could be impleaded as a legal representative. But even in the Allahabad case, the Court recognized that after impleading the survivor as a legal representative, a decree could be passed only against the assets of the deceased and not as against the joint family property. In the light of these considerations I am of opinion that an objection could have been taken on behalf of the minor defendant to his being impleaded as a legal representative in the small cause suit on the death of his undivided uncle. When he was so added, he could have raised only such defences as were appropriate to his character as legal representative. An issue as to the binding character of the note on the family should not have been permitted to be raised and dealt with at all. Cases which relate to the immoveable property possessed by a joint Hindu family in respect of which a member of the family sues or is sued in a representative character and cases in which the managing member of a family may sue on debts due to the family stand on a different footing altogether and do not bear any analogy to the present case.

Assuming however that the omission to take exception in the Small Cause suit to the trial of the question of the liability of the family property would not of itself amount to gross negligence on the part of the guardian ad litem, because the question must at least have been tried in a separate suit the minor has a stronger ground, on the merits in the present case. As I have stated already, both the Courts have concurrently found that the trade in the course of which the debt was incurred by the uncle was not an ancestral trade but one started by the uncle. If this fact had been pleaded, a decree could not have been passed as against the joint family property in the hands of the minor. I do not see how the omission to examine the plaintiff's mother or the vakil who appeared for him in the former litigation bears upon this question. I am prepared to assume for the purpose of argument that the mother herself was the guardian ad litem of the minor. The respondent could not put his case on a higher footing. It will then follow either that she was not aware of the law or that she was not aware of the material facts. In either view, the omission to raise the plea will amount to gross negligence. I am not for a moment asserting that untenable or unfounded defences should have been put forward but the investigation of the facts in the present case has shown that this defence was clearly available. On the other hand the only defence thought of on the former occasion was the stock defence of illegality and immorality which no attempt was made to substantiate. As held in 27 M L J 486[5] the omission to put forward the correct defence equally with the putting forward of an absurd defence will constitute gross negligence on the part of the guardian ad litem. The second appeal must therefore be allowed and the decree of the trial Court restored with costs here and in the Court below.

(Application is made to me for leave to file a Letters Patent Appeal. I should gladly have granted the leave if the interests involved were large enough to justify it. The amount of the Small Cause decree is only about Rs. 367 and subsequent interest. I do not think it justifies the further prolongation of this litigation. I decline to grant leave.)

C.R.K./W.D. *Appeal allowed.*

15. Viraraghavamma v. Samudrala, (1885) 8 Mad 208.
16. Guruvappa v. Thimma, (1887) 10 Mad 316.
17. Sathuvayyan v. Muthuswami, (1889) 12 Mad 325.
18. Lakshmana Chettiar v. Muthu Chellia Goundan, A I R 1935 Mad 145=155 I C 574=68 M L J 104.
19. Seshayya v. Sanjivarayudu, A I R 1934 Mad 350=150 I C 885=67 M L J 393.
20. Rangathammal v. Venkatachariar, A I R 1930 Mad 575=127 I C 237.

A. I. R. 1937 Madras 476

VARADACHARIAR, J.

Pavani Subbamma and *another* —
Appellants.

v.

Anumala Ramanaidu and *others* —
Respondents.

Second Appeal No. 1349 of 1932, Decided on 19th November 1936, against decree of Sub-Judge, Nellore, in A. S. No. 229 of 1930.

(a) Will — Construction — Presence of gift over is indication that prior gift is limited.

The proper rule of construction of a will is to take the will as a whole; and the presence of a gift over, which is not a mere gift by way of defeasance is an indication that the prior gift is only of a limited interest : *A I R 1935 Mad 704, Rel. on.* [P 477 C 1]

(b) Hindu Law — Will — Testator creating limited interest in favour of widow followed by gift over to grandchildren—Limited interest in favour of widow can be regarded as woman's estate under Hindu law and not strict life-interest in English law sense — Alienations by widow for legal necessity are binding on reversioners.

Where a Hindu testator creates a limited interest in favour of his wife followed by a gift over to his grandchildren, the limited interest in favour of the wife can reasonably be regarded as woman's estate under Hindu law and not strictly a life-interest in the English law sense, because first it is possible to create an interest analogous to a woman's estate notwithstanding the addition of a gift over, and secondly a Hindu testator may reasonably be presumed to create an estate known to the Hindu law rather than a strict life-interest as understood in English law. Alienations by widow for legal necessity are therefore binding on the reversioners : *A I R 1925 Mad 497, Rel. on.* [P 477 C 2; P 478 C 1]

M. Patanjali Sastry — for Appellants.

B. Somayya and *D. Narasa Raju* —
for Respondents.

Judgment.—This case raises questions of some difficulty; but, having given the matter my best consideration, I have come to the conclusion, though not without hesitation, that there is no sufficient reason for my interfering with the concurrent decisions of the Courts below. The suit property formed part of the estate of one Venkataramanayya who died in 1904, leaving a will, Ex. A. At his death he left surviving his widow Savitramma and two grandchildren, namely a daughter's son (defendant 2) and a son's daughter (the plaintiff). The will accordingly provided that the widow should enjoy the properties and after her lifetime they would be taken in the ratio of 3 to 5 by the son's daughter and the daughter's son respectively. The present suit was instituted by the son's daughter for recovery of possession of her share in one item of property forming part of Venkataramanayya's estate which had been sold by Savitramma to defendant 1 in 1917.

The plaintiff's husband, who has been examined as P. W. 1, admits that since Venkataramanayya's death, he has been living with Savitramma and looking after her affairs. It also appears from his evidence that many of the transactions entered into by Savitramma were entered into by her with his knowledge and the knowledge of defendant 2 and that the documents executed by her were attested by these two people. The Court may therefore fairly presume that there was very little likelihood of Savitramma doing any acts prejudicial to those who are to take the property after her. The sale in favour of defendant 1 was effected for discharging debts which arose mainly out of a suit instituted by the Government against Savitramma and her co-sharer under the Madras Railway Protection Act. A tank, which it was their duty to repair, was in disrepair and as a notice given to the co-sharers under the provisions of the Act to make the necessary repairs was not complied with, the Government executed the repairs and instituted a suit in 1912 for recovery of the money spent. It is unnecessary to refer to the steps taken in execution of the decree obtained in that suit and to the steps taken by the widow to meet that liability. It is sufficient to say that both the Courts have concurrently found that the suit sale became necessary for the purpose of meeting the liability resulting from that suit. Two questions have to be considered in deciding whether the sale thus effected will be binding upon the plaintiff, namely (1) whether Savitramma was at all entitled to sell anything more than her life interest even for purposes of meeting a necessity binding upon the estate, and secondly, whether the liability under the Railway Protection Act was only a personal liability of Savitramma or was one for which not merely her life-interest but the property itself including the interest of the reversioners, if any, could be sold. The answer to the first question depends upon the true construction of the will Ex. A.

Mr. Somayya, who appeared for the alienee, went so far as to contend that Ex. A confers a stridhanam or an absolute

estate upon Savitramma. He relied in support of that argument upon the use of the word 'Hakdar' and upon the statement that Savitramma should enjoy the property in the way that the testator himself had been doing. But as against this, it has to be pointed that the will contains a gift over in favour of his grandchildren at her death and the gift over is said to be of the entire properties. It will be very doubtful, if the first gift in favour of Savitramma is to be held to be an absolute estate, whether a gift over in these terms would be valid at all. To avoid such a possibility, the proper rule of construction has been held to be to take the will as a whole; and the presence of a gift over, which is not a mere gift by way of defeasance, has generally been held to be an indication that the prior gift was only of a limited interest. There is another circumstance in the present case which points strongly in favour of interpreting the gift to Savitramma as a limited gift, namely the express provision made at the end of the will that the grandchildren shall have powers of gift, sale, etc. This clause undoubtedly indicates that the testator intended to draw a distinction between the powers of the widow and the powers of the grandchildren. In *A. S. No. 232 of 1929* (67 M L J, short notes, p. 69),[1] a Division Bench, dealing with a similar will, held in favour of the limited construction of the prior gift. The language there was stronger in favour of an absolute estate to the widow because the dispositive clause contained words conferring wide powers of disposition on her, but in view of the gift over and the reference in the context to the discharge of debts, the learned Judges thought it right to limit the power of disposition to circumstances of necessity or the discharge of debts. I am accordingly of opinion that the Courts below were right in holding that Savitramma took only a limited interest and not an absolute interest.

The further question arises whether the limited interest was one similar to the estate of a Hindu widow or only a strict life-interest. The lower appellate Court had not felt any difficulty in holding that, even if Savitramma's estate was only a life-interest, she would have had powers of alienating the full interest in the estate for necessary purposes. I am not by any means satisfied that this proposition can be so easily assumed. It is one thing to say that the purpose is a necessary or proper purpose but another thing to hold that an alienation will convey the full proprietary interest, regardless of the nature of the alienor's interest, for ordinarily the alienor can convey only the interest to which he or she is entitled. It is true that under the Hindu law a female, holding what is known as the woman's estate, can alienate the estate for proper purposes but that has been held to be possible because her interest is not exactly the same as a life-interest under the English law. Arguments have accordingly been advanced before me as to whether taking Savitramma's interest under Ex. A to be a 'limited' interest, it is only a life-interest in the English law sense or it resembles a woman's estate under the Hindu law. In favour of the theory of the 'limited' estate of a female heir, there is the consideration that a Hindu testator may reasonably be presumed to create an estate known to the Hindu law rather than a strict life-interest as understood in the English law, but the former view would make the gift over in favour of the grandchildren a contingent one. There are two decisions of the Privy Council in 2 I A 7[2] and 2 I A 256[3] and I am free to confess that it is not easy to reconcile their Lordships' observations in these two judgments. Mr. Somayya relied on a judgment of this Court in 26 M L J 616.[4] I have always had some difficulty in understanding this judgment because the learned Judges assume the possibility of a vested remainder subsisting side by side with a limited interest analogous to a Hindu woman's estate. In 48 Mad 1[5] at pp. 125 to 129, the two decisions in 2 Indian Appeals as well as a Full Bench judgment of the Patna High Court have been referred to at some length by Kumaraswami Sastriar, J. and the learned Judge holds that it is possible to create by a document an interest analogous to a Hindu woman's estate and

1. Thayalai Achi v. Kannammal, A I R 1935 Mad 704=156 I C 846=68 M L J 707.

2. Mahomed Shumsool v. Shewrukhram, (1874) 2 I A 7=14 Beng L R 226=22 W R 409=3 Sar 405 (P C).

3. Mt. Bhagbutti Daee v. Bholanath Thakoor, (1875) 1 Cal 104=2 I A 256 (P C).

4. Ratna Chettiar v. Narayanaswami Chettiar, A I R 1914 Mad 64=24 I C 796=26 M L J 616.

5. Maharajah of Kolhapur v. Sundaram Ayyar, A I R 1925 Mad 497=93 I C 705=48 Mad 1.

tack on to it a remainder, though he does not go the length of stating that such a remainder will be a 'vested' remainder. In deference to the view of the learned Judges who have considered that it is possible to create an interest analogous to a woman's estate notwithstanding the addition of a gift over like that in Ex. A, I am not prepared to say that the estate taken by Savitramma under Ex. A must necessarily be taken to be only a life-estate.

On the assumption, then, that Savitramma took an estate analogous to a woman's estate under the Hindu law, the next question for decision is whether the alienation in favour of defendant 1 was one justified by legal necessity. I am not very much impressed by the argument that there is a concurrent finding by the Courts below on this point because some of the aspects placed before me by Mr. Patanjali Sastri on behalf of the appellant have not been adverted to in those judgments. But so far as inferences of fact have been drawn by the lower appellate Court, I see no reason to differ from them. As I understand it, the position taken by Mr. Patanjali Sastri is that the liability to make the repairs or to pay the cost thereof in cases arising under the Railway Protection Act was the personal liability of Savitramma and that therefore only her interest could have been sold even in execution of that decree and accordingly there is no reason for holding that any larger interest passed under the sale by her to defendant 1. Even assuming that contention to be correct in cases where the disrepair had been due to the default of Savitramma, it will be scarcely correct to postulate the same position if the disrepair had arisen even during her husband's lifetime. Unfortunately, there is no definite information on this point, though Mr. Somayya relied with some justification on the fact that the notice by the Government was issued in December 1906, that is, within a couple of years after Venkataramanayya's death; and he argued that having regard to the amount that was actually spent by the Government on the repairs, it could hardly have been the case that such repairs became necessary merely by reason of any neglect on the part of Savitramma after Venkataramanayya's death. It is true that to a great extent the onus in a case of this kind will lie upon the alienee, but, as I have already stated, the management of the lady's affairs has been mainly in the hands of P. W. 1 and the lady has entered into most of her transactions only with the knowledge and consent of P. W. 1 and defendant 2. The suit itself was instituted only after the lapse of 10 years after the lady's death. The evidence of P. W. 1 also shows that the estate of Venkataramanayya was heavily encumbered even during his lifetime and that further encumbrances had to be made by Savitramma. The lower appellate Court definitely states that it was scarcely likely that the income available to her would have made it possible for her to make the repairs out of her current income. In the light of these facts, I do not feel justified in differing from the conclusion of the Courts below merely on the ground that prima facie the onus lay upon the alienee. I accordingly confirm the decree of the Courts below and dismiss the second appeal with costs. Leave to appeal is granted.

C.R.K./B.D. *Appeal dismissed.*

A. I. R. 1937 Madras 478

VENKATARAMANA RAO, J.

G. Ramiah Bhagavathar — Petitioner.

v.

Chinna Karuppannan Servai and *another*—Opposite Parties.

Civil Revn. No. 955 of 1935, Decided on 15th December 1936, from decree of Additional Sub-Judge, Madura, D/- 9th March 1935.

Landlord and Tenant—Obligation of lessee to deliver possession on expiry of lease—Lessee sub-leasing some of leased property—Lessee holding over after expiration of his lease—Sub-lessee not delivering possession to lessee after expiration of sub-lease—Lessee is entitled to recover rents from sub-lessee—Fact of expiration of title of lessee by expiration of lease is no defence to suit for rent against sub-lessee unless sub-lessee shows that he is holding property from some other person.

One of the obligations of the lessee is to deliver possession of the premises demised to the lessor from whom he derived possession and until that obligation is fulfilled, he is bound to pay him either rent or damages for the use and occupation. Even though the lessee's title might have expired by the expiration of the term of the lease, still until the sub-lessee has shown that he has renounced the obligation of surrendering possession to the lessee by commencing to hold the property under some other person either the landlord of the lessee or a person claiming by title paramount or by delivering possession to them, the mere fact that the lessee's title has expired is

no defence to a suit for arrears of rent or for damages. [P 479 C 2; P 480 C 1]

The plaintiff-lessee obtained a lease of certain properties for a term of three years and sub-leased some of the properties to another person. On expiration of the lease neither the plaintiff nor the sub-lessee delivered possession of the properties. A suit for recovery of properties sub-leased was brought by the plaintiff against the sub-lessee:

Held: that the plaintiff was entitled to a decree for rent against the sub-lessee. [P 480 C 1]

N. R. Govindachary — for Petitioner.

V. Ramaswami Iyer — for Opposite Parties.

Order.—The question involved in this revision petition is the right to recover arrears of rent by the plaintiff from the defendants from March 1932. The plaintiff obtained a lease from the Koodal Alagar Devasthanam on 7th October 1929 for a period of three years. Even prior to the said lease he was holding the lands on another lease which was to expire on the date of the new lease. In anticipation of getting the new lease he sub-leased the property to the defendants for a period of three years. The lease expired on 7th October 1932 but the plaintiff did not surrender possession of the property on the expiry of the term; neither the defendants who were holding a portion of the property under the said sub-lease delivered possession to the plaintiff. It transpires from the evidence that the plaintiff was attempting negotiations with the Devasthanam for the renewal of the lease and the defendants were also making similar attempts for getting the lease to themselves and ultimately the defendants succeeded in getting the lease from the Devasthanam under Ex. 1 which is dated 27th April 1933. It is also clear from the evidence that the plaintiff was sued by the Devasthanam for recovery of arrears of rent and possession on the ground that he ought to have surrendered possession on the expiry of the term and that he failed to do so. In that suit a decree for rent was passed against the plaintiff.

The plaintiff has now filed the present suit for recovery of arrears of rent and also for certain damages in respect of the contract for milling paddy which the defendants entered into with the plaintiff and also for certain items due on account. The learned Subordinate Judge found as a fact that the plaintiff was not entitled to the moneys alleged to be due to him in respect of the dealings, and in regard to arrears of rent he was of the opinion that the lease in favour of the plaintiff had expired and he was not entitled to sue and claim relief in respect thereof. It seems to me that this view is unsound. One of the obligations of the lessee is to deliver possession of the premises demised to the lessor from whom he derived possession and until that obligation is fulfilled, he was bound to pay him either rent or damages for the use and occupation. Of course it is open to him to show that his title having expired he has surrendered possession to the original landlord from whom the lessor derived possession or to a person claiming by title paramount and in such cases it has been held that no question of estoppel arises, but when he is not able to plead a valid defence to his obligation to surrender possession, it will not be open to him to resist the demand made by his lessor for damages for the use and occupation during the period he was in possession until he surrendered possession to the lessor. Mr. Ramaswami Ayyar relied on two decisions reported in 8 Cal 238[1] and 66 M L J 355[2] to the effect that it is open to a lessee after the expiration of the term to plead that the lessor's title has expired in a suit for rent. In my opinion the proposition is very widely stated in those cases because it will be seen from the statement of the law in Everest and Strode's Law of Estoppel that a lessor by merely showing that the title has expired cannot escape the obligations he was under his lease. The rule is thus stated in Edn. 3, of the said book :

> A tenant is not estopped from showing that his landlord's title expired at a period subsequent to the date when the tenant was let into possession but the tenant must however in order to be allowed to show the expiration of his landlord's title, solemnly renounce such title and commence a fresh holding under some other person.

Therefore, even though the plaintiff's title might have expired by the expiration of the term of the lease, still until he has shown that he has renounced the obligation of surrendering possession to him by commencing to hold the property under some other person either the landlord of the plaintiff or a person claiming by title paramount or by delivering possession to them, the mere fact that the

1. Lodai Mullah v. Kally Dass Roy, (1882) 8 Cal 238=10 C L R 581.
2. Valia Muhammad v. Savakutti Keyi, A I R 1934 Mad 197=147 I C 1218=66 M L J 355.

plaintiff's title has expired is no defence to a suit for arrears of rent or for damages. I therefore reverse the decree of the lower Court so far as this matter is concerned, and direct that a decree be given to the plaintiff for arrears of rent as and by way of damages for use and occupation from 1st March 1932 up to the date Ex. 1 came into effect. For this purpose, the case is remanded to the lower Court for disposal and for the necessary decree being passed in favour of the plaintiff, but in the circumstances, I direct each party to bear his own costs of this revision petition.

C.R.K./K.B. *Case remanded.*

A. I. R. 1937 Madras 480

PANDRANG ROW, J.

Dakamarri Kannayya—Petitioner.

v.

Vadali Venkatesam—Opposite Party.

Criminal Revn. Case No. 573 and Petn. No. 527 of 1936, Decided on 21st January 1937, against order of Bench of First Class Magistrates, Vizagapatam, D/- 6th July 1936.

Penal Code (1860), S. 447—Alleged trespass on vacant site when neither complainant nor any one on his behalf was in actual possession—Complainant not able to say on what date trespass took place — Accused held could not be convicted and complaint ought to have been dismissed under S. 203, Criminal P. C.

The alleged trespass was on a piece of vacant site and it happened at a time when neither the complainant nor any one on his behalf was in actual possession; the complainant himself was not able to say on what date the alleged trespass took place. The accused were owners of the adjoining land and there was a dispute about the boundary:

Held: that the accused could not be convicted and that the complaint ought to have been dismissed under S. 203, Criminal P. C. [P 480 C 2]

P. G. Raghavendra Rao for *V. Krishnamachari*—for Petitioners.

P. Satyanarayana Raju—for Opposite Party.

Public Prosecutor—for the Crown.

Order.—This is a case in which the petitioners who are dhobies by occupation have been convicted of criminal trespass and sentenced to pay a fine of Rs. 5/- each under S. 447, I. P. C. After a mere perusal of the complaint itself and the sworn deposition, any Magistrate who applied his mind to the provisions of S. 203, Criminal P. C., would certainly have had no difficulty in dismissing the complaint under S. 203, Criminal P. C., and it would have been his duty to do so.

The alleged trespass was on a piece of vacant site and it happened at a time when neither the complainant nor any one on his behalf was in actual possession; the complainant himself was not able to say on what date the alleged trespass took place. The accused were admittedly owners of the adjoining land and undoubtedly there was a dispute about the boundary. The complaint should, as I have already said, have been dismissed *in limine* under S. 203, Criminal P. C. Not only was this not done but there was a long and protracted trial of these poor washermen from March 1936 till July 1936, the interval between the closing of the case and the pronouncement of the judgment being nearly two months. The judgment of the Bench Magistrates does not give a single reason in support of their finding that the accused are guilty. They do not state what the evidence is either of the alleged encroachment or trespass or of the intention that lay behind it. The judgment does not fulfil the elementary requirements of the law. Even in cases tried summarily where there is a conviction there must be a brief statement of the reasons for it and there is nothing that is worthy to be called a reason to be found in the judgment in support of the conviction. On the material before me I have no doubt that either the complaint should have been dismissed at the very outset or the Magistrates ought to have acquitted the petitioners and even ordered the complainant to pay compensation for dragging them unnecessarily to a Criminal Court on a false and vexatious complaint, with the object of compelling them to come to terms. This is a case which engenders some doubt as to the desirability of entrusting the disposal of cases coming under S. 447, I. P. C., to Bench Courts. There seems to be a difficulty felt by Bench Courts in distinguishing between cases of civil trespass and cases of criminal trespass. In this particular case there is no doubt that the conviction of the petitioners was quite wrong on the merits and that the judgment is not according to law.

The convictions and the sentences are therefore set aside and the petitioners acquitted. The fines paid by them should be refunded.

C.R.K./S.C. *Convictions set aside.*

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* A. I. R. 1937 Madras 481

VENKATARAMANA RAO, J.

Perurulala Ramanuja Jeer Swamigal — Petitioner.

v.

T. S. Pichu Iyengar — Opposite Party.

Civil Revn. No. 959 of 1936, Decided on 7th January 1937, against order of Dist. Court, Tinnevelly, D/ 20th August 1936.

*** (a) Madras Hindu Religious Endowments Act (2 of 1927), Ss. 62, 63 and 65—Scope—Board rejecting petition under S. 62 for settlement of scheme—Suit to set aside order of Board and to frame scheme itself—Court has no jurisdiction to set aside such order and frame scheme itself—Words "any scheme which has been settled by Court under S. 63" in S. 65 only mean scheme which has been modified by it under S. 63 and not scheme which has been settled by itself.**

Where an application made under S. 62, Madras Hindu Religious Endowments Act to the Hindu Religious Endowment Board, for settlement of a scheme regarding a certain temple is rejected by it on the ground that no case is made out for the framing of a scheme, a civil Court has no jurisdiction to set aside the order made by the Board rejecting the petition under S. 62 of the Act and to frame a scheme itself under S. 63 of the Act. An order by the Board rejecting the petition to frame a scheme is not an order contemplated by S. 63. Only three kinds of orders are contemplated by S. 63, namely order settling, modifying or cancelling a scheme. The order contemplated by S. 63, Cl. (4) only refers to these three kinds of orders and not to any order as to whether a scheme is necessary or not. [P 482 C 2; P 483 C 1, 2; P 484 C 1]

Words "any scheme of administration which has been settled by a Court under S. 63" in S. 65 only mean a scheme which has been modified by the Court under S. 63 and not a scheme which has been settled by itself. Before a Court can function there must be a scheme framed by the Board or else it has no jurisdiction to deal with it. [P 484 C 1]

(b) Interpretation of Statutes—Language of Act difficult and ambiguous—Rules made under Act—Rules can be referred to for construing language of Act.

When the language of an Act is ambiguous and difficult to construe, the Court may, for its assistance in its construction, refer to rules made under the provisions of the Act, especially where such rules are directed by the statute authorizing them to be read as part of the Act. [P 483 C 1]

B. Sitarama Rao and *K. E. Rajagopalachari* — for Petitioner.

K. V. Sesha Ayyangar — for Opposite Party.

Order.—The question raised in this revision petition is one of some importance. It relates to the construction of S. 63, Madras Hindu Religious Endowments Act. Under S. 62 of the Act petition was put in by some of the residents of Tirukkurungudi village, Nanguneri Taluk, Tinnevelly District, for the settlement of a scheme for the temple of of Sri Alaginambirayar, Tirukkurungudi, alleging mismanagement on the part of the trustee. The Hindu Religious Endowment Boards after making the necessary enquiry came to the conclusion that no case has been made out for the framing of a scheme and rejected the petition. This suit has been filed for setting aside the said order and for framing a scheme. A preliminary issue was raised whether a suit lies under S. 63, Cl. 4 of the Act. The learned District Judge has held that such a suit lies. It is against the said order that the above revision petition has been filed.

It is contended by Mr. Sitarama Rao that on a proper construction of Ss. 62 and 63 of the Act when the Board in the exercise of its discretion declines to frame a scheme the Court has no jurisdiction to interfere with it. The question is, is this contention tenable? Under S. 63, Cl. 4, the trustee or any person having interest is entitled to institute a suit in a Court of law to modify, or set aside an order of the Board under the said section. The point in controversy now is whether an order by the Board rejecting the petition to frame a scheme would be an order within the meaning of S. 63. S. 63 does not expressly provide for such an order. But it is argued that it does by implication. It is contended by Mr. K. V. Sesha Iyengar that when S. 63 empowers the Board by order to settle a scheme it necessarily carries with it the power by order to refuse to settle a scheme. To appreciate this contention it is necessary to examine the scope and object of the sections. Before doing so, it is desirable to look into the state of the law at the time the Act was passed and the necessity for the enactment.

Before the passing of the Hindu Religious Endowments Act the provision, so far as the mofussil Courts in the Presidency are concerned, for the settlement of schemes relating to religious endowments is S. 92, Civil P. C. Under that section the Advocate-General or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General may institute a suit for getting any of the reliefs mentioned in that section. It will be noticed

that all the reliefs relate to the proper administration and superintendence of the endowments dealt with by the section and the procedure indicated therein was made mandatory. Before any suit can be instituted by persons other than the Advocate-General, the consent of the Advocate-General is a condition precedent. The Advocate-General of his own motion or on the representation of persons interested in the trust after making an enquiry must come to a conclusion that in the interests of the trust a scheme is necessary. If as a result of the enquiry he is not satisfied as to the necessity for framing a scheme no suit can be instituted and no relief can be given. Nor can any Court of law compel the Advocate-General to give sanction. It has been even held that no writ analogous to that of mandamus under S. 45, Specific Relief Act, can issue to him. The reasons given by him for his refusal cannot be canvassed in a Court of law.

The principle underlying that provision is that the Advocate-General represents the Crown who as *parens patria* is the guardian of all the charities. Therefore he is the competent person to judge whether it is in the interests of the institution that action should be taken. Again if the Advocate-General sanctions the institution of the suit the Court is not bound to frame a scheme. The Court also is invested with a discretion to go into the whole matter and finally come to the conclusion that a scheme may or may not be necessary. If it comes to the conclusion that a scheme is necessary it will frame a scheme, otherwise not. Such was the state of the law on the date of the passing of the Act. It was felt that Courts should as far as possible be divested of the burden of superintending religious endowments, that their administration and superintendence should be vested in a body of persons who by experience, habits of thought and their acquaintance with the local conditions would be better also to frame suitable schemes and see that the religious endowments are properly administered and duly appropriated for the purpose for which they were made. By the passing of the Hindu Religious Endowments Act, S. 92, has been repealed and the only way to get reliefs provided in that section is by resorting to the procedure indicated in the Act. A comparison of the several sections of the Act will clearly show that the Legislature dealt with every aspect of the administration and management of the religious endowments in the same manner as S. 92 was intended to deal with. For the consent of the Advocate-General the consent of the Board has now been substituted. Under S. 73 of the Act the Board or any person having obtained the consent of the Board may institute a suit for some of the reliefs which were previously obtained under S. 92. In regard to the framing of the scheme the jurisdiction has been conferred upon the Board itself. The underlying policy of the Act is as already stated that the jurisdiction of the Court to frame a scheme should be taken away and should be vested in a body of persons better competent to do so. If we now turn to Ss. 62 and 63 of the Act it will be seen that the power to frame a scheme for an excepted temple is solely vested in the Board which power was formerly vested in a Court. In lieu of the safeguard which was provided in S. 92 before initiating proceedings for a scheme, viz., the decision of the Advocate-General as to prima facie proof of its necessity, the decision of the Board has been substituted in Ss. 62 and 63. Like the Advocate General in S. 92, the Board must be satisfied that a scheme is necessary. For that purpose it can of its own motion or on the representation of persons interested in the trust who should be not less than 20 in number, make an enquiry as to the necessity of a scheme. It is only when it is satisfied that the trustee has mismanaged or in the interests of the proper administration a scheme should be settled, jurisdiction is conferred upon the Board by the order to settle a scheme. If it is not satisfied, it has no jurisdiction to frame a scheme.

The order that is specifically referred to in S. 63, is only an order settling a scheme. And there is no provision in S. 62 or S. 63, providing for an order by the Board that a scheme is necessary or not. S. 63 will not come into operation till the initial decision by the Board that a scheme is necessary. Such an order is not one contemplated by S. 63. For example if the Board itself takes the initiative there is no provision in S. 62 or S. 63 to pass an order that a scheme is necessary or is not necessary because if it comes to the conclusion that a scheme is necessary it straightaway assumes jurisdiction under S. 63. The order of rejection

which is passed after the preliminary enquiry on the petition under S. 62 is an order which it is competent to pass as a body empowered to deal with the matter in the ordinary course of its functions. In S. 63 only three orders are mentioned namely, (1) order settling a scheme, (2) order modifying a scheme, (3) order cancelling the scheme. S. 63 (4) mentions 'every order of the Board under this section'. Prima facie it must relate to the three orders mentioned in S. 63, Cls. 1 and 3. A reference to the statutory rules made in pursuance of the power conferred by the Act also lends support to the view that the order contemplated in Cl. 4 can only refer to those three orders and not to any order stating that a scheme is necessary or not. S. 63, Cl. 4 says that every order of the Board shall be published in the prescribed manner, and the rule made by the Local Government in 1926 after the passing of the Hindu Religious Endowments Act of 1925 in regard to the publication in these terms :

> Every order of the Board settling, modifying or cancelling a scheme, under S. 53 or S. 59 (corresponding to S. 63 of the present Act) shall be published in the notice board of the temple or math affected by the order and in the District Gazette of the District or Districts in which the temple or math is situated ; where the order affects a temple, it shall also be published in the notice board of the committee, if any, within whose jurisdiction the temple affected is situated.

Thus it will be seen that only three orders are required to be published, i. e., orders settling, modifying or cancelling a scheme. This rule read in conjunction with S. 63, Cl. 4, shows that every order of the Board under this section only comprises the above three orders and no other. In the case of doubtful or difficult construction of the Act it is permissible to look into the statutory rules framed in pursuance of the authority conferred under the Act. The rule of construction is thus stated in Craies on Statute Law at p. 144:

> When the language of an Act is ambiguous and difficult to construe, the Court may, for its assistance in its construction, refer to rules made under the provisions of the Act, especially where such rules are, by the statute authorising them, directed to be read as part of the Act.

In support of this rule, reliance is placed on the observations of Mellish, L. J. in (1871) 6 Ch A 875[1] at p. 879, viz. :

> But we are of opinion that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act it is our duty to adopt and follow that construction.

As already pointed out by me, previous to the passing of the Act, when the Advocate-General declined to give sanction, there was no power in the Court to interfere with it. I do not think there was any alteration in the law intended when the consent of the Board was substituted for that of the Advocate-General. And further there is the additional fact that as the refusal by the Advocate-General was not final and it was open to him to alter his decision and subsequently sanction the institution of the suit, similarly it would be open to the Board to revise their decision and come to the conclusion that a scheme may be necessary. It is contended by Mr. Sesha Iyengar that if the Court is invested with a power of cancelling a scheme and in doing so can go into the grounds on which a scheme was considered necessary it would have been contemplated by the Legislature that the Court can also go into the grounds of refusal. I am not able to agree with this view. When the Board settles a scheme it does interfere with vested rights and therefore a power of revision is conferred on the Court to see that such rights have not been unduly interfered with. The power now given to the Court is the same which was exercised by it previously, namely where the Advocate General sanctions the institution of the suit for framing a scheme, still the Court can decline to frame a scheme.

There is also another reason which is apparent from the provisions of S. 63 and points to the conclusion that it was not in the contemplation of the Legislature that the Court should interfere with the exercise of discretion by the Board in refusing to frame a scheme. So far as the power of interference of the Court is concerned, it can only modify a scheme which had already been made by the Board. It has no power to frame a scheme itself. It can cancel a scheme framed by the Board but it cannot itself frame a scheme though it might modify it. So when the Board declines to frame a scheme there is no use in the Court setting at naught that discretion because there is no power in the Court to compel the Board to frame a scheme. Unless the Court has got that power it would be

1. *In re* Weir, (1871) 6 Ch A 875=41 L J B K 14=25 L T 369=19 W R 1042.

futile to set aside such an order. Mr. Sesha Iyengar contends that such a power can be deemed to be implied is suggested by the wording of S. 65. I do not see how. When S. 65 says: "any scheme of administration which has been settled by a Court under S. 63", it only means a scheme which has been modified by the Court under S. 63 and not a scheme which has been settled by itself. Before a Court can function there must be a scheme framed by the Board or else it has no jurisdiction to deal with it.

Mr. Sesha Iyengar relied upon a decision of the Privy Council in 2 Cal 131,[2] where their Lordships of the Privy Council were construing S. 76, Registration Act 8 of 1871, which provided that no appeal lay from an order made under that section. Their Lordships of the Judicial Committee held that an order against which no appeal can be preferred would apply to an order rejecting as well as to an order admitting an application for registration. Similarly, Mr. Sesha Iyengar contended the order refusing to settle a scheme must be deemed to have been passed under S. 62. As I have already pointed out an order allowing the petition to frame a scheme is not an order contemplated under S. 63. Therefore that decision has no bearing on the facts of this case. I am therefore of opinion that the Court has no jurisdiction to set aside an order made by the Board rejecting the petition under S. 62 of the Act. I therefore allow the revision petition and set aside the order of the learned District Judge and dismiss the suit. But in the circumstances I make no order as to costs.

C.R.K./K.B. *Revision allowed.*

2. Hadjee Abdoollah Reasut Hossain v. Hadjee Abdoollah, (1876) 2 Cal 131=3 I A 221=26 W R 50 (P C).

A. I. R. 1937 Madras 484

VARADACHARIAR, J.

Felix Joseph Sarprasadam and *others* —Appellants.

v.

P. Rm. Sp. Subramania Chettiar— Respondent.

Second Appeal No. 91 of 1935, Decided on 23rd November 1936, against decree of Dist. Court, Trichinopoly, in A. S. No. 1 of 1934.

(a) Succession Act (1925), Ss. 319 to 323 — Purpose of Ss. 319 to 323 is regulation of claims of priorities inter se among different creditors and not regulation of rights of creditors against testator's estate—Loan on pro-note executed by mother for herself and as guardian and executrix of her minor sons to whom property is bequeathed by their grandmother — Mother stating in pro-note that loan is required for obtaining probate of will in favour of her minor sons and for family expenses — Creditor, however, cannot get charge against estate of testator—S. 321 does not apply.

A creditor who lends money on a promissory note executed by an executor is not entitled to direct recourse against the testator's estate. The purpose of Ss. 319 to 323, Succession Act, is not the regulation of the rights of creditors against the estate of the testator but the regulation of claims of priorities *inter se* among various kinds of creditors. The provisions assume that a certain fund is available in the hands of the executor and then proceed to lay down in what order of priority that fund ought to be disbursed. It will be a misreading of S. 321 to hold that it declares a charge on the estate as between the lender and those interested in the estate. [P 486 C 2; P 487 C 1]

Where the mother executes a pro-note for herself and as mother and guardian and executrix of her minor sons, to whom the property is bequeathed by their paternal grand mother, even though the mother states in the pro-note that the loan is required for obtaining the probate of the will in favour of the minor sons and for expenses of the family, the creditor in a suit on the pro-note against the mother and her sons will not be entitled to a charge on the estate of the testator: *Case law referred.* [P 486 C 2; P 487 C 1]

(b) Succession Act (1925), S. 321 — Executor's indemnity — Suit by creditor against executor and beneficiaries on pro-note by executor—Objection by beneficiaries that their estate was not liable for loan—Though plaintiff filing application for amendment of plaint in other respects after such objection, plaintiff not praying for amendment by addition of alternative relief of indemnity — Prayer for such relief by plaintiff in second appeal held could not be allowed.

The plaintiff brought a suit against the executor and the beneficiaries on a pro-note executed by such executor for himself and for the beneficiaries. The beneficiaries contended that their estate was not liable for the loan. In spite of such objection the plaintiff did not apply for amendment of the plaint by adding alternative relief of indemnity to which the executor would be entitled, even though he had applied for amendment of the plaint in some other respects after such objection. The plaintiff then prayed in second appeal for this alternative relief:

Held: that inasmuch as the plaintiff did not think fit to ask for the alternative relief of his right of indemnity even after the objection by the beneficiaries, the plaintiff's prayer for such a relief, could not be allowed. [P 487 C 1, 2]

A. V. Narayanaswamy Aiyar— for Appellants.

K. S. Desikan—for Respondent.

Judgment.—This second appeal arises out of a suit on a promissory note. The promissory note was executed by defendants 4 and 5, defendant 4 being the mother of defendants 1 to 3 and defendant 5 their grand-mother. The body of the note also mentions defendants 1, 2 and 3 who were all minors at the time as parties to the note and defendant 4 signed it on her own behalf and on behalf of the three minors. I may add that defendant 4 had been appointed executrix of her mother-in-law's will whereby the mother-in-law had bequeathed substantial properties to her grand-children the present defendants 1 to 3. Ex. A accordingly recites that defendant 4 joined in the note in the capacity of 'guardian and mother of and executrix for Nos. 1 to 3'. The purpose of the loan is stated to be 'to meet the Court expenses of getting the probate through Court of the will in favour of the said minors and to meet the expenses of the family'.

The plaintiff prayed for a decree directing defendants 4 and 5 to pay the amount due under the promissory note both personally and from out of the estate of the deceased grand-mother of defendants 1 to 3 which defendant 4 was managing as executrix. Defendant 5 remained ex parte throughout. Defendant 4 was ex parte up to a late stage in the trial and then appeared by a vakil and sought to raise a contention that she had received no consideration under the promissory note and accordingly there should be no decree against her. Defendants 1 to 3 raised the contention that as their father was alive the mother was not their guardian, that the note was therefore not binding upon them, that in fact there was no consideration for the note and that even if money had been borrowed by defendant 4 and defendant 5 under the note, it could not be held to be binding upon the properties bequeathed to them under their grand-mother's will because it was only a promissory note loan to defendants 4 and 5 on which the creditor was not entitled to direct recourse against the estate of the testatrix.

Issue 1 was raised in rather vague terms viz., whether the suit promissory note was true, valid and binding on defendants 1 to 3. It was rightly held by the District Munsif that defendant 4 was not the guardian of defendants 1 to 3 and these defendants could not accordingly be held to be parties to the promissory note. On the question of consideration, the District Munsif held against defendants 4 and 5 and granted a personal decree against them; but as regards the claim against the estate in the hands of defendant 4 as executrix, the District Munsif followed the decision in 33 M L J 631,[1] 6 M L W 640[2] and 59 Cal 216[3] and declined to grant a decree. He added that though the plaintiff might be entitled to be subrogated to defendant 4's rights of indemnity if any from the estate, the plaint had not been framed on those lines. On appeal the learned District Judge confirmed the finding of the Court below as to the factum of consideration. He also held that the loan was borrowed for purposes binding on the estate obtained by the minors under the will of their grand-mother, because according to the evidence he thought it must have been borrowed for expenses of the probate proceedings. He then referred to S. 321, Succession Act and construed it as declaring a charge in favour of the creditor who lends money to an executor for probate expenses. He accordingly passed a decree awarding to the plaintiff a charge upon the estate of the deceased testatrix in the hands of defendant 4, the executrix. Hence this appeal by defendants 1 to 3.

Before me the learned counsel for the appellants raised various questions, some of them questions of fact. At one time it seemed to me that there might be some ground for a suspicion that the suit promissory note might have been brought about by the husband of defendant 4 for an amount due from himself under a prior decree in favour of the plaintiff. Indeed the written statement had gone the length of suggesting that at a time when defendant 4's husband was about to be arrested, the suit promissory note must have been brought into existence in substitution of his liability. It is regrettable that without an examination of the records of the suit in which the decree against defendant 4's husband had been passed a suggestion of that kind should have been made. An examination of the

1. Ammalu Ammal v. Namagiri Ammal, A I R 1918 Mad 300=43 I C 760=33 M L J 631.
2. Chidambaram Pillai v. Veerappa Chettiar, A I R 1919 Mad 992=43 I C 865=6 M L W 640.
3. Srichandra Nandi v. Sudhikrishna Banerji, A I R 1932 Cal 182=136 I C 893=59 Cal 216 =35 C W N 850=53 C L J 589.

records relating to that suit has now shown that at or about this time there was in fact no application for the arrest of defendant 4's husband at all. That makes one very reluctant to attach any weight to the testimony of defendant 4. On the question of fact I see no reason to decline to accept the finding of the learned District Judge that money must have been borrowed under Ex. A as stated in the document.

As regards the purpose of the loan, Mr. Narayanaswamy Iyer laid some stress on the fact that Ex. A itself recites that the money was borrowed not merely for probate expenses but also for the expenses of the family and he argued that even S. 321 on which the learned District Judge relied would not apply to so much of the money as might have been applied to domestic expenses. In the view that I take of S. 321 it is not necessary for me to deal with this contention; but I must however remark that if really the money had been borrowed under Ex. A, as held by the learned District Judge the persons who could have placed information before the Court as to the portion thereof spent for purposes other than probate expenses are defendants 4 and 5 and the father of defendants 1 to 3. If defendant 4 chooses to speak a falsehood and the other people do not choose to come forward to give evidence, I do not think the appellants can rely merely upon the doctrine of onus and say that the plaintiff has not discharged the onus lying upon him. I therefore deal with the case on the footing that as found by the learned District Judge money had been borrowed on the representation that it was required for expenses in connection with the probate proceedings. But I regret to hold that even on that state of facts, it is not possible to give the plaintiff a decree against the interests derived by the minors under their grand-mother's will. Here again, I must notice a technical objection raised by the appellants' learned counsel, viz., that defendant 4 had not been impleaded in the appeal to the District Court nor the other beneficiaries under the will. These are no doubt curious omissions, but if I was otherwise prepared to uphold the plaintiff's claim I should have even been prepared to take the necessary steps to implead defendant 4 at least before me so as to represent the estate. It was apparently thought in the lower Court that as it was defendants 1 to 3 who took the objection that the plaintiff was not entitled to a decree against their interests under their grand-mother's will it was sufficient to obtain a decree in the appellate Court against them and hence they alone were impleaded as parties to the appeal in the lower appellate Court.

Coming now to the main contention that a creditor who lends money on a promissory note executed by an executor is not entitled to direct recourse against the testator's estate, there can be very little doubt that that is the ordinary rule. It is sufficient to refer to the decisions already mentioned as relied on by the trial Court. The same reasoning has been adopted by a Single Judge of the Rangoon High Court in 14 Rang 336.[4] The learned District Judge was apparently prepared to follow the same rule but for the interpretation that he placed upon S. 321, Succession Act. No case has been brought to my notice in which S. 321 has been construed in the way the learned District Judge has done. Nor has any decision of the English Courts been shown where moneys borrowed by an executor for items of the kind referred to in S. 319 or S. 320 have been held directly recoverable from the estate of the deceased. On the other hand Mr. Narayanaswamy Iyer contended with some justification that the decision in 150 E R 1179,[5] so far as it relates to moneys borrowed by the executor for funeral expenses and the way that that case has been referred to in 7 Ch A 123,[6] support the contrary conclusion. A reading of Ss. 319 to 323, Succession Act, will show that the purpose of these provisions is not the regulation of the rights of creditors against the estate of the testator but the regulation of claims of priorities *inter se* among various kinds of creditors. The provisions assume that a certain fund is available in the hands of the executor and then proceed to lay down in what order of priority that fund ought to be disbursed. S. 319 starts with laying down the duty of the executor to collect the assets due to the deceased; Ss. 320, 321, and 322 provide what payments should be made out

4. Mahant Singh v. U Aye, A I R 1936 Rang 514=166 I C 247=14 Rang 336.
5. Corner v. Shew, (1838) 150 E R 1179=3 M & W 350=6 Dowl P C 584=7 L J Ex 105=1 Jur 848=49 R R 632.
6. Farhall v. Farhall, (1871) 7 Ch A 123=25 L T 685=20 W R 157=41 L J Ch 146.

of such assets in the first instance and S. 323 winds up with the provision that save as aforesaid no creditor shall have right of priority over another. It seems to me it will be a misreading of S. 321 to hold that it declares a charge on the estate as between the lender and those interested in the estate. In this view I must hold that the view taken by the learned District Judge that S. 321 justifies a different treatment of this case from the decisions already referred to is not correct.

As the plaintiffs' suit must fail on the above ground, it is unnecessary to consider the objections raised by Mr. Narayanaswamy Iyer as to the rate of interest provided for in Ex. A and allowed by the Courts below without any discussion as to whether borrowing at such a high rate was necessary or justified. Nor is it necessary for me to deal with his argument that in the circumstances of the case, the lower Court should have directed the costs of the appellants before it, even if he was entitled to a decree, to come out of the estate and not to be paid by the present appellants personally. Seeing that two at least of the present appellants are minors, it is not unlikely as Mr. Narayanaswamy Iyer suggests that the learned District Judge himself did not intend to give a personal decree but it is unnecessary for me to say more about it. On behalf of the respondent, Mr. Desikan asks that his clients may at least be allowed the benefit of the indemnity to which according to the cases the executrix will be entitled from the estate if it is shown that the money had been applied for purposes necessary for or beneficial to the estate. Whether the pleadings justify the consideration of this question has often been the subject of difference of opinion. Even putting a very liberal construction on the plaint in the present case, I am sorry to find that this aspect of the matter never seems to have occurred to the plaintiff's advisers. Even after the appellants had taken the objection that the plaintiff was not entitled to a decree against the estate and even at a time when the plaintiff did apply for some amendment of the plaint he did not think fit to ask for alternative relief on the footing of his right to avail himself of the right of indemnity. Whether such a right can be availed of by him in other appropriate proceedings it is not for me to say. I regret to say that I am unable to allow this suit to be converted into one in which that claim can be made. The result is that the second appeal must be allowed and the decree of the trial Court restored. On the question of costs, I am not prepared to allow the appellants to take shelter under the usual suggestion that the onus was on the plaintiff and that they were at liberty to put forward any false story as regards consideration. The suggestion that the promissory note was taken under a kind of duress against the appellant's father was absolutely uncalled for. I however do not wish to interfere with the first Court's direction as to costs; but I propose to direct that both in the lower appellate Court and in this Court, the parties should bear their respective costs. Leave granted.

C.R.K./W.D. *Appeal allowed.*

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* A. I. R. 1937 Madras 487

PANDRANG ROW, J.

Sevugan Chettiar and *others* —
Petitioners.

v.

Karuppan Chettiar and *others* —
Opposite Parties.

Criminal Revn. Case No. 67 and Petn. No. 63 of 1937, Decided on 1st February 1937, against order of Joint Magistrate, Ramnad, D/- 18th January 1937.

(a) Criminal P. C. (1898), Ss. 144, 529 (f) and 531 — District Magistrate transferring application made under S. 144 (4)—Order of transfer is not void even if District Magistrate has no power of transfer.

Where a District Magistrate transfers an application made under S. 144 (4), Criminal P. C., the order of transfer is not void and cannot be set aside even if it be assumed that the District Magistrate has no power of transfer in view of S. 529 (f) and S. 531. [P 488 C 2]

*** (b) Criminal P. C. (1898), Ss. 144 (4) and 530 (1) — Superior Magistrate possessing territorial jurisdiction for disposal of application under S. 144 (4), when such application was filed — Magistrate subsequently ceasing to possess such jurisdiction — Such Magistrate passing order on application when he ceases to have jurisdiction—Magistrate substituting new order of his own.**

The jurisdiction conferred by S. 144 (4), Criminal P. C., is neither appellate nor revisional, and that jurisdiction is a special one that can be exercised only if the actual terms of the section

are strictly satisfied. Jurisdiction is given to Magistrate by sub-s. (4), S. 144 only to alter or rescind the order by which the petitioners before him are said to be aggrieved, and he may remove altogether the grievance complained of or reduce its extent as it were, but he cannot make a new order which would constitute a fresh grievance to a party not before him. [P 489 C 1, 2]

Where therefore, a superior Magistrate possessed jurisdiction to dispose of an application under S. 144 (4), when such application was made, but he ceased to possess the jurisdiction when he passed the order on the application, and instead of rescinding or altering the order of the subordinate Magistrate, he substituted a new order of his own :

Held : that having ceased to possess the territorial jurisdiction on the day of the order, the superior Magistrate had no power to rescind or alter the order made by the subordinate Magistrate, much less could he substitute a new order of his own. The order of superior Magistrate being without jurisdiction was void in view of S. 530 (1) of the Code. [P 489 C 1, 2; P 490 C 1]

V. L. Ethiraj, V. Rajagopala Iyer and *T. V. Ramiah* — for Petitioners.

T. R. Venkatarama Sastry for *Dr. V. K. John* — for Opposite Parties.

Parakat Govinda Menon for *Public Prosecutor* — for the Crown.

Order.—This is a petition to revise the order of the Subdivisional Magistrate, Ramnad, dated 18th January 1937. The order purports to be one made under S. 144 (4). The original order under S. 144 (1) was passed by the Taluk Magistrate of Sivaganga and it related to the performance of what is known as Sevvai Pongal in a certain temple in Nattarasankottai. It is not necessary to go into the merits of the dispute which led to the passing of this order. It is enough to say that there is a small minority in that community to which the temple belongs whose participation in the festival along with the majority of the community is resented by the majority. The Taluk Magistrate passed an order that Sevvai Pongal by the minority was to be performed on 19th January and by the majority on 26th January, both being Tuesdays and he directed that neither party should interfere with the celebration of the festival by the other party on the date allotted to it. The minority presented an application to the District Magistrate on the very day on which the Joint Magistrate passed the order, that is to say, 16th January. The application was apparently made under sub-s. 4, S. 144, Criminal P. C. That petition or application was transferred by the District Magistrate to the Joint Magistrate, Ramnad, for disposal on the same day. The Joint Magistrate, Ramnad, has no territorial jurisdiction in Nattarasankottai which belongs to the Devakottai Subdivision and lies within the jurisdiction of the Subdivisional Magistrate, Devakottai. The latter was however on leave and the joint Magistrate, Ramnad, was in charge of the Devakottai Subdivision at the time. He continued to be in charge till 17th January including the 17th itself.

The Subdivisional Magistrate, Devakottai, returned to duty on the 18th morning and resumed charge of the division and thereby the Joint Magistrate, Ramnad, became *functus officio*, so far as charge of Devakottai division and his jurisdiction over that division were concerned, in the morning of the 18th. The order that is now sought to be revised is one passed by the Subdivisional Magistrate, Ramnad, on the 18th, that is to say, after he had become *functus officio* in this manner. The order is attacked on several grounds. So far as the power of the District Magistrate to transfer is concerned, it is not necessary in my opinion to decide whether in a case of this kind there is a power to transfer. No specific authority on the point has been quoted, but I have said some time ago that there is no power of transfer in respect of an order passed under S. 144. In this case however even assuming that there was no power of transfer, the order of transfer cannot be regarded as void and cannot be set aside merely on that ground in view of S. 529 (f), Criminal P. C., and also of S. 531 of the same Code. The other objections are (1) that the Magistrate to whom the application under S. 144 (4) was transferred had ceased to have jurisdiction to deal with the application on 18th January when he passed the order, and that the order is therefore void, and (2) the order actually passed goes beyond the jurisdiction conferred by S. 144 (4) even if the Magistrate had such jurisdiction ; in other words, that the order which he passed is not a mere rescission or alteration of the order passed by the Taluk Magistrate but goes beyond it. There can be no doubt that a Magistrate who has ceased to possess jurisdiction cannot pass any valid order in respect of any matter even if it was properly before him before he became *functus officio*. In this particular case apart from the ques-

tion of whether the order was valid or not, the Joint Magistrate, Ramnad, had no doubt jurisdiction to deal with the matter when he received the application by transfer, because he was then in charge of the Devakottai Sub-Division, and thus had jurisdiction in the capacity of a Magistrate to whom the Taluk Magistrate of Sivaganga was subordinate, to alter or rescind any order made by the Taluk Magistrate. But when he actually passed the order he had ceased to be in charge of that division and therefore ceased to be a Magistrate to whom the Taluk Magistrate was subordinate, and the jurisdiction conferred by S. 144 (4) had ceased to exist so far as he was concerned. That sub-section runs as follows :

> Any Magistrate may, either on his own motion or on the application of any person aggrieved rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office.

The joint Magistrate of Ramnad on the 18th January was not then either the Magistrate who passed the order or his successor or the Magistrate to whom the Magistrate who passed the order is subordinate. The jurisdiction conferred by S. 144 (4), Criminal P. C., is neither appellate nor revisional, and that jurisdiction is a special one that can be exercised only if the actual terms of the section are strictly satisfied. I am therefore of opinion that the joint Magistrate of Ramnad who had ceased to be in charge of the Devakottai sub-division on the 18th January had no power to rescind or alter the order made by the Taluk Magistrate, Sivaganga, on the 16th January. It is clear from S. 530(1) that when any Magistrate not empowered by law issues an order under S. 144, his proceedings shall be void. This observation applies with equal force to the present order as to an order which comes strictly within the limits of sub-cl. (4). The order passed by the joint Magistrate did not merely alter or rescind the order of the Taluk Magistrate; it also prohibited the performance of the festival altogether by either of the parties. In fact, he went to the length of passing a separate order under S. 144 (2) prohibiting members of the Nattarasankottai public from celebrating the festival. The order runs as follows:

> Whereas it has been made to appear to me that a breach of the peace is imminent if you members of the two parties, names given separately, and your followers celebrate Sevvai Pongal together, and whereas you are unwilling to celebrate the festival together amicably, I hereby prohibit you members of the Nattarasankottai public, from celebrating Sevvai Pongal. This order will be in force for a period of two months. Given under my hand and the seal of the Court this 18th day of January 1937.

This order passed by the joint Magistrate, Ramnad, is one obviously passed without jurisdiction because he had admittedly no territorial jurisdiction so far as Nattarasankottai was concerned on the 18th January; in no way can it be said that this jurisdiction was conferred upon him by the transfer of the application by the District Magistrate even though the transfer is considered valid. That order of transfer, if considered valid, would have given him jurisdiction either to alter or rescind the order of the Taluk Magistrate which was complained of by the petitioners; it did not certainly authorize him to pass a new order altogether, in other words, to substitute an entirely new order of his own for the order which was sought to be altered or rescinded. In short, it may be said that while it is open to the superior Magistrate to alter the order, he cannot alter the party to be affected by the order. Where a Subordinate Magistrate allows a certain party to perform a certain festival on a certain day, it cannot be prohibited by the superior Magistrate on an application by another party under S. 144 (4), Criminal P. C., or where a subordinate Magistrate prohibits one party from doing a certain act the superior Magistrate cannot under S. 144 (4), Criminal P. C., prohibit the opposite party from doing that act. Jurisdiction is given to him by this sub-section only to alter or rescind the order by which the petitioners before him are said to be aggrieved, and he may remove altogether the grievance complained of or reduce its extent as it were, but he cannot make a new order which would constitute a fresh grievance to a party not before him.

This is exactly what has been done in this case. The superior Magistrate has prohibited a party which was not before him from doing a certain act which had been permitted by the Taluk Magistrate to be done on the 26th January. Even if he had territorial jurisdiction this would not be permissible under sub-cl. (4) though a separate order under sub-cl. (1) or sub-cl. (2) could be made by a Magistrate having territorial jurisdiction. It therefore follows that the order sought to be revised, namely, the order of the joint Magistrate of Ramnad, dated the 18th January 1937, is an

order which is void and it must be declared to be such. That order is accordingly declared to be void and to be of no force or effect. It is not necessary for me to express any opinion on the merits of the contentions of the parties or to indicate what should now be done by the Magistracy if anything at all has to be done under S. 144, Criminal P. C., in respect of this dispute. That is a matter entirely within the discretion of the Magistrate having jurisdiction and I do not propose to say anything which would in any way fetter their discretion in the matter.

C.R.K./K.B. *Order accordingly.*

A. I. R. 1937 Madras 490

PANDRANG ROW, J.

Public Prosecutor — Appellant.

v.

Thammanna Rattayya and *others* — Respondents.

Criminal Appeal No. 616 of 1936, Decided on 28th January 1937, against acquittal by Sess. Court, Kistna Division, in C. A. No. 16 of 1936.

(a) Child Marriage Restraint Act (1929), Ss. 5 and 6—Applicability—S. 5 applies only to solemnization of marriage by persons other than parents—S. 6 applies to case of parents.

Section 5, Child Marriage Restraint Act applies only to solemnization of marriage by persons other than parents. The Proviso to S. 6 that no woman shall be punishable by imprisonment under that section indicates that it is this section namely, S. 6, that is applicable to parents who promote a child marriage or permit it or negligently fail to prevent it: *A I R 1932 Nag 174* and *A I R 1936 All 11, Rel. on.* [P 491 C 1]

(b) Child Marriage Restraint Act (1929), S. 6—Father in charge of minor bridegroom promoting and performing marriage of his son—Mother not in charge of minor bridegroom cannot be convicted of offence punishable under S. 6—Her mere participation in marriage cannot constitute offence punishable under S. 6.

Section 6, Child Marriage Restraint Act, is confined only to the person who has actual charge of the minor either as parent or guardian at the time of marriage. [P 492 C 1]

Where a minor bridegroom is in charge of the father and not of the mother and the father promotes his marriage and gets it performed, the mother of the bridegroom cannot be convicted of an offence punishable under S. 6 of the Act, as she has no authority by law to prevent the marriage. Her mere participation in the marriage cannot be regarded as constituting an offence under S. 6. [P 492 C 1]

(c) Child Marriage Restraint Act (1929), S. 5—Person solemnizing marriage must make reasonable enquiry that marriage is not child marriage—Personal opinion as to age of parties by a look at them is not enough.

Section 5, Child Marriage Restraint Act, contemplates that the person who solemnizes a marriage must make some reasonable enquiry as to the ages of the parties to the marriage and satisfy himself that neither of the participants is a child. It is not enough if he merely looks at the bride and the bridegroom and forms his own opinion. He must know that it is difficult to judge by appearance and the law casts upon him the duty of making reasonable enquiry before he can claim to have had a reason to believe that neither the bride nor the bridegroom was a child. [P 492 C 2]

Therefore in the absence of proof of enquiry or suggestion that any inquiry was made to ascertain the age of the parties to marriage, the person solemnizing a marriage, which turns out to be a child marriage, is guilty of an offence under S. 5 of the Act. [P 492 C 2]

Parakat Govinda Menon — for Appellant.

T. L. Venkatarama Iyer — for Respondents.

Judgment.—This is an appeal from the acquittal of three of the accused in C. C. No. 29 of 1935 on the file of the District Magistrate of Kistna. The acquittal of these accused was ordered by the Sessions Judge of Kistna in Criminal Appeal No. 16 of 1936. The offences charged were under Ss. 5 and 6, Child Marriage Restraint Act (19 of 1929). These three accused were accused 3, 4 and 5 in the trial Court. Accused 3 and 4 were the parents of the bridegroom and accused 5 was the priest who solemnized the marriage, which is alleged by the prosecution to be a child marriage. The case for the prosecution was that the bridegroom was under 18 years of age and the bride under 14 years of age when the marriage was solemnized on 7th February 1935. Accused 1 and 2 were the parents of the bride and their convictions were upheld in appeal. Accused 6 was another priest who was said to have solemnized the marriage. He was acquitted on appeal, but there has been no appeal so far as his acquittal is concerned.

The learned District Magistrate in his judgment refers to the conflict of authority as to the question whether the parents are liable under S. 5 or S. 6 or under both these sections of the Child Marriage Restraint Act, the decisions he refers to being those reported in A I R 1932 Nag

174[1] and A I R 1936 All 11.[2] The District Magistrate followed the decision in the Nagpur case to the effect that S. 6 alone applies to the case of parents. This view in my opinion is right and the criticism of the learned Sessions Judge does not appear to be sound. Apart from the marginal notes which are relied upon in the Nagpur case there is the proviso to S. 6 that no woman shall be punishable with imprisonment under that section which indicates that it is this section, namely S. 6, that is applicable to parents; the absence of such a proviso to S. 5 indicates that it was not meant to apply to parents. Further, the concluding words of S. 5 which throw upon the accused person the burden of proving that he had reason to believe that the marriage was not a child marriage, seem to show that this burden would not have been thrown by the Legislature on the parents who must know the age of their own child. The view therefore that S. 5 applies only to solemnization of marriage by others than parents appears to be correct and it follows therefore that S. 6 alone applies to parents who promote a child marriage or permit it or negligently fail to prevent it. It is not disputed that accused 3 and 4 who are the parents of the bridegroom cannot be convicted under S. 6 merely because the bride was under 14 years, and that they can be convicted, if at all, under S. 6, only if the bridegroom, that is their own son who was in their charge was under 18 years at the time of the marriage. The only question therefore that arises is whether the bridegroom was under 18 years of age, or in other words, a child as defined in the Act at the time of the marriage.

The District Magistrate appears to have relied mainly on the alleged admission of accused 3 in his statement during the trial in which his wife, accused 4, joined, to the effect that the bridegroom had not completed his 18th year at the time of marriage. The learned Sessions Judge points out that the District Magistrate was misled by a wrong translation of the statement of accused 3 in Telugu. The learned Sessions Judge does not say what the correct translation is, and on the other hand, make a mis-statement of fact when he says that there is absolutely no evidence that the bridegroom was under the age of 18 years. As a matter of fact there is the evidence of P. W. 1 to the effect that the bridegroom was 17 years old at the time of the marriage and this evidence was not attacked in cross-examination. The learned Sessions Judge must have completely lost sight of this evidence of the age of the bridegroom, for otherwise it is impossible to believe that he would have said that there is absolutely no evidence on the point. I have looked into the statement made by accused 3 in Telugu and I cannot say that the learned District Magistrate was clearly wrong in interpreting the last sentence in the statement to mean that the son had not completed 18 years. The last sentence really means that the son was just 18 years old. It may be that this was with reference to his age at the time the statement was made. Apparently the District Magistrate took it to mean that accused 3's son had just attained 18 years when accused 3 made the statement. If so he was right in coming to the conclusion that there was an admission to the effect that the bridegroom had not completed his 18 years at the time of the marriage because the statement was made very nearly a year after the marriage.

It is of course equally possible that the statement made by accused 3 meant that the bridegroom was just 18 years of age at the time of the marriage, in which case there would be no admission that the bridegroom was under 18 years at the time of the marriage. In this state of doubt as to what accused 3 really meant by his statement he and his wife are entitled to the benefit of the doubt, and his so-called admission cannot be relied upon in support of the prosecution. There is however, as I have pointed out, the uncontradicted evidence of P. W. 1 on the point. If that evidence that the bridegroom was only 17 years at the time of the marriage had been not true, the witness would not have been cross-examined, and in all probability evidence to rebut this evidence of P. W. 1 would have been put forward on the side of the defence. That was not done, and I have no doubt that P. W. 1 was not cross-examined because the evidence he gave was true and could not be successfully contradicted. There is no reason why

1. Ganpatrao v. Emperor, A I R 1932 Nag 174=1932 Cr C 909=142 I C 277=34 Cr L J 311=28 N L R 302.
2. Munshi Ram v. Emperor, A I R 1936 All 11=1936 Cr C 14=158 I C 1007=36 Cr L J 1483=1935 A L J 1166=58 All 402.

that evidence should not be accepted, and it must therefore be found that the prosecution has established the fact that the bridegroom was under 18 years of age at the time of the marriage. It follows therefore that the acquittal of accused 3 was wrong and that it must be set aside. It is accordingly set aside and he is convicted of an offence punishable under S. 6, Child Marriage Restraint Act (Act 19 of 1929) and sentenced to the sentence imposed by the District Magistrate upon him, namely, a fine of Rs. 150, and in default of payment simple imprisonment for one week.

As regards accused 4, that is the mother of the bridegroom, it has been argued that the mother cannot be convicted at the same time as the father of the bridegroom when it is obvious that the minor bridegroom was in charge of the father and not of the mother. The case for the prosecution was that the father himself promoted the marriage and got it performed. In these circumstances it is impossible to contend that the mother could have done anything to prevent it. She had no authority by law to prevent the marriage and her mere participation in the marriage cannot be regarded as constituting an offence punishable under S. 6 of the Act which is confined only to the person who has actual charge of the minor either as parent or as guardian at the time. It cannot, in the circumstances, be said that the mother of the bridegroom had charge of the bridegroom at the time of the marriage. Her acquittal though it was based on other grounds cannot therefore be interfered with in appeal. As regards accused 5, who is the purohit who solemnized the marriage in question, he was charged and convicted under S. 5 of the Act. The conviction was set aside and he was acquitted in appeal on the ground that he had reason to believe that the marriage was not a child marriage. The learned Sessions Judge has not given any reasons for coming to the conclusion that the priest had reason to believe this; beyond his bare statement that he did believe that the bridegroom was over 18 years and the bride was 14 years, there is no scrap of evidence to show that he had any reason to believe that it was so. It is clear that both the bridegroom and the bride were children as defined by the Act and he has done nothing to discharge the burden which lay upon him to show that he had reason to believe that neither of them was a child.

The argument which found favour with the learned Sessions Judge was that it is well known to students of Medical Jurisprudence that it is impossible to estimate by appearance the age of a girl, between the ages of 12 and 16. This is the only reason given in support of the finding that accused 5 had reason to believe that the marriage was not a child marriage. If this were to be accepted as a sufficient reason, the burden imposed by S. 5 of the Act on the person charged will cease to exist for, in every case this argument would be available, viz., the statement in books on Medical Jurisprudence that it is impossible to estimate accurately by appearance the age of a girl between the ages of 12 and 16. S. 5 contemplates that the person who solemnizes a marriage must make some reasonable enquiry as to the ages of the parties to the marriage and satisfy himself that neither of the participants is a child. It is not enough if he merely looks at the bride and the bridegroom and forms his own opinion. He must know that it is difficult to judge by appearance and the law casts upon him the duty of making reasonable enquiry before he can claim to have had reason to believe that neither the bride nor the bridegroom was a child. It is not alleged nor suggested that any enquiry was made and certainly there is no proof of any such enquiry being made. I have no doubt that the statement that accused 5 believed that neither the bride nor the bridegroom was a child is not true. His acquittal therefore must be set aside and it is accordingly set aside. He is convicted of an offence punishable under S. 5 of the Act and sentenced to the same sentence as that imposed by the District Magistrate, viz., to pay a fine of Rs. 75 and in default of payment to undergo simple imprisonment for one week.

C.R.K./K.B. *Order accordingly.*

A. I. R. 1937 Madras 492

PANDRANG ROW, J.

Kaliappa Udayan — Petitioner.

v.

Emperor.

Criminal Revn. Case No. 835 and Petn. No. 775 of 1936, Decided on 4th February 1937, against order of Second Class Magistrate, Tiruvannamalai, D/- 16-10-1936.

Evidence Act (1872), Ss. 123 and 124—Persons accused of offence under S. 21 (f) Madras Forest Act—During inquiry one of accused moving Court for production of certain statements recorded by forest officer from certain other accused during investigation—Privilege under Ss. 123 and 124 held could not be claimed.

Certain persons were accused of an offence punishable under S. 21 (f), Madras Forest Act. In the course of the inquiry one of the accused moved the Court for the production of certain statements recorded by the Forest Officer in the course of his investigation from certain other accused. A privilege was claimed under Ss. 123 and 124, Evidence Act, in respect of the statements made by them :

Held : that no privilege could be claimed as the statements did not relate to any affairs of State nor could they be said to be communications made in official confidence the disclosure of which would be injurious to the public interests. The statements were recorded in the course of an investigation permitted by law and there was absolutely no reason why the record of such an investigation should not be made available to the Court which heard the same case judicially.

[P 493 C 2]

A. S. Sivakaminathan — for Petitioner.

Public Prosecutor — for the Crown.

Order.—The petitioner and several others were accused of being in possession of billets of illicit sandalwood suspected to have been removed from a certain reserve forest and they were charged with an offence punishable under S. 21 (f), Madras Forest Act. Apparently in the course of the inquiry there was an attempt made to convert the charge into one of theft or dishonest detention of stolen property. In the course of the inquiry accused 1 moved the Court for the production of certain statements recorded by the Forest Range Officer in the course of his investigation in the present case from accused 2 and 3 and others. Summons for the production of these records appears to have been issued and they appear to have been actually produced in Court. Privilege was claimed under Ss. 123 and 124, Evidence Act. The Magistrate thought that such privilege could not be claimed and even addressed the District Forest Officer on the subject expressing that opinion (*vide* the Sub-Magistrate's letter dated 27th April 1936 to the District Forest Officer).

The Forest Officer appears to have contended that the statements recorded at the time of the investigation were not admissible as legal evidence. Finally the Magistrate's successor passed an order disallowing the request of the accused for the production of the statement in question. The last order of the Magistrate which is now sought to be revised is not very clear as to the ground on which the request of the accused was refused. There is a reference to the privilege claimed under S. 123, Evidence Act, in the order and also to the objection made by the vakil for the second accused on the ground that the records were inadmissible in evidence. The learned Sub-Magistrate appears to have mixed up these two questions which ought to have been kept separate. The first question was "Can privilege be claimed in respect of these statements under Ss. 123 and 124, Evidence Act ?" and the second was "If no such privilege can be claimed and the statements have to be produced in Court, would they be admissible in evidence ?" So far as the first question is concerned it is clear that no privilege can be claimed under Ss. 123 and 124, Evidence Act, in respect of these statements. They do not relate to any affairs of state nor can they be said to be communications made in official confidence the disclosure of which would be injurious to public interests. The statements were recorded in the course of an investigation permitted by law and there is absolutely no reason why the record of such an investigation should not be made available to the Court which hears the same case judicially.

I have therefore no doubt that the production of the statements in question ought to have been insisted upon by the Magistrate and the statements should have been permitted to be inspected by accused 1 at whose instance they were called for. As regards the other question whether any of these statements are admissible in evidence, in the absence of the statements themselves it is not possible to pronounce any opinion. It will be for the Magistrate after perusing the statements and considering the objections as to their admissibility that may be raised before him to decide for himself whether any particular statement which is sought to be put in as evidence is admissible or not. The Sub-Magistrate is therefore directed to proceed with the inquiry in the light of the above observations.

C.R.K /S.C. *Order accordingly.*

A. I. R. 1937 Madras 494

PANDRANG ROW, J.

Vattathara S. J. and *another* —

Petitioners.

v.

Reverend Koshi and *others* —

Opposite Parties.

Criminal Revn. Case No. 920 and Petn. No. 831 of 1936, Decided on 14th January 1937, from order of Sub-divisional Magistrate, Trichinopoly, D/- 23rd December 1936.

Criminal P. C (1898), Ss. 144 and 145 — Orders under — Magistrate must first decide that dispute is likely to lead to breach of peace or disturbance public tranquillity — If this essential pre-requisite is not observed, order and opinion contained therein have no legal force.

Before passing any order under S. 144 or S. 145, Criminal P. C., a Magistrate must decide as a matter of fact whether a dispute is likely to lead to a breach of the peace or a disturbance of public tranquillity. If this essential preliminary to assuming jurisdiction has not been found to exist, any order passed must be deemed to be an order having no legal force, and any expression of opinion contained therein must be deemed to be void of legal force or effect. [P 494 C 2]

A. Narasimha Iyer and *Rajagopalachari* — for Petitioners.

K. S. Jayarama Iyer — for Opposite Parties.

Public Prosecutor — for the Crown.

Order.—This is a petition to revise the order of the Sub-divisional Magistrate, Trichinopoly, dated 23rd December 1936. That order appears to have been passed on a petition presented under S. 145 (4), Criminal P. C., on the same date. There were previous petitions but the order that is now sought to be revised is the order passed on 23rd December 1936 on a petition of that date. That order really does not purport to be passed under S. 145 or S. 144, Criminal P. C. It does not in fact purport to be an order passed in the exercise of any jurisdiction conferred on the Magistrate by any section of the Criminal Procedure Code or any other provision of law. An order of this kind would not probably have induced any one to carry it in revision but for certain observations made therein which are considered by the petitioners to be prejudicial to their interests. There was a dispute between what are known as loyal Christians, that is to say, those who accept the right of the Bishop to control the ceremonies, etc., in the Chapel of Irudayapuram and the local Christians at Irudayapuram who are given the appellation of seceders. These appellations or designations are used only for the purpose of convenience and should not be taken to mean anything more. The seceders are apparently so-called because they seceded from the Church of the Lady of Seven Dolours and not because they refused to recognize the authority of the Bishop altogether. The learned Magistrate did not decide as a matter of fact whether this dispute was likely to lead to a breach of the peace or a disturbance of public tranquillity. This essential preliminary to assuming jurisdiction has not been found to exist and in this state of affairs his order must be deemed to be an order having no legal force, and any expression of opinion contained therein must be deemed to be void of legal force or effect and in particular the expression of opinion that

the seceders are even now in possession and enjoyment of the Irudayapuram chapel and are having prayers there.

It is thus found that there is no order which requires to be formally set aside or modified in revision, the order complained of being one which has really no legal force or effect. It will of course be open to the Magistrate after satisfying himself that a breach of the peace or disturbance of public tranquillity is likely to arise as a result of the dispute between the parties to take appropriate action under S. 145 or, if the matter is really urgent, under S. 144, Criminal P. C. In taking such action however he must necessarily follow the procedure prescribed by these sections, and it will not be desirable that he should pass orders again which do not purport to be orders passed under any specific provision of law. In view of the fact that the order now complained of was communicated to several police officers the petitioners complain that they have not been able to exercise their rights with the same freedom as they would otherwise have done by reason of certain expressions of opinion found in the order in question. Such an order must necessarily prejudice a party and it is not at all desirable that the Magistrate who has jurisdiction should omit to exercise his jurisdiction in the manner prescribed by law but on the other hand proceed to deal with it in a way not contemplated by the law. If the Magistrate of course finds that there is no likelihood of a breach of the peace or disturbance of public tranquillity as a result

of the dispute, he will say so and inform the petitioners accordingly and it will be for the petitioners to decide for themselves whether they will have recourse to a civil Court or not. Nothing further can be done on behalf of the petitioners at this stage.

C.R.K./B.D. *Order accordingly.*

A. I. R. 1937 Madras 495

VENKATASUBBA RAO, J.

Chellammal and *others*—Appellants.

v.

Aiyamperumal Kudumban and *others*—Respondents.

Second Appeal No. 64 of 1930, Decided on 27th April 1936, against decree of Sub-Judge, Tuticorin, in A. S. No. 254 of 1927.

Specific Relief Act (1877), S. 42—'Further relief' means, relief arising from cause of action in suit.

'Further relief' in S. 42, Specific Relief Act, does not mean every kind of relief that may be prayed for; what is contemplated is, a relief arising from the cause of action on which the plaintiff's suit is based. If the plaintiff by reason of the declaration he seeks and obtains, becomes entitled in some remote way to other reliefs, they are not so related to his cause of action, as to be properly termed 'further reliefs' within the meaning of the section: *A I R 1919 Mad 956, Rel. on.* [P 496 C 1]

R. Krishnaswamy — for Appellants.

K. R. Rama Iyer and *K. S Desikan*—for Respondents.

Order.— (*14th February 1934.*) The plaintiffs are Indian Christians and they attacked in this suit the decree obtained against them in O. S. No. 243 of 1923 on the file of the Tuticorin Munsif's Court (same as O. S. No. 91 of 1924 on the file of the Srivikuntam Munsif's Court) by defendants 1 to 3. The decree is attacked on two grounds: First, that it was obtained by the fraud of defendants 1 to 4 and secondly, that there was gross negligence on the part of defendant 7, the plaintiff's mother. Although the relief claimed is a declaration that the decree in the former action is not binding, the suit may be treated as one brought to set aside that decree. There is also a prayer for an injunction to restrain defendants 1 to 4 from executing that decree.

The learned District Munsif rightly points out that several relevant documents have not been filed, and this has been responsible for a great deal of inconvenience that has arisen. The facts, so far as I have been able to gather them, may be shortly stated. The suit property belonged to defendant 5 and he created a mortgage over it in 1903 in favour of a nidhi, of which defendant 4 was the secretary. That mortgage was assigned by defendant 4 in favour of Perumpadia Kudumban, the father of defendants 1 to 4. In 1916 defendant 5 sold the property to Nanmai Alwar Nadar, the father of the plaintiffs (Ex. D). Perumpadia filed O. S. No. 111 of 1918 against defendant 5 and his son defendant 6 to enforce the mortgage of 1903. To that suit Nanmai Alwar Nadar was not impleaded as defendant: this non-joinder of the purchaser of the equity of redemption is the origin of the litigation that has ensued. To return to O. S. No. 111 of 1918, the District Munsif decreed that suit. Defendants 5 and 6 filed an appeal and the Subordinate Judge reversed the trial Court's decree. Perumpadia then filed S. A. No. 965 of 1919, the respondents to that appeal being the present defendants 5 and 6. On 3rd March 1920, Sadasiva Iyer and Spencer, JJ. set aside the appellate Court's decision and restored the decree of the District Munsif granting a mortgage decree. Perumpadia executed that decree and himself purchased the mortgaged property. When he tried to take possession, he was resisted by Nanmai Alwar Nadar. There was a re-inquiry under O. 21, R. 99, Civil P. C., and Perumpadia's application for possession was dismissed. To set aside the order of dismissal, the suit already referred to, O. S. No. 243 of 1923, was filed under O. 21, R. 103, by Perumpadia's sons, the present defendants 1 to 3. That suit was brought against the present plaintiffs, Nanmai Alwar Nadar having apparently died in the meantime. The present action as I have said is brought for the purpose of getting rid of the decree in O. S. No. 243 of 1923. The plaintiffs as already stated complain that the decree was procured by the fraud of defendants 1 to 4 and also that their mother, defendant 7, was guilty of gross negligence. (I must observe that plaintiff, it is said, was a major even at the time of the previous suit). The records of O. S. No. 243 of 1923 have not been filed, but that suit seems to have been decreed on 21st March 1925. Whether the previous suit (O. S. No. 243 of 1923) was brought only for a declaration or whether possession also was prayed for, does not appear. However Ex. 1, dated 14th March 1926,

shows that in execution of the decree in that suit, defendant 4 on behalf of defendants 1 to 3 obtained delivery of the property. Subsequently, it appears at some time—the date is not given—the property was conveyed by defendants 1 to 3 to defendant 4. This suit was commenced on 1st July 1926, and the arguments have proceeded on the assumption that defendant 4 had by then become the purchaser.

The District Munsif has found that no fraud has been made out but that gross negligence on the part of defendant 7 has been proved; but on the ground that possession should have been asked for as 'further relief' under S. 42, Specific Relief Act, he has dismissed the suit. On this point the learned Subordinate Judge, agreeing with the Munsif, has held that the suit was properly dismissed; but on the questions regarding fraud and gross negligence, he has given no findings.

In my view the decision of the lower Court is wrong. 'Further relief' in S. 42 does not mean every kind of relief that may be prayed for; what is contemplated is a relief arising from the cause of action on which the plaintiff's suit is based: 33 M L J 676.[1] If the plaintiff by reason of the declaration he seeks and obtains, becomes entitled in some remote way to other reliefs, they are not so related to his cause of action, as to be properly termed 'further reliefs' within the meaning of the section. I do not think that this suit should fail on account of the fact that possession has not been prayed for. If the plaintiffs succeed in obtaining the reliefs they now seek, the former suit, O. S. No. 91 of 1924, will be revived and must be proceeded with. If they ultimately fail in that suit, they will not be entitled to possession by way of restitution. Moreover, the situation is complicated by the fact that possession has passed to defendant 4 who subsequent to the Court-sale, brought the property from the decree-holders (i. e., the Court-auction-purchasers) and so far as he is concerned, as regards obtaining possession, other questions may arise, such as his bona fides. I think it would be outside the scope of the present suit to raise questions of this sort, and I am, therefore, of the opinion that the decision of the lower Courts that the suit fails by reason of S. 42 is wrong.

The judgment of the lower appellate Court is set aside and I remit the case to that Court with a direction that the appeal shall be re-heard and findings shall be submitted, on the evidence already in the record, on the questions of fraud and gross negligence. For the guidance of the lower Court, I may refer to my observations in A I R 1928 Mad 708.[2] The findings shall be submitted in one month from the receipt by the lower Court of this order. Time for objections, if any, is ten days. (On receipt of the findings, the High Court delivered the final judgment on 27th April 1936 allowing the second appeal.)

C.R.K./S.C. *Appeal allowed.*

1. Kanni Ammal v. Sankar Krishnamurthy, A I R 1919 Mad 956=43 I C 25=33 M L J 676.

2. Shanmuga Mudaliar v. Kaveri Ammal, A I R 1928 Mad 708=109 I C 539.

A. I. R. 1937 Madras 496

VENKATASUBBA RAO AND CORNISH. JJ.

Sellappa Chettiar and *others* —
Appellants.

v.

Suppan Chettiar and *others* —
Respondents.

Appeal No. 418 of 1931, Decided on 12th November 1936, against decree of Dist. Court, West Tanjore, in O. S. No. 16 of 1928.

(a) Madras Impartible Estates Act (2 of 1904), S. 4—Proprietor's power of alienation—Power can be exercised not only in case of need but also for benefit of estate — Benefit need not be of defensive character only—Mortgage of portion of impartible property by proprietor and son for purchase of residential house—House whether formed accretion to estate not shown—Mortgage to extent of money borrowed for purchase of house held was not for benefit of estate and hence not binding on it—It only affected life-interest of proprietor and his son.

The power of alienation of a proprietor of an impartible estate can be exercised not only in a case of need but also 'for the benefit of the estate'; for a transaction to be for the benefit of the estate it is not necessary that it should be of defensive character. [P 497 C 2; P 498 2]

A proprietor and his son mortgaged a portion of the impartible estate for the purchase of a residential house and for the purpose of marriage of the daughter of the proprietor. A portion of the money borrowed was spent towards the repairs of the house, but it was not shown whether the house formed an accretion to the estate:

Held: that the mortgage to the extent of money borrowed for purpose of marriage was bind-

ing on the estate. But mortgage to the extent of money borrowed for purpose of purchase of the house was not for benefit of the estate and hence was not binding on the estate. It only affected the life-interest of the proprietor and that of the son: *Case law discussed.* [P 499 C 1]

(b) Hindu Law—Impartible estate—Right of survivorship still remains—Right of junior members is not mere spes successionis but right of property which they can transfer.

It is the general law of the Mitakshara that regulates the partible and impartible property alike belonging to a co-parcenary, but in the case of impartible property, custom has superseded the general law in certain respects. As regards the right of survivorship, the general law not having been superseded by custom, that right still remains. To this extent the estate retains its character of joint family property and the right of co-ownership is preserved. The right of the junior member is not a mere *spes successionis* but a right of property, which he can part with or transfer: *30 Mad 255, held no longer correct law; Case law discussed.* [P 499 C 2; P 500 C 1]

T. L. Venkatarama Iyer — for Appellants.

B. Sitarama Rao and *S. R. Muthuswami Iyer*—for Respondents.

Venkatasubba Rao, J.—This suit has been brought to enforce a simple mortgage granted to the plaintiff on 8th January 1916, (Ex. A) by defendant 1 and his father, the late zamindar of Neduvasal to secure the repayment of Rs. 8,300. It may be mentioned that the plaintiff was a usufructuary mortgagee under two earlier deeds executed in his favour on 16th December 1910, for about Rs. 86,000. The suit mortgage comprises six villages, of which four have been subsequently sold by defendant 1 and his father to defendant 2 by Ex. F, dated 14th August 1919. The latter by Ex. H dated 1st June 1925 conveyed his interest to defendants 3 to 5, reciting in the deed that the original purchase was intended to be on their behalf.

The only persons contesting the suit are defendants 3 to 5. Defendant 1, it may however be stated, originally filed a defence, but subsequently not only withdrew it but admitted the plaintiff's claim. The villages in question are part of an impartible estate, of which defendant 1's father was the proprietor at the time the suit mortgage was granted. Defendants 3 to 5 contend that the alienation was made without legal necessity and is consequently not binding on the estate under S. 4, Impartible Estates Act (Madras Act 2 of 1904). The effect of that section is that the power of the proprietor in regard to alienating his estate or binding it by his debts, is co-extensive with that of a manager of a joint Hindu family, not being a father or grandfather; in other words, the Act does not recognize the doctrine either of antecedent debt or of pious obligation: *see* 19 M L W 132.[1] The short question therefore is, was the alienation made for a purpose which would have been held justifiable, had it been made by a manager of co-parcenary property? Before dealing with the question, we may observe (and it is conceded), that it is unnecessary to inquire in this suit, what interest, if any, defendants 3 to 5 have acquired in the suit property by reason of the alienations mentioned above (Exs. F and H).

The mortgage amount of Rs. 8,300 consists of two parts: (i) Rs. 4,892, borrowed for the purpose of redeeming from mortgage a property at Tanjore known as 'Kamala Vilas'; (ii) Rs. 3,408 borrowed for meeting the expenses of the marriage of the late zamindar's daughter, i. e., defendant 1's sister. In regard to the former amount, the facts are these: The late zamindar purchased a house known as 'Kamala Vilas' on 26th June 1915 for Rs. 6,500. The house had been previously mortgaged and the zamindar undertook to discharge the mortgage debt. This amounted to Rs. 4,892, which sum was paid from the amount borrowed from the plaintiff. If the original purchase of the house can be justified, it follows that this part of the debt must be held to be binding. This raises the question, what is the extent of a manager's power in regard to buying property? It is not doubted that the power of the manager can be exercised not only in a case of need but 'for the benefit of the estate'. This has been held in numerous cases which have followed 6 M I A 393,[2] but as regards what is meant by the expression 'the benefit of the estate', there has been a conflict of judicial opinion. One view seems to be, that unless the transaction is of a defensive character, in the sense that it is calculated to protect the estate from some threatened danger or destruction, it cannot be said to be for the benefit of the estate. We are unable to place this narrow inter-

1. Venkata Lingama Nayanim v. Arunachalam Chettiar, A I R 1924 Mad 511=78 I C 1012 =19 M L W 132.
2. Hunooman Pershaud Pandey v. Mt. Babooee Mundraj, (1854-57) 6 M I A 393 = 18 W R 18*n*=2 Suther 29=1 Sar 552 (P C).

pretation upon the words in question. If the true doctrine is that the 'defensive character' is to be the test, the distinction between necessity and benefit disappears. For, suppose an alienation is made for raising funds to preserve some part of the estate from extinction. It is difficult to say in this instance whether the purpose is one of need or one of benefit, but there can be no doubt that the primary purpose is one of need. Suppose again money is raised for defending the estate from hostile litigation. Here again, the question whether the purpose is one of necessity or benefit presents similar difficulty. The fact is that benefit and need are so interwoven in such cases as to make the demarcation difficult. To hold therefore that the rule of benefit should be confined only to cases where both need and benefit co-exist, would be to disregard 'benefit' as affording a distinct ground of justification. In *Hunooman Pershaud's case*,[2] the rule is stated with sufficient emphasis upon 'benefit' as furnishing a further ground. Their Lordships say :

> It (the power) can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance, the charge is one which a prudent owner would make in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate.

In this passage the reference to "prudent owner", when considering the question of benefit, is not without significance. That seems to show that their Lordships are thinking of "benefit" as something distinct from "need". Their Lordships then go on to say :

> The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.

This seems to have given rise to the view that the "pressure" and the "danger" referred to here are examples of the "benefit" mentioned. In 44 I A 147,[3] their Lordships of the Judicial Committee point out the difficulty of stating precisely what is meant by "benefit" used in this connection. The whole passage is worth quoting :

> No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description "benefit to the estate". It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things, would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not.

Their Lordships recognise the difficulty (we may add, possibly also the danger) of attempting a precise statement of what are included in the term 'benefit'. To infer from the three instances given in this passage that the transaction should be of a defensive nature does not seem warranted by the language used. These three instances are given as cases of obvious benefit, which seems necessarily to imply, far from suggesting the contrary, that cases of less obvious benefit, are not to be excluded. Indeed, it could be easily conceived what strange anomalies would arise were the restricted view to prevail. To take a familiar example, where unproductive immoveable property is sold with a view to the investment of the proceeds in the purchase of more suitable property, we fail to see why the sale should be condemned as not being for a justifiable purpose. Other similar cases may be supposed, in which it would be in the interest of the co-parcenary to sell ancestral property with a view to make a fresh purchase. Is it to be held that a manager cannot sell the family dwelling house situated in a slum, in order to buy a fresh property intended for the future residence of the family? Again, is a manager to be debarred from selling the dwelling house in a remote village, when the family for educating its children shifts its residence to a town? Or again, is it proper to hold that a manager can repair a dilapidated family house, but cannot incur a debt for the purpose of reasonably improving and enlarging it? The Full Bench of the Allahabad High Court, in a forcible and lucid judgment, repelled the theory that the transaction must necessarily be of a "defensive nature" (50 All 969)[4] and we agree with the opinion expressed there that the pronouncements of the Judicial Committee would not justify the narrower view being taken of the expression "for the benefit of the estate."

The question then remains, whether the evidence adduced here is sufficient to

3. Palaniappa Chetty v. Devasikamony Pandara Sannadhi, A I R 1917 P C 33=39 I C 722=44 I A 147=40 Mad 709 (P C).

4. Jagtnarain v. Mathuradas, A I R 1928 All 454=116 I C 484=26 A L J 841=50 All 969 (F B).

prove that the purchase of the house could be said to have conferred a benefit upon the estate in the sense we have interpreted it. There was no attempt made to show in what circumstances or for what purpose the house was purchased. Mr. Sitarama Rao for the plaintiff relies upon the recital in Ex. F to the effect that on its date, namely in 1919, the Zamindar and his family were actually residing in that house. Granting the recital to be evidence, it merely shows that the house was used for residential purposes; but that is hardly sufficient. Moreover, it ought to be shown that the house formed an accretion to the impartible estate, for, if there was no intention to incorporate it, the purpose could hardly be described as justifiable. In Ex. F it is stated that for the repair of this house, a part of the amount raised under that document was utilised. The mere fact that the money represents a portion of the proceeds of the sale of a fraction of the impartible estate raises no presumption of an intention to incorporate; beyond that, no evidence whatsoever has been adduced. We must therefore hold that the mortgage to the extent of Rs. 4,892 was not for a purpose binding upon the estate. The transaction would, however, affect the Zamindar's life-interest; but as he had died before the action, the plaintiff could derive no benefit from the alienation made by the previous holder.

This leads us to the question whether the Zamindar's son, i. e., present defendant 1, by joining in the mortgage conveyed any interest to the plaintiff. Mr. T. L. Venkatarama Iyer strongly contends, relying upon some cases of which 30 Mad 255[5] is the most important, that in the case of an impartible joint family estate, the coparceners other than the Zamindar in possession have no right of ownership. This question has been fully considered in two recent decisions of the Judicial Committee and their Lordships have with great emphasis repelled the contention that there was no co-ownership. In 59 I A 331,[6] their Lordships in the judgment delivered by Sir Dinshaw Mulla review the case law on the point and show that the decisions proceed upon two apparently inconsistent views; one set of decisions : 15 I A 51,[7] the first *Pittapur case*(26 I A 83[8]) and the second *Pittapur case* (45 I A 148[9])proceed on the view that there is no co-ownership, while the other line represented by *Baijnath's case*, 48 I A 195,[10] rests upon the principle that there is a right of survivorship, which in turn is founded upon co-ownership. Their Lordships point out that the inconsistency is apparent and not real. It is the general law of the Mitakshara that regulates the partible and impartible property alike belonging to a co-parcenary, but in the case of impartible property, custom has superseded the general law in certain respects. As regards the right of survivorship, the general law not having been superseded by custom, that right still remains and that is what was held in *Baijnath's case.*[10] To this extent the estate retains its character of joint family property and the right of co-ownership is preserved. Their Lordships cite a passage from the judgment of Sir, J. Colvile in 2 I A 263,[11] where the right of the junior members is referred to as a contingent right of property, which they can part with or transfer. After full discussion, the position is thus summed up by their Lordships :

> Though the other rights which a co-parcener acquires by birth in joint family property no longer exist the birthright of the senior member to take by survivorship still remains. Now is this right a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, expressed or implied, on the part of the junior members of the family to renounce their right of succession to the estate : 59 I A 331[6] at pp. 345 and 346.

What this decision lays down is the very opposite of what has been held in

5. Ramaswami Naick v. Ramaswami Chetty, (1907) 30 Mad 255=17 M L J 201.
6. Shiba Prasad Singh v. Prayag Kumari Debi, A I R 1932 P C 216=138 I C 861=59 I A 331=59 Cal 1399 (P C).
7. Sartaj Kuari v. Deoraj Kuari, (1888) 10 All 272=15 I A 51=5 Sar 139 (P C).
8. Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards, (1899) 22 Mad 383=26 I A 83=9 M L J Sup 1=7 Sar 481 (P C).
9. Venkata Mahipati Gangadhara Rama Rao Bahadur v. Rajah of Pittapur, A I R 1918 P C 81=47 I C 354=45 I A 148=41 Mad 776 (P C).
10. Baijnath Prasad Singh v. Tej Bali Singh, A I R 1921 P C 62=60 I C 534=48 I A 195=43 All 228 (P C).
11. Chowdury Chintamun Singh v. Mt. Nowlukho Konwari, (1876) 1 Cal 153=2 I A 263=24 W R 255=3 Suther 204=3 Sar 537 (P C).

30 Mad 255.[5] The contention was put forward that the interest possessed by the junior members, if any, was only a *spes successionis* and that contention was definitely rejected. It is noticable that in the passage quoted above, the right of the senior member to take by survivorship is referred to as his birthright capable of being renounced or surrendered. In 61 I A 286[12] their Lordships, in the judgment delivered by Lord Blanesburgh re-affirm this doctrine. They first point out that the *Sartaj Kauri's case*[7] and the first *Pittapur case*[8] appeared to be destructive of the rule that an impartible zamindari could be in any sense joint family property, but they go on to say that this view, apparently implied in these cases, was definitely negatived by Lord Dunedin when delivering the judgment in *Baijnath's case*.[10] Then they make the following significant observation :

> One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as, for instance the *Chellapallee's case* (27 I A 151)[13] which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family : p. 302 (of 61 I A).

After further discussion, their Lordships observe that while the power of the holder of an impartible Raj to dispose of it by deed or by will remains definitely established, the right of the junior branch to succeed by survivorship on the extinction of the senior branch has also been definitely and emphatically re-affirmed : "Nor must this right be whittled away; it cannot be regarded as merely visionary". In view of these pronouncements of the Judicial Committee we can no longer regard 30 Mad 255,[5] which held the interest of the co-parceners to be a mere *spes successionis*, as having laid down the correct law. It is unnecessary to consider whether a member other than the zamindar in possession can by transferring his interests, bring in a stranger; nor is it necessary to enquire whether one member can, by making a transfer, affect the interest possessed by members other than himself : *see* 5 I A 61[14] dealing with Padamattur estate in Sivaganga zamindari. For, under the Impartible Estates Act, no member could make an alienation which would enure beyond his own lifetime. We have therefore here no difficulty in holding that the mortgage in question to the extent of the first item of the consideration affects the life-interest of defendant 1 by reason of his having joined in the transaction. Then passing on to the next item of the consideration, namely Rs. 3,408, we must hold that the debt to that extent was borrowed for a legal necessity. The plaintiff has deposed that the amount was utilized in meeting the expenses of the marriage of the late zamindar's daughter. The evidence stands uncontradicted. The mortgage was executed in January 1916, and the marriage had been performed in the previous July. In Exs. D and D-1, written by the zamindar to the plaintiff's father in June and July 1915 he refers to the proposed marriage and for a loan. A sum of Rs. 500 was borrowed under Ex. C, a promissory note executed in December 1913 by both the father and the son. The plaintiff deposes that they borrowed this amount for the purpose of making jewels in view of the intended marriage. The plaintiff's evidence is consistent with the recital not only in Ex. A, the mortgage deed, but in Ex. F, under which the contesting defendants claim. We must therefore hold that to this extent what has passed to the plaintiff under the mortgage is the entire estate in the properties in question and not merely the life-interests of the two executants, namely the late zamindar and defendant 1.

The only contention that remains is as regards interest. We agree with the learned Judge that the stipulation in respect of it does not amount to a penalty and that the amount claimed is therefore due. Lastly, the direction in para. 5 of the decree as to the passing of a personal decree, it is conceded, cannot stand and it is accordingly deleted. In the result, for recovering Rs. 3,408 and the interest thereupon, the mortgaged items can be sold, but for recovering the remaining sum, namely Rs. 4,892 with interest upon it, what can be sold is defendant 1's life-interest alone in those properties, and we accordingly give judgment to that effect. The lower Court's order as to the costs of the suit will stand, three eighths of those costs being assigned to the former amount and five eighths to the latter. As regards

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12. Collector of Gorakhpur v. Ram Sundar Mal, A I R 1934 P C 157=150 I C 545=61 I A 286 =56 All 468 (P C).
13. Yaralagadda Mallikarjuna Prasada Nayudu v. Yarlagadda Durga Prasada Nayudu, (1900) 24 Mad 147=27 I A 151=10 M L J 294=7 Sar 761 (P C).
14. Sivaganga Tevar v. Periasami, (1880) 1 Mad 312=5 I A 61 (P C).

the costs of the appeal, our order is that the appellants (defendants 3 to 5) shall pay two-thirds of the plaintiff-respondent's costs. These costs also will be apportioned in the manner stated above. In the memorandum of objections we make no order as to costs. Time for redemption will be six months from now.

C.R.K./S.C. *Order accordingly.*

A. I. R. 1937 Madras 501

VARADACHARIAR, J.

Firm Ayili Mallappa Sanna —
Appellant.

v.

Parasetti Sidramappa and *another* —
Respondents.

Second Appeal No. 64 of 1933, Decided on 24th November 1936, against decree of Dist. Court, Bellary, in A. S. No. 107 of 1930.

(a) Civil P. C. (1908), O. 34, R. 14—Scope—Suit on mortgage — Mortgagee stating in plaint that he has given up his mortgage right and is suing on mortgage as simple money bond—Mortgagee can sue for sale under O. 34, R. 14 notwithstanding such statement by him—Penalty imposed under O. 2, R. 2 (3) does not apply in such a case.

Where the mortgagee brings a suit on a mortgage stating in the plaint that he has given up his mortgage right and is merely suing on the mortgage as a simple money bond he can still sue for sale under O. 34, R. 14, Civil P. C. notwithstanding his statement in the plaint. The penalty imposed in O. 2, R. 2 (3) is not applicable in the case where the mortgagee chooses to enforce his money claim without claiming the relief by way of sale. [P 502 C 2]

(b) Contract Act (1872), S. 141—Suit by mortgagee against principal debtor and surety on mortgage for more than Rs. 100—Statement by mortgagee in plaint that he was suing on mortgage only as money bond, giving up his mortgage right—Except such statement, no other act of relinquishment, oral or documentary, giving up mortgage right—Mortgage right not being extinguishable except by registered document under S. 17 (i) (b) of Registration Act, mortgage right held was not extinguished by such statement—Surety, therefore, held was not discharged.

A mortgagee brought a suit on a mortgage for more than Rs. 100 against the principal debtor and the surety. He, however, stated in the plaint that he had given up his mortgage right and was suing on the mortgage as a simple money bond. There was no other act of relinquishment on the part of the mortgagee, oral or documentary, giving up his mortgage right except the statement in the plaint. It was contended by the surety that he was discharged by this statement by virtue of S. 141 of the Contract Act.

Held : that the statement could be reasonably construed only as a statement of an intention not to claim the relief by way of sale. Inasmuch as under S. 17 (i) (b) of the Registration Act, the mortgage could not be extinguished except by a registered instrument, the statement in the plaint could not have the effect of extinguishing the mortgage right of the mortgagee. The surety was not therefore discharged : *7 Bom H C A C 118, Disting.* [P 502 C 2; P 500 C 1]

B. Sitarama Rao— for Appellant.

V. S. Narasimhachar — for Respondents.

Judgment.—This second appeal arises out of an action instituted against a principal debtor and his surety. The debt was due by defendant 1 under a mortgage bond executed by him; and defendant 2 had made himself liable for the sum as surety under Ex. K. The defences raised in the case were overruled by the first Court which gave a decree to the plaintiff against both the defendants. Defendant 2 appealed to the lower appellate Court on the ground that he should be held to have been exonerated from all liability by reason of the plaintiff having given up his rights under the mortgage bond executed by defendant 1. The lower appellate Court accepted this contention and dismissed the suit. The decree of the lower appellate Court is very loosely worded and even suggests that it might be construed as a total dismissal of the suit. But it is obvious that the District Judge could not have meant to dismiss the suit even as against defendant 1; if necessary, I should be prepared to set right that mistake. Against the decree of the lower appellate Court the plaintiff has preferred this appeal, contending that the circumstances of the case are not sufficient to warrant the exoneration of defendant 2 under S. 141, Contract Act, and that a decree should have been given against defendant 2 as well.

The question of the discharge of defendant 2 by reason of the relinquishment of the mortgage right by the plaintiff was raised by the fifth issue in the case. So far as I am able to gather from the available records, the argument as to relinquishment is based upon a statement in the plaint to the following effect: "The plaintiffs have given up only the mortgage right and filed the suit as on a simple bond". Mr. Sitarama Rao, the learned counsel for the appellant, has translated the vernacular in a slightly different form, but I am content to accept the translation

in the above terms given by Mr. V. S. Narasimhachar as this is also the translation adopted by the learned District Judge. Neither of the learned counsel appearing in the case is able to enlighten me as to the circumstances which led to this allegation in the plaint. No attempt has been made either by cross-examination of the plaintiff's witnesses or by any independent evidence adduced on the other side, to suggest that there was any relinquishment of the mortgage right by the plaintiff except by reason of the above statement contained in the plaint. The only reasonable construction of this statement in the plaint is that the plaintiff is content to enforce the bond as a money claim and does not want a mortgage decree. I am free to admit that it passes my comprehension why or under what advice the plaintiff came to make this statement in the plaint. It could not have saved him even a pie by way of diminution of the court-fee; not even the most idiotic client would have taken such a step if he had been advised as to the danger that he ran by making such a gratuitous statement for no purpose. I can only express my regret that such is the kind of help and advice still available to litigants. However, if the case clearly falls under the terms of S. 141, Contract Act, it is my duty to apply the law independent of any personal regret of mine. But I am glad to be able to hold that this foolish conduct of the plaintiff has not really deprived him of his rights against the surety.

Section 141, Contract Act, provides that if the creditor loses, or without the consent of the surety, parts with any security held by him against the principal debtor at the time when the contract of suretyship was entered into, the surety is discharged to the extent of the value of the security. With reference to the concluding words of the section, Mr. Sitarama Rao contended that even on the view taken by the lower appellate Court, it ought not to have wholly dismissed the suit as against defendant 2 but directed an enquiry as to the extent of the value of the security which defendant 2 must be held to have lost by reason of the creditor's conduct. That would no doubt have been the correct course, but in the view I take on the main question in the case, it is unnecessary to pursue that point. The question for determination is whether the creditor has lost or parted with the security which had been given by defendant 1. I find no specific reference either in the judgment of the first Court or in the judgment of the lower appellate Court to the provision in O. 34, R. 14, Civil P. C., to the effect that a mortgagee, who has obtained decree for payment of money in satisfaction of a claim arising under the mortgage, may institute a suit for sale on foot of the mortgage, notwithstanding anything contained in O. 2, R. 2, Civil P. C. The utmost that could be said against the plaintiff in the present case is that he has omitted without the leave of the Court to sue for all the reliefs that he was entitled to. The penalty therefor is indicated in sub-cl. (3) of O. 2, R. 2, Civil P. C. But the provision that I have already extracted from O. 34, R. 14, makes this penalty inapplicable to a mortgagee who chooses to enforce the money claim without claiming relief by way of sale. The result therefore is that notwithstanding this statement in the plaint, the plaintiff can sue for sale and there is accordingly nothing that precludes him from assigning the mortgage right to the surety as per the terms of Ex. K or precludes the surety from enforcing the mortgage right by reason of the provisions of S. 141, Contract Act, which entitle him by way of subrogation to the benefit of the securities held by the principal creditor.

Mr. Narasimhachar however went further and contended that the conduct of the plaintiff is not merely of the kind provided for in O. 2, R. 2 but amounts to a giving up of the mortgage right in the sense of releasing it or extinguishing it. I see no warrant for that contention. As I have already observed, it has nowhere been suggested that there was any other act of relinquishment oral or documentary, except such as might arise from the statement contained in the plaint. That statement can, as I have already held, be reasonably construed only as a statement of an intention not to claim the relief by way of sale. But if it should be held to amount to anything more, it will be inoperative in law because under S. 17 (i) (b) of the Registration Act, no document which is unregistered can extinguish the mortgage, because the mortgage here was admittedly for more than Rs. 100. I am unable to agree in the view taken by the learned District Judge that what was given up was not only the remedy but the

mortgage right itself. In any event, as I have said, the mortgage right cannot in the circumstances be held to have been extinguished because there is no registered document. My attention was drawn to a decision of the Bombay High Court in 7 Bom H C A C 118.[1] That decision no doubt is in favour of the respondents' contention, but it was pronounced at a time when there was no statutory provision corresponding to O. 34, R. 14, Civil P. C. The learned Judges accordingly held that as the course adopted by the creditor had deprived the creditor as well as the surety of the benefit of the security according to the law as it then stood, the surety must be held to be discharged to the extent of the security. Holding the view that by reason of the provisions of O. 34, R. 14, Civil P. C., it is still open to the plaintiff as well as to defendant 2 to sue to enforce the mortgage, I must set aside the decree of the District Judge, which is based on the ground that that right is no longer available to either of them. The result is that the second appeal must be allowed and the decree of the District Munsif restored. But as the plaintiff has brought this trouble on himself, I am not prepared to make any order as to costs either in this Court or in the lower appellate Court. Leave to appeal is granted.

C.R.K./W.D. *Appeal allowed.*

1. Narayan Govind v. Ganesh Atmaram Fadke, (1870) 7 Bom H C A C 118.

A. I. R. 1937 Madras 503

VARADACHARIAR AND HORWILL, JJ.

Kotta Venkataraju Garu — Appellant.

v.

Sri Rajah Sahib Mehrban-I-Dostan Sri Rajah Ravu Kumara Mahipathi Surya Rao Bahadur Garu and *others* — Respondents.

Letters Patent Appeal No. 89 of 1936, Decided on 10th November 1936, against order of Cornish, J., D/- 14th August 1936.

Civil P. C. (1908), O. 41, R. 19 — Application for setting aside order of dismissal for default — Considerations to be observed by Court in dealing with such application — Party should not be deprived of hearing unless there is misconduct or gross negligence on his part — Similar considerations apply where non-appearance is due to default of counsel.

In dealing with applications to set aside order of dismissal for default, the Court has to consider the position of the party concerned rather than the conduct of the members of the bar, though it may sometimes be difficult to dissociate the one from the other. As regards the position of the party, a litigant should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs ; where the non-appearance is due to the default of the counsel engaged in the case, a similar consideration will *mutatis mutandis* be applicable, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his counsel. The consideration is all the more weighty when dealing with cases of default in appearance before the High Court, because it may sometimes happen that the party is not present there at all, having entrusted his case to counsel. It will be unmerited hardship if the party's interests should be irreparably prejudiced by reason of every default on the part of counsel : *A I R 1923 Mad 63* and *A I R 1930 All 217*, *Rel. on.* [P 504 C 1]

V. Suryanarayanan — for Appellant.

Advocate-General — for Respondents.

Varadachariar, J.—This Letters Patent appeal has been preferred against an order of Cornish, J. refusing to restore S. A. No. 848 of 1932 which was dismissed under O. 41, R. 17, Civil P. C., as the appellant's counsel did not appear when the case was called. In support of the application, a verified petition has been filed by the counsel engaged in the case and it is there stated that at the time the second appeal came on before our learned brother, the counsel, was actually engaged in arguing a case before another Division Bench that he did not make other arrangements for the second appeal because he expected the case before the Division Bench to be over earlier, but that to meet all contingencies he had asked a representation to be made to our learned brother if the case should be reached earlier, that he was actually engaged before another Bench and that he would be before Cornish, J. in a few minutes.

When the matter came on before us on a previous occasion, a question had been raised by the office whether the appeal was competent without leave granted by the learned Judge himself. Mr. Suryanarayana maintained that as this was not an order relating to the appellate decree itself no leave was necessary under the terms of Cl. 15, Letters Patent. But as the point was not free from doubt, we preferred to allow the case to stand over to enable Mr. Suryanarayana to apply to Cornish, J. himself for leave. Leave has since been obtained. We think it proper to refer here to the observations made by the

learned Judge at the time that he granted leave because these observations make it clear that while it might be true that Mr. Suryanarayana had made proper arrangements for his difficulty being represented to the learned Judge, there was some mistake in carrying out these instructions so that the learned Judge was not properly informed of the exact situation. His observations leave little doubt in our mind that if only the matter had been properly placed before the learned Judge, this unfortunate situation would not have arisen.

The application was not opposed even before the learned Judge ; and before us it has been very fairly stated on behalf of the respondents that they do not oppose the appeal. In these circumstances, we have less difficulty in dealing with the matter than we should otherwise have. We would only point out that in dealing with applications of this kind, the Court has to consider the position of the party concerned rather than the conduct of the members of the bar, though it may sometimes be difficult to dissociate the one from the other. As regards the position of the party, it was observed in 46 Mad 60[1] that a litigant should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs ; where the non-appearance is due to the default of the counsel engaged in the case, a similar consideration will *mutatis mutandis* be applicable, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his counsel. This consideration is all the more weighty when dealing with cases of default in appearance before this Court, because it may sometimes happen that the party is not present here at all, having entrusted his case to counsel here : *cf.* 52 All 536.[2] It will be unmerited hardship if the party's interests should be irreparably prejudiced by reason of every default on the part of counsel.

From the point of view of the duty of the members of the bar, we have no doubt that every endeavour will be made to maintain and if possible improve upon the traditions of cordiality between the Bench and the Bar and that no endeavour will be lacking on the part of the members of the Bar to facilitate the disposal of work before the Court as far as possible. In this view we strongly commend to the profession the remarks made by Cornish, J. in his note.* It is difficult to lay down any general rule as to what will constitute "sufficient cause" for non-appearance in cases of default of appearance by counsel engaged in a case. The observations of Jai Lal, J. in 10 Lah 570[3] at pp. 578 and 579 seem to us, if we may say so, to lay down a safe guide in matters of this kind. With these remarks we allow the appeal and direct the restoration of Second Appeal No. 848 of 1932. There will be no order as to costs either in the Letters Patent appeal or in the application before Cornish, J.

C.R K./S.C. *Appeal allowed.*

1. Arunachala Aiyar v. Subbaramiah, A I R 1923 Mad 63=68 I C 971=43 M L J 632=46 Mad 60.
2. Ajai Varma v. Baldeo Prasad, A I R 1930 All 217=127 I C 528=1930 A L J 632=52 All 536.

*Note.—In view of the difficulty suggested by Varadachariar and Horwill, JJ., I give leave to appeal. But I think it right that I should formally state my reasons in writing, which I stated orally for my refusal to allow this C. M. P. The case was posted third in the list after a part-heard and some applications to excuse delay. When it was called on, nobody was present on behalf of the appellant. After some delay, during which the advocate was sent for, a clerk came and said that the advocate was engaged in another Court. I pointed out in dismissing the C. M. P. that an advocate so placed could have done one of three things : he might have got some friend to inform the Judge when he came into Court of his difficulty and asked for the case to be passed over ; or he might have come to the Judge in his room; or he might have written a note to the Judge. But the advocate did none of these things. He considered it sufficient after the case had been called on to send a clerk. It seemed to me that submission to such treatment was tantamount to allowing an advocate to dictate to the Court when and where he should appear.

3. Abdul Aziz v. Punjab National Bank Ltd., A I R 1929 Lah 96=114 I C 76=10 Lah 570 =30 P L R 628.

A. I. R. 1937 Madras 504

VENKATARAMANA RAO, J.

Kandula Ramayya — Petitioner.

v.

Bangaru Rangaraju and *others* — Opposite Parties.

Civil Revn. Petitions Nos. 806 to 819 of 1934, Decided on 7th December 1936, from orders of Sub-Judge, Narsapur, D/- 23rd October 1933.

(a) Registration Act (1908), S. 17 (2) (vi)—S. 17 (2) (vi) contemplates that specific immoveable property must be subject matter of litigation—Suit against father and his joint sons on promissory note executed by father—Prayer for personal decree against father and for decree against joint family property in hands of sons—Compromise decree passed creating charge on certain items of property—Joint property held was not subject matter of suit — Compromise decree not being registered though required to be registered under S. 17 (2) (vi) charge held could not prevail.

Section 17 (2) (vi), Registration Act, contemplates that specific immoveable property must be the subject matter of litigation. There must be a claim or right in or to the specific immoveable property asserted in the litigation and relief sought in respect thereof in order to make the said property the subject matter of a suit. A claim to have a liability satisfied out of the general estate of a person is not enough; in such a case it cannot be said that all the moveable and immoveable property belonging to him forms the subject of litigation and therefore the subject matter of a suit. Where a claim is made against a legal representative of the deceased on a promissory note executed by him the claim is really one *in personam* though the decree is sought against the assets left by the deceased. It is really a personal decree against the legal representative but the extent of his liability is defined by the decree directing that it is limited to the assets of the deceased person and recoverable only from such assets. A claim *in personam* does not necessarily mean that the claim should be enforced by the arrest of the person. A claim which can be satisfied out of the general estate of a person is nevertheless a claim *in personam*. Where therefore a claim is made on a pro-note executed by the father and the sons are impleaded as parties the character of the claim is not changed. [P 506 C 2 ; P 507 C 1]

The plaintiff filed a suit on foot of a promissory note executed by the father against the father and his undivided sons. It was prayed that as the debt was incurred for legal necessity a decree might be passed against the father personally and against the joint family properties in the hands of the sons. A compromise decree was passed in the suit and the decretal amount was made a charge on certain items of immoveable property :

Held: that the prayer which sought to enforce the liability of the father against the sons by a decree against the assets of the family did not make the immoveable property of the joint family the subject matter of the suit as neither any title to the immoveable property nor the enforcement of any lien in regard thereto was claimed in the suit. As the immoveable property which was charged in the compromise decree was not the subject matter of the suit, the compromise decree required to be registered under S. 17 (2) (vi) of the Act and as it was not registered, the charge on the items of immoveable property could not prevail: *Case law discussed.* [P 507 C 1,2 ; P 508 C 2]

(b) Civil P. C. (1908), S. 73—One decree against father and second decree against father and undivided sons—Joint family property sold in execution of decree—Judgment-debtors in both decrees are same for purposes of S. 73—Question of binding nature of debt on sons is immaterial in considering question whether judgment-debtors are same so long as decree stands.

Where there is a decree against the father and also a decree against the father and his sons and where the property from which the assets are realized by the sale is the property of the joint family of which the father and sons are undivided members, the judgment-debtors must be held to be the same for the purpose of S. 73, Civil P. C. Where there is a decree against the father the creditor is entitled to enforce the said decree against all the joint family property including the shares of the sons until the sons choose to take exception to it either in execution or by way of a suit that the said debt is one which they are not liable to pay under Hindu law. So long as the decree stands and the property sold is joint family property, no question as to the binding nature of the debt arises in the consideration of the question whether the judgment-debtors are the same: *26 Mad 179*; *A I R 1935 Mad 961*; *A I R 1936 Mad 123* and *A I R 1936 Mad 948*, *Rel. on.* [P 508 C 2 : P 509 C 1]

(c) Civil P. C. (1908), S. 73—Application for rateable distribution made on very day on which sale proceeds deposited in Court—No presumption as to priority of application arises — Court must find as a fact whether application is made prior or later.

Where an application for rateable distribution is made on the very same day on which the sale proceeds are deposited into the Court, there is no warrant for assumption that the application must have been made prior to the deposit of the sale proceeds. It must be found by the Court as a fact whether the application is made prior or later: *A I R 1919 Mad 758*, *Rel. on.* [P 509 C 1]

V. Suryanarayana — for Petitioner.

G. Lashmanna, *G. Chandrasekhara Sastry*, *Ch. Raghava Rao*, *M. Apparao*, *A. Satyanarayana*, *K. Bhimasankaran* and *N. Vasudeva Rao* — for Opposite Parties.

Order.—This batch of revision petitions arises out of an order for rateable distribution of the sale proceeds of property realized in execution of a decree in O. S. No. 23 of 1931 passed by the Subordinate Judge of Narsapur. This order is impeached by the petitioner the decree-holder in the said suit, on the ground that the sale proceeds are not liable to be distributed. To appreciate the contentions raised on his behalf by his learned counsel Mr. Suryanarayana, a few facts may be necessary. The petitioner filed the said O. S. No. 23 of 1931 against one Chunduri Panakala Rao and his three sons to recover a sum of Rs. 9,192-9-0 on foot of a promissory note executed by the said Chunduri Panakala Rao in his favour. It is admitted that the said Chunduri Panakala Rao and his three sons who are defendants

2 to 4 in that suit form members of an undivided Hindu family. The allegation in the plaint is that the debt was contracted by the father for a necessary purpose and therefore the debt is binding on the sons. The prayer in the plaint is that a decree may be passed against defendant 1, the father personally and against the joint family properties in the hands of the other defendants. This suit was compromised and a decree was passed in terms of the said compromise on 5th February 1932. In and by the said decree the defendants were directed to pay the amount decreed in two instalments and as security for the due repayment of the said sum a charge was created on two items of immoveable property specified in the schedule thereto, namely, a house in Palakole and 2 acres and 4 cents of land in the same place. On 5th July 1933 the said property was attached and brought to sale and one-fourth of the sale proceeds were deposited on the 5th July and the remaining sale proceeds were deposited on 17th July 1933. Several decree-holders, some of whom obtained decrees against the father alone and some of whom obtained decrees against the father and the sons filed applications for rateable distribution of the said sale proceeds. The petitioner contended that no question of rateable distribution arose in view of the fact that a charge was created in his favour in and by virtue of the said decree in O. S. No. 23 of 1931. This contention is pressed before me by his learned counsel. This contention was negatived by the Subordinate Judge on the ground that the said decree not having been registered as required by S. 17, Cl. (2) (vi), Registration Act, the charge cannot prevail. The question is whether this view is sound. S. 17, Cl. 2 (vi), Registration Act, exempts some documents from registration among others decrees and orders of Court and the clause relating to the same runs thus :

> Any decree or order of a Court (except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject matter of the suit or proceeding.

It will be seen that while the clause exempts decrees and orders of Court from registration it provides an exception so far as decrees or orders passed on a compromise and comprising immoveable property which is not the subject matter of the suit or proceeding which has been compromised. This exception, it may be noticed, was introduced in 1929 by S. 10, T. P. (Amendment) Supplementary Act, 1929. Before the amendment, the Privy Council, in *Hemanta Kumari's case*, 47 Cal 485[1] observed that where an agreement of compromise comprised lands not included in the suit and a decree was passed in accordance therewith incorporating the whole agreement, the decree will be admissible in evidence in regard to lands outside the purview of suit without the bar of registration. The effect of the amendment is to supersede the decision in the said case. The question therefore is whether the two items of immoveable property which have been charged by the compromise decree in O. S. No. 23 of 1931 can be said to be the subject matter of the said suit. The expression 'subject matter of the suit' is not defined in the Registration Act. It seems to me that what the clause contemplates is that specific immoveable property must be the subject matter of litigation. There must be a claim or right in or to the specific immoveable property asserted in the litigation and relief sought in respect thereof in order to make the said property the subject matter of a suit. A claim to have a liability satisfied out of the general estate of a person is not enough; in such a case it cannot be said that all the moveable and immoveable property belonging to him forms the subject of litigation and therefore the subject matter of a suit. In 9 Cal 406[2] a testator by his will directed payment of all his debts, and subject thereto devised his property to his heirs. One of the debts specified in the will was due to one Ram Jibun. Ram Jibun obtained a decree against the heirs in their representative capacity as heirs of the testator which by its terms was to be satisfied out of the assets left by him. One of the heirs subsequent to the decree executed a mortgage of his share of property. The question was whether the mortgage was subject to the decree. Wilson, J., holding it was not, thus explains the nature of the decree :

> The decree which was against the representatives of the original owner of the property in question declares that the property of the original owner is liable. But the decree is in the ordinary form of a decree made in a suit against the representative of a deceased person. It is a decree

1. Hemanta Kumari Debi v. Midnapore Zamindari Co., A I R 1919 P C 79=53 I C 534=46 I A 240=47 Cal 485 (P C).
2. Ram Dhun Dhur v. Mohesh Chunder Chowdhry, (1883) 9 Cal 406=11 C L R 565.

which is known to English lawyers as *de bonis testatoris*, a decree which by its terms is to be satisfied out of the assets left by the deceased person. It appears to us that it has no other effect than as a mere money decree, and has not the effect of creating a charge upon the property.

Where a claim is made against a legal representative of a deceased on a promissory note executed by him the claim is really one *in personam* though the decree is sought against the assets left by the deceased. It is really a personal decree against the legal representative but the extent of his liability is defined by the decree directing that it is limited to the assets of the deceased person and recoverable only from such assets. A claim *in personam* does not necessarily mean that the claim should be enforced by the arrest of the person. A claim which can be satisfied out of the general estate of a person is nevertheless a claim *in personam*. Where therefore a claim is made on a pro-note executed by the father and the sons are impleaded as parties the character of the claim is not changed. The object of impleading the sons is to have it declared that in respect of the claim sued on they are under a pious obligation to discharge the same. If that declaration is obtained by the creditor he would be entitled to proceed against the entire joint family property in the hands of the father. Hindu law annexes the liability in consequence of the declaration made by the decree that the sons are liable for the debt. In fact the decree does not determine whether joint family property exists or not and if any property is joint family property or not. In 40 Mad 581[3] Ayling and Srinivasa Ayyangar, JJ., thus explain the principle underlying the joinder of the son :

The joinder of the son with the father in a suit to enforce payment of the father's debt is for the purpose of enabling the Court to exercise the power which the father had of selling family property including his son's share, to pay his own private debts provided they were not illegal or immoral, and to prevent the son from questioning the nature of the debt, in execution, in the event of the decree against the father being executed by attachment and sale of the family property including the son's share.

Therefore the prayer in O. S. No. 23 of 1931 which seeks to enforce the liability of the father against the sons by a decree against the assets of the family does not make the immovable property of the joint family the subject matter of the suit. No title to the immoveable property is claimed in the suit, nor the enforcement of any lien in regard thereto and no particular property is described in the suit and therefore can be said to have been made the subject matter of the litigation. The subject matter of the suit is the claim on the pro-note i.e., a money claim. A number of cases have been relied on by Mr. Surayanarayana. They are mostly cases relating to maintenance claims by Hindu widows. In such cases questions have often arisen whether an alienation *pendente lite* will be subject to the ultimate decree in the suit charging specific immoveable property. Distinction is drawn between cases where the plaint specifies all the property and prays that a charge may be created over the whole or a part thereof and where the plaint does not specify any property and simply prays that the amount fixed by the decree may be made payable from and out of the joint family property of the persons against whom the relief is claimed. Where the plaint prays to have a charge declared it has been held that alienations pending the suit will be subject to the doctrine of *lis pendens*. But where no such relief is sought there is no question of *lis pendens*. In a recent decision in 42 M L W 550[4] Ramesam and Venkatasubba Rao, JJ. put the principle thus :

If the properties are not specified or if they are enumerated merely for enabling the Court to fix the quantum of maintenance, in either case the doctrine will have no application, but if the property is sufficiently designated so as to make it directly and specifically the subject matter of the litigation, the fact that the charge is claimed over all the properties of the family, can make no difference.

Thus it will be seen before immoveable property can form the subject matter of a litigation, it must be sufficiently designated: *vide* 42 M L W 199[5] at p. 201. Else no question of *lis pendens* will arise. The same view is indicated in 54 Mad 132[6] at p. 149 :

Where no charge is claimed on any specific immoveable peoperty, but only a general claim is made against the defendant (manager) and the joint family property generally, without specify-

3. Narayana Chettiar v. Veerappa Chettiar, A I R 1917 Mad 989=35 I C 918=40 Mad 581=31 M L J 386.

4. Ramasami Pillai v. Trichinopoly C. C. Bank Ltd., A I R 1935 Mad 867=158 I C 778=69 M L J 447=42 M L W 550=59 Mad 101.

5. Municipal Council, Karaikudi v Thirumalai Ayyangar, A I R 1935 Mad 657=157 I C 977 =69 M L J 221=42 M L W 199.

6. Seetharamanujacharyulu v. Venkatasubbamma, A I R 1930 Mad 824=127 I C 809= 54 Mad 132=59 M L J 485.

ing in the plaint any property, then in such cases, a decree creating a charge on any specific immoveable property would take effect ordinarily only from the date of the decree; but the case would be different when the plaint claims a charge on specific immoveable property and the decree also grants such a prayer and charges such specific property.

Considerable reliance was placed on the decision of the Privy Council in 4 Cal 402.[7] In that case a widow sued for dower against one of the heirs of her husband and a decree was passed in her favour directing the same to be paid out of the estate of her husband. The Judicial Committee held in that case that a mortgage executed during the pendency of that litigation would be subject to the doctrine of *lis pendens* but the decision must be considered with reference to the facts of the particular case. The suit was filed by the widow against the son who claimed exclusive title to the whole estate under a mokurrari alleged to have been executed by the husband of the widows and the father of the defendant. The widows there sued to set aside the mokurrari under which the son claimed to be entitled to the whole estate from his father; to declare that he was a mere stranger and they also prayed for an order that possession of the estate should be recovered by them and that the dower which they claimed should be paid out of the estate. Though the other prayers were negatived, the last prayer was given. In such circumstances their Lordships held that the doctrine of *lis pendens* will apply thereby indicating that the estate of the husband was the subject matter of litigation and therefore there was a right to specific immoveable property in question in the suit. It is also clear from their approval of the observations of Phear, J. in the lower Court in that case :

> I need hardly say that a decree of this kind directing the person in whose hands the property was to account for it in order that it must be applied for the purpose of discharging the debts due from Khorshed Ali, was a decree against that property, and operative to bind it in the hands of Najimooddin, and therefore of any other person who took from Najimooddin with notice of the decree or under such circumstances as to make him affected by the doctrine of *lis pendens*.

The decision of the Judicial Committee cannot be taken as an authority for the position that whenever a decree is asked for against the assets of a deceased person or joint family property in the hands of the junior members of the family or of the sons on a personal claim against the father as manager without claiming any specific lien thereon any alienation made during the pendency of the suit will be subject to the doctrine of *lis pendens*. I am therefore of the opinion that as the immoveable property which was charged in O. S. No. 23 of 1931 was not the subject matter of the suit, the decree requires registration under S. 17, Cl. 2 (vi) and the charge therefore cannot prevail. I therefore overrule this contention of Mr. Satyanarayana on behalf of the petitioner. The next contention advanced by Mr. Satyanarayana is that so far as seven decrees are concerned they were only against the father whereas the decree of the petitioner is against the father and sons and therefore the decree-holders against the father alone cannot be treated as persons holding decrees against the same judgment-debtors within the meaning of S 73, Civil P. C. It seems to me that this contention is untenable and is concluded by authority.

Where there is a decree against the father and there is also a decree against the father and sons and where it is admitted that the property from which the assets are realized by the sale was the property of the joint family of which the father and sons are undivided members, the judgment-debtors must be held to be the same for the purpose of S. 73, Civil P. C. This was the view taken in 26 Mad 179[8] which has since been followed by the Full Bench in 42 M L W 835[9] I have since taken the same view in a case reported in 43 M L W 624[10] and also in C. R. P. No. 1356/35 since reported in 1936 M W N 1142.[11] A decision of Horwill, J. in C. R. P. No. 1343 of 1934[12] has been cited to me as indicating a contrary view. The learned Judge seems to be of the opinion that where there is a decree against the father alone it cannot be said that the decree was obtained against the father for a debt binding on the son. It may be so. But

7. Bazayet Hossin v. Doolichand, (1879) 4 Cal 402=5 I A 211=3 Sar 853 (P C).

8. Ramanathan Chettiar v. Subramania Sastriar, (1903) 26 Mad 179.
9. Ramakrishnan Chettiar v. Kasi Viswanathan Chettiar, A I R 1936 Mad 40=159 I C 501=59 Mad 93 = 69 M L J 711=42 M L W 835 (F B).
10. Swaminatha Iyer v. Saivu Rowthan, A I R 1936 Mad 123=160 I C 559=43 M L W 624.
11. Palaniappa Chettiar v. Palani Goundan, A I R 1936 Mad 948=165 I C 664=71 M L J 541=1936 M W N 1142.
12. Arunachellam Chettiar v. Kalayappa Chettiar, *Reported in* A I R 1937 Mad 259=167 I C 503=(1937) 1 M L J 180.

once there is a decree against the father the creditor is entitled to enforce the said decree against all the joint family property including the shares of the sons until the sons choose to take exception to it either in execution or by way of a suit that the said debt is one which they are not liable to pay under the Hindu law. So long as the decree stands and the property sold is joint family property, no question as to the binding nature of the debt arises in the consideration of the question whether the judgment-debtors are the same. I therefore hold that the contention of Mr. Suryanayarana is not tenable.

Another point is raised by Mr. Suryanarayana in connection with three of the decrees, namely, that the application for rateable distribution was made after the entire sale proceeds were deposited and therefore the holder of the said decree is not entitled to get rateable distribution. The fact is that the application for rateable distribution was made on the very same day as when the sale proceeds were deposited into Court. The learned Judge assumed that the application must have been made prior to the deposit. There is no warrant for such an assumption. It must be found as a fact whether the application was made prior or later: *vide* 1918 M W N 520.[13] I have therefore to set aside the order of the learned Judge so far as the said decrees are concerned and remand the matter for disposal for the determination of the said question and giving the relief accordingly. Subject to this modification the order of the lower Court is confirmed and the revision petitions except C. R. P. Nos. 815/34, 816/34 818/34 fail and are dismissed. The petitioner will pay Rs. 20 as and for advocate's fees in each of the petitions dismissed. In the C. R. P. Nos. 815/34, 816/34 and 818/34, I make no order as to costs.

C.R.K./K.B. *Order accordingly.*

13. Muthiah Chetty v. Alagappa Chetty, A I R 1919 Mad 753=47 I C 296=1918 M W N 520.

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MOCKETT AND HORWILL, JJ.

Sethurajan — Appellant.

v.

Guruswami Pathar — Respondent.

Appeal No. 146 of 1933, Decided on 25th January 1937, against order of Dist. Court, East Tanjore, D/. 18th February 1933.

Civil P. C. (1908), S. 47—Decree against judgment-debtor who was impleaded as major —Execution—Objection that judgment-debtor was minor cannot be entertained by executing Court —Executing Court entertaining such objection and passing order under S. 47 —Order though wrong is under S. 47 and therefore appealable.

Section 47, Civil P. C., is not intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree. [P 510 C 2]

A decree was passed against the judgment-debtor who was impleaded as major. In execution the judgment-debtor pleaded that he was a minor. The executing Court allowed the plea:

Held: that the matter was not one relating to the execution, discharge or satisfaction of the decree, but amounted to a plea that the decree was void and that it was wrongly passed by the trial Court. The executing Court therefore could not entertain the objection: *A I R 1917 Cal 844* and *A I R 1925 Cal 907, Foll.*; *Case law reviewed.* [P 510 C 1, 2]

Held further: that though the order of the executing Court was wrong yet as it purported to be passed under S. 47 it was appealable. [P 511 C 1]

S. R. Muthuswami Iyer—for Appellant.

M. S. Venkatarama Iyer — for Respondent.

Mockett, J.—This is a second appeal against the order of the District Judge of East Tanjore allowing the appeal against the order of the District Munsif of Shiyali. The decree-holder respondent obtained a decree against the father of the appellant and the appellant. He impleaded the appellant as a major. In execution defendant 3 obstructed and a petition was put in by the decree-holder to have his obstruction removed and possession of the property delivered. The appellant then appeared by his mother as guardian and pleaded that he was a minor. The lower Court having so found, dismissed the petition. The lower appellate Court allowed the appeal on the grounds that this matter could not be raised by the appellant in execution and that his proper remedy was by way of suit. The point for decision is which of these two views is correct. The appellant has argued that under O. 21, R. 99, the petition was correctly dismissed because he being a minor, was in the same position as a person "other than the judgment-debtor," and according to the ruling of the Privy Council in 31 All 572[1] at p. 582, the appellant, not having been properly represented, was

1. Rashid-un-nissa v. Muhammad Ismail Khan, (1909) 31 All 572=3 I C 864=36 I A 168 (P C).

not a party at all. That argument, however, seems to beg the question in this case, which is: at what stage should the question of minority be gone into ? And it is to be observed that in the above-mentioned case, the question was raised in connexion with S. 244=S. 47, Civil P. C., and it was held that a suit to set aside execution proceedings by a minor on the ground of non-representation was not barred by the above section. There are conflicting authorities on the subject. In A I R 1928 Mad 1057,[2] Devadoss, J., took the view that the question of a defendant being a minor could be taken at any time, even in execution. And in 52 Mad 275[3] (Kumaraswami Sastry and Devadoss, JJ.) Kumaraswami Sastri, J., one of the referring Judges, stated that, at least on the balance of convenience, it was better that the question whether a decree was void by reason of the defendant being a minor should be gone into in execution and not by means of a suit. Devadoss, J. at p. 284 says:

> The second question is, can the executing Court entertain an objection to the execution of the decree against a minor on the ground that the guardian ad litem had an interest adverse to that of the minor in the suit ? If the decree is not illegal on the face of it, is it open to the executing Court to go behind it ?

He then goes on to say that it is open to the minors to have these matters investigated in a suit. Kumaraswami Sastri, J. seems to draw a distinction between a void and a voidable decree. In the former, he considers that the matter can be investigated in execution and so does Devadoss, J. The Full Bench set at rest none of these questions. It is necessary to say a few words with regard to Kumaraswami Sastri, J.'s suggestion that the balance of convenience is in favour of investigating the question of minority, in execution. That may be so, and that comment might frequently be made with regard to the preferability of investigations in execution to those in a suit. But with great respect, it does not seem to me to satisfy the test laid down by S. 47. The point that is raised in such cases seems to be not one "relating to the execution, discharge or satisfaction of the decree", but amounts to a plea that the decree is void and that it was wrongly passed by the trial Court. An examination of the cases mentioned shows that they are not direct decisions on this point, the observations in favour of the appellant in these cases being obiter. But the matter has been directly dealt with in two recent decisions of this High Court. In 61 M L J 520,[4] Jackson, J. had to deal with this very question. In that case, it was raised in execution that the defendant was a lunatic, unrepresented. Jackson, J. following the decision of the Calcutta High Court in 44 Cal 627[5] and 53 Cal 166[6] at p. 173, took the view that it was not open to the executing Court to go into the matter. The rule to be derived from 53 Cal 166[6] seems to be that the voidness of the decree must be apparent on the face of it. Jackson, J. observes that the rule laid down by the Calcutta High Court conforms with the universally recognized principle, and he accepted those decisions. In 68 M L J 318[7] a Bench of this High Court (Curgenven and Cornish, JJ.) has expressed approval of the above decision of Jackson, J. and prefers his view to that of Oldfield, J. in 38 Mad 682[8] and Madhavan Nair, J. in 50 M L J 232.[9] It may be mentioned that the High Court of Rangoon in 9 Rang 480[10] has dissented from the Full Bench decision of the Calcutta High Court in 53 Cal 166.[6] I prefer the Calcutta view expressed in 44 Cal 627[5] and 53 Cal 166.[6] I do not consider that S. 47, Civil P. C., is intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree. Cases in which pleas of minority might be deliberately withheld for the purpose of obstructing future execution proceedings can be easily imagined and I am not impressed by the argument as to

2. Sami Chettiar v. T. R. Sesha Iyer & Co., A I R 1928 Mad 1057=113 I C 663.
3. Venkatasomeswara Rao v. Lakshmanaswami, A I R 1929 Mad 213=115 I C 801=56 M L J 175=52 Mad 275 (F B).
4. Govinda Nadar v. Natesa Pillai, A I R 1932 Mad 7=135 I C 314=61 M L J 520.
5. Kalipada Sirkar v. Hari Mohan Dalal, A I R 1917 Cal 844=35 I C 856=44 Cal 627=24 C L J 375=21 C W N 1104.
6. Gora Chand Holdar v. Profulla Kumar Roy, A I R 1925 Cal 907=89 I C 685=29 C W N 948=42 C L J 1=53 Cal 166 (F B).
7. Lakshmanan Chettiar v. Chidambaram Chettiar, A I R 1935 Mad 236=156 I C 172=58 Mad 752=68 M L J 318.
8. Subramania Iyer v. Vaithinatha Iyer, A I R 1916 Mad 656=31 I C 198=38 Mad 682.
9. Arunachelam Chetty v. Abdul Suban Sahib, A I R 1926 Mad 429=93 I C 356=50 M L J 232.
10. S. A. Nathan v. S. R. Samson, A I R 1931 Rang 252=135 I C 65=9 Rang 480 (F B).

hardship. As to the question of hardship, in suitable cases, the Court in which the suit is filed to set aside the decree can always, by interlocutory orders, make provision against the minor's property being unjustly sold. As to the point raised that the order of the District Munsif was not appealable it is quite clear that he purported to make it under S. 47, and there is no substance in this contention; as a result of these conclusions I would dismiss this appeal with costs.

Horwill, J.—I agree. There is no definite current of decisions in any High Court to the effect that an executing Court, whose business it is to execute, should institute an enquiry at the instance of any person to ascertain whether a decree, to all appearances a perfectly valid one, may not for some reason or other be invalid. It is against the well established principles governing the duties of an executing Court that it should sit in judgment over a Court that has passed a decree, which may even be a superior Court. Cases do however arise where the executing Court is forced to notice that a decree is not executable and in such cases it should not execute. The unexecutability of the decree may be obvious from a perusal of the judgment and the pleadings or it may appear, when a decree-holder is seeking to make a legal representative of a judgment-debtor liable, that the legal representative is not liable because no decree was passed against the judgment-debtor while he was yet alive. Executing Courts must recognize these facts. I do however feel that it would be against the trend of decisions—above all the decisions since the closely reasoned judgments in 44 Cal 627[5]—to countenance an enquiry in execution whether a judgment debtor was a minor. Although the principal case relied on by the appellants, in 9 Rang 480[10] disagrees with 53 Cal 166,[6] regarding the distinction between a decree that is void on the face of it and one that is found to be void after enquiry, yet the effect of the judgment in 9 Rang 480,[10] is to make an exception only with regard to a judgment-debtor who died before decree, a special case since distinguished even by the Calcutta High Court. In most of the decisions placed before us on behalf of the appellants the effect of the Privy Council case in 31 All 572,[1] has not been considered; but in the Rangoon case it is recognized that this decision of the Committee does stand in the way of an enquiry regarding the minority of a judgment-debtor. When a judgment-debtor appears in execution and asserts that he is a minor he is in fact saying that he was not a party to the decree which admission precludes the executing Court from making an enquiry under S. 47, Civil P. C.

It is argued that if the District Munsif had no authority under S. 47, to go into this matter his order was not one under S. 47 and so is not appealable. The fallacy of this argument is that although the District Munsif ought not to have made this enquiry he assumed jurisdiction and purported to pass an order under S. 47, Civil P. C. His order, wrongly given though it was, was therefore under S. 47, Civil P. C., and appealable. The respondent has put forward an alternative answer to the appellant. It is that as two brothers of the appellant, with identical rights and liabilities, were parties to the decree, they sufficiently represented the minor appellant. This is a reasonable contention but it is weakened if not vitiated by the fact that the plaintiff did not treat them as representatives of the appellant's interest because he impleaded him, as well as his brothers. In view of the fact that the appeal fails otherwise we have not thought it necessary to decide this rather nice point.

C.R.K./S.C. *Appeal dismissed.*

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* A. I. R. 1937 Madras 511

BEASLEY, C. J. AND HORWILL, J.

Alluri Bapanna — Appellant.

v.

Inuganti Vengayya and *others*— Respondents.

Letters Patent Appeal No. 15 of 1936, Decided on 5th November 1936, against judgment of Wadsworth, J., D/. 2nd December 1935, reported in *A. I. R. 1936 Mad 472.*

(a) Civil P. C. (1908), O. 21, R. 2 (3)—Sub-r. (3) to O. 21, R. 2 does not give right to decree-holder to ignore any payment towards decree amount—Purpose of O. 21, R. 2 (3) explained.

Sub rule 3 to O. 21, R. 2, Civil P. C. does not give a right to a decree-holder to ignore any payment against the decree amount. On the contrary, sub-r. 1 says that he shall certify the payment. The purpose of O. 21, R. 2 (3) which

merely prevents the judgment-debtor from pleading an uncertified payment, seems to be to avoid unnecessary delay and to obviate the trial of complicated issues in execution proceedings which might prevent decree-holders from realizing promptly the fruit of their decrees. [P 513 C 1]

(b) Civil P. C. (1908), O. 21, R. 2—It is enough that payment made by judgment-debtor is brought to notice of executing Court — Once decree-holder has admitted payment by judgment-debtor he cannot be allowed to execute his decree for same amount over again.

It does not matter under what circumstances the payment by the judgment-debtor is brought to the notice of the executing Court by the decree-holder; such bringing to notice is sufficient to satisfy the requirements of O. 21, R. 2, Civil P. C., and to prevent the decree-holder from executing over again for a sum that he admitted having received: *A I R 1929 P C 19*; *A I R 1919 Mad 123*; *A I R 1929 Mad 783*; *A I R 1929 Mad 811* and *A I R 1916 Cal 451, Rel. on.* [P 513 C 2]

*** (c) Res judicata — Constructive—Execution proceedings—Caution should be exercised in applying principle of constructive res judicata to execution proceedings—Mere failure of judgment-debtor to dispute at first opportunity correctness of decree amount would not bar him from raising that point in subsequent proceedings.**

Section 11, Civil P. C., does not apply to execution proceedings; but for the same reasons that S. 11 became necessary for controlling the trial of suits it has been necessary to apply the same or similar principles to execution proceedings. Caution has however to be exercised in applying the principle of constructive res judicata to execution proceedings. It can only apply to cases where the Court could not have acted as it did if the judgment-debtor had successfully raised the points which are sought to be held by this principle against him. In general, a Court cannot order execution unless it is satisfied (i) that the petitioner has a right to execute; (ii) that the judgment-debtor is liable to satisfy the decree; (iii) that the decree is executable: and (iv) that it is not barred by limitation. If therefore an executing Court orders execution to proceed it must be presumed to have held that all these conditions are satisfied. If a judgment-debtor with due notice of the proceedings fails to raise any objection on any of these grounds it must be held by the principle of construotive res judicata that his failure to do so has the same legal effect as if it had been raised and decided against him. The mere fact that the sum for which the decree is sought to be executed is not the correct amount due by the judgment-debtor to the decree-holder would not prevent execution from proceeding; and so the failure of a judgment-debtor to dispute at the first opportunity the correctness of the figure would not bar him by the principle of constructive res judicata from raising that point in subsequent proceedings or at some later stage of the same proceedings: *A I R 1929 Mad 903* and *A I R 1933 Mad 466, Rel. on.* [P 514 C 1, 2]

K. Venkatarama Raju—for Appellant.

V. Govindarajachari and *B. V. Ramanarasu*—for Respondents.

Horwill, J. — On 26th June 1923 Yellappu Bapanamma obtained part satisfaction of her decree to the extent of Rs. 2,500 and in December of the same year she obtained another sum of Rupees 1,000. Both these amounts were certified. On 3rd August 1924, Rs. 2,520 were paid to her but the payment was not certified. On 10th January 1929 the decree was transferred to the present appellant by Ex. 1. That document recites that two sums of Rs. 2,500 and Rs. 2,520 respectively had been collected towards the decree amount, that the decree-holder is entitled to execute for the balance, and that she transferred her right to execute to the appellant. Both the trial Court and the lower appellate Court held that on a construction of Ex. 1 the right transferred to the appellant was to execute for such sum as was due after making the deductions mentioned in the deed. In Second Appeal Wadsworth, J. was of the same opinion and referred to the possibility that the document of transfer and the filing of E. P. No. 231 of 1929 by the appellant might amount to a certification within the meaning of O. 21, R. 2. Against this judgment of Wadsworth, J. the present Letters Patent appeal has been preferred.

The main point discussed in this appeal is whether, in view of the terms of Ex. 1, the appellant is entitled to ignore the uncertified payment. The argument of the learned counsel for the appellant is that in spite of her admissions the decree-holder herself could have executed for an amount which included this uncertified payment and that as she had conveyed all her rights under the decree to the appellant, he had the right to ignore this payment in executing the decree. Mr. Venkatarama Raju has argued with great insistency that the Full Bench case of this Court (62 M L J 562)[1] concludes the matter; but in that case it was only decided that a transferee-decree-holder was in no worse a position than the transferor and that the judgment-debtor was prevented by O. 21, R. 2 (3) from relying upon an uncertified payment. It was not considered how far the rights of the transferee-decree-holder would be determined by the terms of the transfer deed or affected by admissions that uncertified

1. Subramanian v. Ramaswami, A I R 1932 Mad 372=137 I C 28=55 Mad 720=62 M L J 562 (F B).

payments had been made. The fallacy in the argument of Mr. Venkatarama Raju lies in the supposition that a decree-holder has a right to execute for a sum uncertified which he can transfer to another person. Certainly sub-rule 3 to O. 21, R. 2 does not give a right to a decree-holder to ignore any payment against the decree amount. On the contrary, sub-rule 1 says that he shall certify the payment. The purpose of O. 21, R. 2 (3) which merely prevents the judgment-debtor from pleading an uncertified payment, seems to be to avoid unnecessary delay and to obviate the trial of complicated issues in execution proceedings which might prevent decree-holders from realizing promptly the fruit of their decrees. The transfer deed Ex. 1 expressly states that the decree-holder herself had no right to execute for this sum of Rs. 2,520, that she was entitled to execute only for the remainder, and that it was this right to execute for the remainder that she transferred to the appellant. It was because he could not execute for this uncertified amount that the consideration for the transfer was correspondingly decreased. No authority has been quoted to us for the contention of the learned Counsel for the appellant that the Court is bound to ignore the terms of a transfer deed and the rights that the transferee obtains under the deed. Moreover, when examined by the Court on his application, to transfer the decree, the appellant admitted that Ex. 1 gave him the right to execute only for what was due on the decree after deducting this uncertified payment. We therefore hold that the decision of our learned brother on this point was correct.

We are also of opinion that his judgment can be supported on the ground that the certification by the decree-holder required by O. 21, R. 2 (1) was given. In 3 Luck 684,[2] a Privy Council case of 1928, the nature of the certification required under O. 21, R. 2 (1) was discussed; and it was held that no application by the decree-holder was required and that even though the certificate was in the form of a petition, the certificate was not in fact a petition. Their Lordships held that the rule contemplates a simple procedure, namely a certificate of payment given to the Court. In 49 I C 141,[3] Sadasiva Ayyar, J. says that:

> A certificate under O. 21, R. 2 by the decree-holder need not be in any particular form, and even the mention of the payment to the Court at any time by the decree-holder in his petition is a sufficient certificate.

In A I R 1929 Mad 783[4] the decree-holder admitted certain payments but stated that the money was used for purposes which did not amount to a discharge of the decree. It was held that the fact that the plaintiff has not formally certified the payment but has only incidentally referred to a payment can make no difference. This principle is only in accordance with common sense and equity. A decree-holder who admits to the executing Court that he has received a payment cannot be allowed by the Court to execute his decree for the same amount over again. Such a procedure would make the process of the Court farcical. In A I R 1929 Mad 811[5] a reference to an uncertified payment was made on an affidavit. It was nevertheless held that such an admission amounted to a certification sufficient to satisfy the requirements of O. 21, R. 2 (1). 43 Cal 207[6] was a case in which the decree-holder referred to the payment in E. P. itself; and it was held that such a reference amounted to a certification of the payment. It would appear from the above cases that it does not matter under what circumstances the payment by the judgment-debtor is brought to the notice of the executing Court by the decree-holder; such bringing to notice is sufficient to satisfy the requirements of O. 21, R. 2 and to prevent the decree-holder from executing over again for a sum that he admitted having received. It is argued by the learned counsel for the appellant that even though it may not be necessary for the decree-holder to put in a formal application to record payment, it is at any rate necessary that he should ask the Court to do so. Such a contention is certainly not warranted by any of the decisions above referred to or by any other cases to which our attention has been drawn. On the contrary in A I R

2. Shri Prokash Singh v. Allahabad Bank Ltd., A I R 1929 P C 19=114 I C 581=56 I A 30 =3 Luck 684 (P C).

3. Thimma Reddi v. Subba Reddiar, A I R 1919 Mad 123=49 I C 141.
4. Chinna Mummidi Royal v. Somasekara Chikka Royal, A I R 1929 Mad 783=119 I C 594.
5. Chinnaswami Kavirayer v. Periathambi Butler, A I R 1929 Mad 811=117 I C 790.
6. Eusufzeman v. Sanchia Lal, A I R 1916 Cal 451=34 I C 606=43 Cal 207=20 C W N 272 =23 C L J 390.

1929 Mad 783[4] the decree-holder, far from asking the Court to certify the payment, strenuously opposed the certification.

The circumstances under which we are asked to find that there was a certification by the transferee decree-holder of this payment of Rs. 2,520 are that in 1929 the appellant filed E. A. No. 231 of 1929 (Ex. A) asking the Court to recognize the transfer. The appellant therein asked the Court to peruse the E. P. records and after examining the deed of transfer to issue notice to the defendants under O. 21, R. 16 and then to recognize the transfer. He also requested the Court to transfer the decree under S. 39, Civil P. C., to the District Munsif's Court, Kovvur, for further execution. In our opinion this was sufficient to draw the attention of the Court to the deed of transfer, in which there was a recital that this sum of Rs. 2,520 had been paid and that the right conferred by the decree-holder on the appellant was one to execute for such amount as might be due after deducting that payment and another.

The learned counsel for the appellant has also put forward a further argument that the judgment-debtor's claim to have his payment recognized is barred by *res judicata*, because he made no mention of this payment either during the execution proceedings in 1926 (where the decree-holder had deducted only the two sums of Rs. 2,520 and Rs. 1,000) or in 1929 when execution proceedings were initiated by the appellant. It has often been pointed out by this Court that S. 11 does not apply to execution proceedings; but for the same reasons that S. 11 became necessary for controlling the trial of suits it has been necessary to apply the same or similar principles to execution proceedings. Caution has however to be exercised in applying the principle of constructive *res judicata* to execution proceedings. It can only apply to cases where the Court could not have acted as it did if the judgment-debtor had successfully raised the points which are sought to be held by this principle against him. In general, a Court cannot order execution unless it is satisfied: (i) that the petitioner has a right to execute; (ii) that the judgment-debtor is liable to satisfy the decree; (iii) that the decree is executable; and (iv) that it is not barred by limitation. If therefore an executing Court orders execution to proceed it must be presumed to have held that all these conditions are satisfied. If a judgment-debtor with due notice of the proceedings fails to raise any objection on any of these grounds it must be held by the principle of constructive *res judicata* that his failure to do so has the same legal effect as if it had been raised and decided against him. The mere fact that the sum for which the decree is sought to be executed is not the correct amount due by the judgment-debtor to the decree-holder would not prevent execution from proceeding; and so the failure of a judgment-debtor to dispute at the first opportunity the correctness of the figure would not bar him by the principle of constructive *res judicata* from raising that point in subsequent proceedings or at some later stage of the same proceedings. The whole question of the operation of the principle of constructive *res judicata* to execution proceedings has been very carefully discussed by Pakenham Walsh, J. in A I R 1929 Mad 903[7] and 64 M L J 629.[8] In 64 M L J 629[8] at p. 636 he says :

> There is ample authority for instance that where execution is taken out for an amount greater than that mentioned in the decree, failure to appear by the defendant would not act as *res judicata* and prevent him from showing in subsequent proceedings that that amount is not due.

Pakenham Walsh, J. also refers to 37 All 589,[9] which is a decision to the same effect. We have also seen an unreported judgment, *C. M. S. A. No. 2 of 1929*,[10] also by Pakenham Walsh, J. in which it was sought to weaken the effect of the words above quoted by referring to certain other expressions used in the same judgment, from which it might be argued that the above quoted principle was of limited application. The learned Judge repelled this argument and held that it was of general application and would apply to all cases where the judgment-debtor failed to object to the amount set out in the E. P.

As far as the earlier execution petition is concerned (Ex. B), E. A. No. 913 of 1926, it is clear that the judgment-debtor could

7. Ulaganatha Mudaliar v. Alagappa Mudaliar, A I R 1929 Mad 903=122 I C 161.
8. Azhagappa Chetti v. Ramanathan Chettiar, A I R 1933 Mad 466=147 I C 1242=64 M L J 629.
9. Kalyan Singh v. Jagan Prasad, A I R 1915 All 344=30 I C 523=37 All 589=13 A L J 828.
10. Suryaprakasa Rao v. B. Venkata Dikshitalu, *since reported in* A I R 1933 Mad 844=146 I C 317.

not effectively put forward the plea of payment because the Court could not take account of any such payment. His failure to raise a point that could not in any way help him could not subject him to the bar of *res judicata*. As pointed out earlier, it is only points that if raised successfully would have modified the orders of the Court that can possibly operate as *res judicata*. The learned counsel for the appellant claims to have a stronger case with regard to the conduct of the judgment-debtor at the time of the originating of the proceedings in 1929; for as Ex. A, read with the transfer deed, amounts to a certification, then if the judgment-debtor had drawn the attention of the Court to the fact that the decree-holder admitted the payment, satisfaction for the uncertified payment would presumably have been recorded. Even here however the principle of constructive *res judicata* would not apply, because the judgment-debtor could not have influenced the conduct of the Court in those proceedings. Some amount still remained due under the decree, even though full credit had been given for all the payments. The Court was therefore bound to acknowledge the right of the appellant to execute the decree, and, as the property against which the decree had to be executed was situated within the limits of another Court, to transfer the decree. The judgment-debtor was not therefore precluded by the principle of constructive *res judicata* from raising the plea of payment at a later stage in those proceedings after the decree had been transferred. The Letters Patent appeal therefore fails and is dismissed with costs.

C.R.K./B.D. *Appeal dismissed.*

*** * A. I. R. 1937 Madras 515**

FULL BENCH

BEASLEY, C. J., MOCKETT AND LAKSHMANA RAO, JJ.

Commissioner of Income-tax, Madras— Petitioner.

v.

The Hon'ble Sri Raju Swetachalapati Ramakrishna Ranga Rao, Rajah of Bobbili — Opposite Party.

O. P. No. 224 of 1936, Decided on 18th December 1936.

*** * Income-tax Act (1922), S. 14 (1) — Scope — Object of S. 14 is to save double taxation in respect of person who is also member of joint Hindu family — Member of joint Hindu family also holder of impartible estate—Income from such estate is his absolute and self-acquired property — Holder therefore can be assessed in respect of such income individually, and exemption under S. 14 (1) does not apply.**

The object of the exemption granted by S. 14 (1), Income-tax Act, is to save double taxation and therefore where the Hindu undivided family has been assessed under S. 3 of the Act in respect of its income a member of it is not to be assessed again individually.

[P 519 C 1]

The income of an impartible estate when received by the holder thereof becomes the absolute and self-acquired property of the holder of such impartible estate and it does not form an accretion to such estate. This principle applies even when the holder of the impartible estate happens to be a member of a joint Hindu family. The income so received by the holder of the impartible estate is not exempt from assessment of income-tax under S. 14 (1), Income-tax Act and the holder can be assessed individually in respect of such income : *A I R 1933 Lah 284, Disting.* ; *A I R 1924 Pat 679* ; *A I R 1923 P C 59*; *29 Cal 433* and *A I R 1932 P C 216, Rel. on*; *Case law discussed.* [P 519 C 1, 2]

M. Patanjali Sastri — for Petitioner.

V. Govindachari — for Opposite Party.

Judgment.—The question before us is :

Whether in respect of the following three sums, viz., Rs. 8,436 being income assessable under the head 'property', Rs. 998 under 'business' and Rs. 3,755 under other sources (quarries and fisheries) the petitioner was rightly taxed as an individual or whether he should have been taxed as the representative of a Hindu undivided family.

The assessee, the Rajah of Bobbili, is the present holder of the impartible estate of Bobbili. During the previous year (1st April 1934 to 31st March 1935) he was also the Chief Minister to the Government of Madras. He is, besides, the managing member of a Hindu undivided family of which he and his brother are the senior co-parceners. For the assessment year 1935-36 his total income from all sources liable to income-tax was ascertained to be Rs. 64,083 made up of the following items :

1. Salaries.	...	Rs. 49,399
2. Interest on securities.	...	420
3. Property.	...	8,446
4. Business, money lending (Rupees 998) and Kerosine Oil Agency (Rs. 525)	...	1,523
5. Other sources : Dividends (Rs. 540) and quarries and fisheries (Rs. 3,755)	...	4,295
	Total	Rs. 64,083

He was assessed both to income-tax and super-tax, super-tax being levied as on an individual. With the exception of certain

amounts it was admitted that the Rajah was rightly assessed as an individual. The sums about which there is a dispute are Rs. 8,436 from property, Rs. 998 from money lending business and Rs. 3,755 from other sources (fisheries and quarries). These sums are income derived from the impartible estate. The assessee's contention is that they are income of the joint family and therefore the joint family should have been assessed as such in respect of them and not the Rajah as an individual. The point for consideration is whether for purposes of income-tax the income from the impartible estate is income of the joint family of which the Rajah is the manager; and in this connexion certain principles with regard to impartible estates must be stated; and they are that from the very nature of the estate there can be no right of partition and that except in Madras no co-parcener can restrain alienations by the head of the family though the right to maintenance and of survivorship may exist. The distinction between an impartible estate and a joint family estate has now been made clear in a number of decisions. What has now to be considered is the income from such an estate, the Income-tax Commissioner's claim being that this income must be regarded for the purposes of income-tax as the income of an individual and in support of his claim a number of cases have been cited. Amongst those cases, which in our opinion lend considerable support to the Income-tax Commissioner's contention, is 59 Cal 1399,[1] a decision of the Privy Council. The litigation in that case related to the succession to the estate of one Raja Durgaprasad who died childless survived by three widows who were the plaintiffs in the suit and the respondents in the first appeal. The defendant Shibaprasad Singh was a collateral relative of the deceased Raja. The parties were governed by the Mitakshara law. The chief item of property was the impartible estate but the Raja died possessed of considerable other immoveable property, also of cash, deposits in banks, jewellery and other moveable property. Upon the Raja's death the defendant took possession of the impartible estate and also other property of the Raja claiming that it passed to him by survivorship. The plaintiffs alleged that the family had ceased to be joint, and claimed the estate under Hindu law, claiming the other immoveable and moveable property as self-acquisitions.

Amongst the questions of law dealt with was whether the holder of an impartible estate can incorporate with it property either moveable or immoveable, so as to make that property descend according to the rule of primogeniture governing the estate. It was held that the blending of income from self-acquired property with income from an impartible estate raises no presumption of an intention to incorporate but that intention can be indicated in other modes and that moveable property cannot form an accretion to an ancestral impartible estate and even the income of an estate of that nature is not an accretion to it. In the course of the judgment of their Lordships' Board a large number of cases touching the question are referred to and examined; and in drawing a distinction between an impartible estate and the ordinary joint family estate on p. 1413 it is stated :

> Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity (3) the right of maintenance and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in 10 All 272[2] and the *First Pittapur case* in 22 Mad 383[3] ; and so also the third as held in the *Second Pittapur case* in 41 Mad 778.[4] To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right therefore still remains, and this is what was held in *Baijnath's case*, 43 All 228.[5] To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property.

The important words affecting the question here are those which state that 'the

1. Shivaprasad Singh v. Prayagkumari Debee, A I R 1932 P C 216 = 138 I C 861 = 59 I A 331=59 Cal 1399 (P C).

2. Sartaj Kauri v. Deoraj Kauri, (1888) 10 All 272=15 I A 51=5 Sar 139 (P C).

3. Venkatasurya Mahipati Ramakrishna Rao v. Court of Wards, (1899) 22 Mad 383=26 I A 83=7 Sar 481 (P C).

4. Gangadhara Rama Rao v. Rajah of Pittapur, A I R 1918 P C 81=47 I C 354=45 I A 148=41 Mad 778 (P C).

5. Baijnath Prasad v. Tej Bali Singh, A I R 1921 P C 62=60 I C 534=48 I A 195=43 All 228 (P C).

impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property'. After dealing with the question of whether the family had ceased to be joint, their Lordships consider on p. 1414 the second question, namely whether it is competent to the holder of an ancestral impartible estate to incorporate with the estate other properties belonging to him, and a number of decisions are referred to, the first of them being 29 Cal 433[6] which was a case relating to succession to an ancestral impartible estate where some property had been purchased on behalf of the last holder out of the savings of the estate. It was contended that this property had been incorporated with the estate and therefore passed with it. The evidence was that the rents of the estate were collected by the same servant and the collection papers were kept with the papers of the estate and it was held that these facts were not adequate for holding that the Raja intended to incorporate the property with the ancestral estate for the purposes of his succession and that the property must therefore follow the rule of the Mitakshara as to self-acquired property. Next 35 All 391[7] is cited. That also relates to immoveable property and referring to the previously cited case, it was held that the question whether properties acquired by an owner become part of the ancestral estate for the purposes of his succession depends on his intention to incorporate the acquisitions with the original estate. Another case referred to is 2 Pat 319[8] which was a case relied upon by Mr. Patanjali Sastri in support of his argument and to which a further reference will be made in this judgment. The actual point of the decision in that case was that where the estate is impartible no such presumption as to an intention to incorporate can be drawn from the blending of the income of self-acquired property with the income of the estate as in the case of ordinary joint family estate. The case does not decide that, if that estate is impartible, there can be no incorporation at all. On the contrary there is an implication and that too a strong one, that there can be an incorporation at least as regards immoveable property. Several other cases are also referred to. On p. 1418 the distinction between the blending of income in the case of a member of a joint family and a member of it who is the holder of an ancestral impartible estate is stated as follows :

> If a member of a joint family blends the income of his self-acquired property with the income of the joint family property, it raises a presumption of an intention to incorporate the self-acquired property with the joint family property: 50 Cal 439.[9] But no such presumption can arise if a member of a joint family, who is the holder of an ancestral impartible estate, mixes the income of his self-acquired property with the income of the estate.

Having dealt with the question of the incorporation of immoveable property purchased out of the income of an impartible estate and having held that it can form an accretion to the joint family estate provided the intention on the part of the holder of the impartible estate is clearly proved, their Lordships proceed to deal on p. 1422 with moveable property as distinguished from immoveable property and there say :

> None of these considerations however apply to moveable property. Such property their Lordships think cannot form an accretion to an ancestral impartible estate,

and here follow the very important words:

> The income even of such an estate is not an accretion to the estate. As was said by the Board in 2 Pat 319,[8] 'the income when received is the absolute property of the owner of the impartible estate'. It does not attach to the estate as does the income of an ordinary ancestral estate attach to that estate.
>
> The conclusion to which their Lordships have come on this part of the case is that, while immoveable property can be incorporated with an impartible estate, moveable property cannot.

It will be convenient now to examine the case reported in 2 Pat 319,[8] another decision of the Privy Council. There it was held that the income of an impartible joint estate is not so affected by its source that it should be assumed to form an accretion to the estate and further as the holder is entitled to the whole of the income, the principle applicable to an ordinary joint family that self-acquired moneys are to be regarded as joint property if mixed with moneys of the joint family does not necessarily apply to property acquired by the holder of an impar-

6. Parbati Kumari Debi v. Jagais Chunder Dabal, (1902) 29 Cal 433=29 I A 82=8 Sar 205 (P C).
7. Janki Prasad Singh v. Dwarka Pershad Singh, (1913) 35 All 391=20 I C 73=40 I A 170=16 O C 216 (P C).
8. Jagadamba Kumari v. Wazir Narain Singh, A I R 1923 P C 59=77 I C 1041=50 I A 1=2 Pat 319 (P C).
9. Rajani Kanta Pal v. Jaga Mohan Pal, A I R 1923 P C 57=73 I C 252=50 I A 173=50 Cal 439 (P C).

tible estate out of the income. In that case, the deceased holder of an impartible estate had applied savings out of the income to purchasing immoveable properties and making loans, the rents and interest being received by the manager of the estate and treated in his books as part of the income of the estate and it was held that the property so acquired had not become part of the impartible estate but remained the separate property of the deceased holder. One question raised, namely whether moveable property can ever be treated as an accretion to immoveable property about which their Lordships expressed considerable doubt has since been set at rest by the decision of their Lordships in 59 Cal 1399[1] already referred to. Lord Buckmaster in delivering the judgment of their Lordships' Board on p. 325 [*of 2 Pat*] states as follows :

> Originally the estate was in debt, and as there is no evidence of any acquisition of property from other sources, it follows that all the estate possessed by the Raja, other than the impartible raj, was derived from the income of the raj itself. In the end this income produced very considerable property. There were certain villages, certain mortgages, usufructuary and otherwise, sums due on bonds and decrees, Government promissory notes to the extent of two lakhs and other moveable and immoveable properties. With the exception of the Government promissory notes the whole of these have been awarded to the plaintiff upon the ground that they represented an accretion to the estate and descended with it. Their Lordships think that this conclusion is wrong and that its error is due to the idea that the produce of the impartible estate naturally belongs to and forms an accretion to the original property. In fact when the true position is considered there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort or that had come to him in circumstances entirely dissociated from the ownership of the raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character.
>
> It is possible that this confusion is due to the consideration of the position with regard to an ordinary joint family estate. In such a case the income, equally with the corpus, forms part of the family property, and if the owner mixes his own moneys with the moneys of the family as for example by putting the whole into one account at the Bank, or by treating them in his accounts as indistinguishable, his own earnings share with the property with which they are mingled the character of joint property ; but no such considerations necessarily apply to the income from impartible property.

These two cases and 29 Cal 433[9] are the only three Privy Council decisions where this question of income from impartible estate has been considered. It appears clearly from these decisions that such income is in no respect different from the income derived from the personal exertions of the holder of the impartible estate or his other self-acquisitions and this income comes to him because he is the holder of the impartible estate. Why should this income be treated for the purposes of income-tax differently to his income arising from his salary as a Minister in respect of which he is assessed under S. 3 as an individual? In addition to these three Privy Council decisions, there is a decision of the Patna High Court which is directly in point, viz., 4 Pat 73.[10] There it was held that the Finance Act of 1922, which, for the purpose of assessing super-tax, allows a larger deduction from income in the case of a Hindu joint family than in the case of an individual, contemplates that larger deduction shall be made only in a case of the income of an undivided family in which all the co-parceners are interested, and not in the case of an impartible estate where the income is the sole property of the holder for the time being. On p. 88 Dawson-Miller, C. J. says :

> The income of the estate is that of the incumbent for the time being, nor does the fact that he is bound to maintain his sons entitle him to treat the income as that of the undivided family. It is essentially his income and I so hold. The Finance Act contemplates the larger deduction for purposes of super-tax only in a case where the income is that of the undivided family in which they are all jointly interested and not in the case of an impartible estate where the income is the sole property of the holder for the time being.

The latest decision of the Privy Council in 56 All 468[11] does not touch this question and what was decided there was that the right of the junior members of the family to maintenance out of an ancestral impartible estate is based upon their joint ownership and not custom. It does not say that the income of an ancestral impartible estate is not the income of the holder for the time being or that the latter is bound in law to apply the income or any portion thereof towards maintenance of the junior members. The contention of the assessee that this income falls to be assessed as that of a Hindu undivided

10. Shiva Prasad Singh v. Emperor, A I R 1924 Pat 679=82 I C 653=4 Pat 73=5 P L T 497.
11. Collector of Gorakhpur v. Ram Sundar Mal, A I R 1934 P C 157=150 I C 545=61 I A 286=56 All 463 (P C).

family is founded upon the words of S. 14, Income-tax Act, which reads as follows:

> The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family.

The object of this exemption is to save double taxation and therefore where the Hindu undivided family has been assessed under S. 3 in respect of its income, a member of it is not to be assessed again individually. It is argued that the assessee here who is admittedly a member of a Hindu undivided family has received the income in question as such member, that he is therefore exempt from an individual assessment and that the words of the section themselves therefore negative the Income-tax authorities' contention; and further assistance is sought by reference to decisions both of this High Court and other High Courts. Taking this High Court first, there is 57 Mad 1023,[12] where it was held that a sum received as maintenance by an assessee as the brother of the last holder of an ancestral impartible estate entitled under the law to receive maintenance out of such estate is a sum received by him as a member of a Hindu undivided family within the meaning of Cl. (1) of S. 14, Income-tax Act and that the right to maintenance which the son of a zamindar still possesses is not the creature of custom but it is an incident to the ordinary joint family property which has been left untouched by customs, despite its encroachment on the other incidents i. e., he receives the maintenance by reason of his status. As Ramesam, J. who delivered the judgment of the Full Bench on p. 1027 says:

> The question is whether the assessee received this payment as a member of a Hindu undivided family. Undoubtedly he does receive this payment of Rs. 6,000 because he is a member of the undivided Hindu family.

It is different in the case of the assessee here; it is true that he is a member of a Hindu undivided family but he receives nothing from the family. The income is received by him as the holder of the impartible estate and it cannot be said that he receives it as a member of a Hindu undivided family. The income is his and the junior members have no right therein. 14 Lah 255[13] was also cited for the assessee. What was decided in that case was that there is no legal sanction for the proposition that an estate which is governed by the rule of primogeniture cannot belong to an undivided Hindu family but must be the sole property of the person who has succeeded to it by the rule of primogeniture. This decision, however, does not touch the question in point here. It is not disputed that the corpus belongs to the undivided family. The question is as regards the income; and if in this case it is assumed that the income from an impartible estate means the joint family income, then that is clearly contrary to what was decided in 2 Pat 319;[8] 29 Cal 433[6] and 59 Cal 1399;[1] and to none of these cases is any reference made; and we must respectfully dissent from that view.

In 14 Pat 785,[14] it was held that S. 14 (1), Income-tax Act, applies only to sums received by a member of a Hindu undivided family out of income to a share in which he has a vested right, that is to say, sums which he receives from the joint income of the family and that a sum received by an assessee because he is a member of an undivided family does not stand on the same footing as a sum received by him as a member of the family within the meaning of S. 14 (1) of the Act. It is contended that this case assists the assessee because it shows that the income is still the joint income of the family. But the assertion of the assessee that the allowance was paid out of joint family property was not controverted in that case and as stated in the leading judgment, the Court had not to consider the nature of the income from the impartible estate in the hands of the holder. In our view, the junior member receives maintenance because he is entitled to a share in the corpus and the holder of the impartible estate is bound to maintain the junior members of the family and no useful purpose will be served by a reference to other cases as none of the cases cited on behalf of the assessee, in our opinion, destroy the force of those relied upon by the Commissioner of Income-tax. We hold, therefore, that the assessee was rightly assessed in respect of his income as an individual. The question propounded is answered

12. Commissioner of Income-tax v. Zamindar of Chemudu, A I R 1934 Mad 608=151 I C 926 =57 Mad 1023=67 M L J 306 (S B).
13. Krishen Kishore v. Commissioner of Income-tax, A I R 1933 Lah 284=141 I C 415=14 Lah 255=34 P L R 560.
14. Commissioner of Income-tax, Bihar and Orissa v. Visheswar Singh, A I R 1935 Pat 342=156 I C 116=14 Pat 785=16 P L T 351 (S B).

accordingly. The assessee will pay Rs. 250 costs to the Commissioner of Income-tax.

C.R.K./K.B. *Answer accordingly.*

A. I. R. 1937 Madras 520

HORWILL, J.

Kizhakkepati Thavazhi Tarwad Karnavan and *Manager, Narayanan Nair* — Appellant.

v.

Thavalapara Komli's son Chekunni and *others* — Respondents.

Second Appeal No. 830 of 1932, Decided on 18th September 1936, against decree of Sub-Judge, Ottapalam, in A. S. No. 54 of 1930.

(a) Mortgage — Mortgage for fixed period can be cancelled and renewed even before expiry of its period.

The existence of a mortgage for certain fixed period does not prevent the parties from renewing the mortgage and cancelling the old one before the expiry of its term. [P 520 C 2]

(b) Civil P. C. (1908), O. 1, R. 9 — Non-joinder—Rule can be applied at any stage of proceeding — Equitable relief in favour of plaintiff should be refused only when plaintiff's conduct disentitles him to it and adding of party would unduly prejudice defendant.

There is no rule of thumb by which a Court can say whether the plaintiff shall be allowed to add a party at a late stage or not. O. 1, R. 9, Civil P. C., is still the rule to be applied at any stage of a proceeding; and the plaintiff should only be refused that equitable relief when his conduct has been such as to disentitle him to it. If he has behaved in a fair and straightforward manner and the adding of a party would not unduly prejudice the defendants, his suit should not be dismissed because of some technicality: *Case law referred.* [P 521 C 2; P 522 C 1]

(c) Second Appeal— High Court will interfere where lower Court wrongly refuses equitable relief.

The High Court will always interfere in second appeal when a lower Court has wrongly refused to grant an equitable relief. [P 522 C 2]

P. Govinda Menon—for Appellant.

K. Kuttikrishna Menon and *P. A. Krishnan Kutti Nair* — for Respondents.

Judgment. — The appellant and one Karthiyayini Amma, a lady of his tarwad, executed a kanom kychit in favour of defendants 9 and 10; and the appellant, as the karnavan of the tarwad, brought this suit for the redemption of the prior mortgages. The suit was decreed by the District Munsif of Walluvanad but in appeal the Subordinate Judge of Ottapalam has given three reasons why the suit should not be decreed. The first is that the suit was premature, in that it was brought before the expiration of the period of the mortgage. The second is that the suit is not maintainable without Karthiyayani Amma's heirs being made parties to the suit, as the kychit was executed by her and the plaintiff jointly and not by the tarwad as represented by them. The third objection to the plaintiff's suit is that he has not asked to be allowed to redeem the whole of the property mortgaged. In appeal all these points have been argued, except that the finding of the learned Subordinate Judge that the kanom kychit was executed by the plaintiff and Karthiyayini Amma in their personal capacities and not on behalf of the tarwad has been accepted. It therefore follows that Karthiyayini Amma must be added as a party; but it is contended that the plaintiff should be given an opportunity of doing so. It has also been conceded that the plaintiff is bound to pay for the improvements of all the lands covered by the mortgage, and therefore to redeem all of them.

The trial Court found that the suit was not premature. The question arose because the mortgage document, Ex. A, was executed seven years after the execution of a similar deed, Ex. 3, for which type of mortgage the normal term is 12 years. The existence of a mortgage for 12 years does not prevent the parties from renewing the mortgage and cancelling the old one before the 12 years have expired; and to see whether that has been done one has to examine the document itself. The learned District Munsif pointed out that there is nothing in Ex. A, to indicate that it was not to operate until the expiration of the 12 years under Ex. 3, and I agree. Not only is there nothing in Ex. A to suggest that it is not intended to operate for a number of years; but there are recitals definitely proving that it is to operate at once. For example, we find: "These items are demised to me today;" later on, "out of this michavaram the paddy shall be paid from 1089 onwards" (the year of Ex. A being 1088); then, lower down: "The oil shall be measured according to the oil measure before the 30th Makaram of each year from 1089 onwards". The next sentence is:

The Government assessment with fund on the scheduled properties from 1089 onwards shall be paid yearly.

Lastly, and still more important, we find the sentence :

I would also forfeit the right to hold the properties for the rest of the period for which the properties have been demised in kanom.

So that the natural presumption that a mortgage deed would not be executed five years before it was intended to operate is reinforced by definite terms in the document itself proving that it is intended to operate at once. The lower appellate Court was wrong in holding that the suit was premature. Most of the contest in this Court has been centred round the question whether the suit must fail because Karthiyayini Amma's heirs have not been added as parties. O. 1, R. 9, Civil P. C., lays down the principle that a suit shall not be dismissed merely because of the non-joinder of some person necessary to the suit ; but admittedly an exception has been made by the Courts to those cases in which the plaintiff has persisted in two or more Courts in not adding the necessary party, even when he was given an opportunity to do so. This principle is enunciated in 61 M L J 294,[1] a Privy Council case. Their Lordships found it necessary to dismiss the suit because the plaintiffs had violated the terms of O. 2, R. 2, in that in a previous litigation they did not ask for the relief that could then have been granted. At the very end of the arguments the counsel for the plaintiff appellant asked for permission to add the co-mortgagors. It appears that the reason why the plaintiff had not added the co-mortgagors at the outset was that the defendant claimed accounts against these co-mortgagors and the plaintiff wished to avoid this issue.

Their Lordships also found that a remand would have necessitated a commencement of the proceedings *de novo* ; for the contest between the defendants and the co-mortgagors would then have had to be opened. The claim in 62 M L J 492[2] was of an intricate nature and the plaintiff was eventually unsuccessful. He then asked in appeal for permission to change his suit into one for contribution. Had he been allowed to do that it would have changed the whole nature of the suit, which was a complicated one. All the evidence that had been let in would have been of no avail and fresh evidence of an entirely different kind would have been necessary. The Court therefore refused to allow the amendment. Their Lordships however held that had there been a mere non-joinder of parties they would have remanded the suit for fresh disposal. 65 M L J 290[3] was a case in which the plaintiff was particularly remiss in not adding a necessary party. There had been disputes between the plaintiff and the Bezwada Municipality. The plaintiff, in order to avoid a direct contest with the Municipality and to try to assert his right by a tortuous method, brought a suit to eject a person from a strip of land that he was claiming. The trial Court found it necessary, although the Municipality was not a party, to consider the relative claims of the plaintiff and the Municipality. Naturally, the defendant was not able to put forward fully the claims of the Municipality and it was held in this Court that the suit should not have been decreed; but should have been dismissed on account of the refusal of the plaintiff to add the Municipality as a party. In each of these cases the Court found that the plaintiff had disentitled himself to an equitable remedy under O. 1, R. 9, by way of amendment of plaint because of his conduct throughout the suit. In none of these cases was the plaintiff's suit dismissed on the purely technical ground that he had failed to amend his plaint in the lower Courts. The conduct of the plaintiff, the persistency with which he prosecuted his wrong claim, his refusal to adopt the remedy open to him when the opportunity arose, or an injustice to the defendants, was the reason for the refusal of the appellate Courts to allow an amendment. In A I R 1923 Mad 337[4] a Bench of this Court refused to allow an amendment where the plaintiff had wrongly refused to add certain executors as parties to a suit on a will ; but there the change in the position of the defendants on account of the conduct of the plaintiff was the reason for the order. From a perusal of these cases quoted on behalf of the defendants it cannot be said that there is any rule of thumb by which a Court can say whether

1. Naba Kumar Hazra v. Radhashyam Mahish, A I R 1931 P C 229=134 I C 654=61 M L J 294 (P C).
2. Faquir Chand v. Aziz Ahmad Khan, A I R 1932 P C 74=136 I C 751=59 I A 106=54 All 199=62 M L J 492 (P C).
3. Subbaraya Sastri v. Setharamaswami, A I R 1933 Mad 664=146 I C 72=65 M L J 290.
4. Mohana Velu Mudaliar v. Annamalai Mudaliar, A I R 1923 Mad 337=72 I C 63=44 M L J 249.

the plaintiff shall be allowed to add a party at a late stage or not. O. 1, R. 9, is still the rule to be applied at any stage of a proceeding; and the plaintiff should only be refused that equitable relief when his conduct has been such as to disentitle him to it.

Although the cases quoted by the learned advocate for the appellant, e. g., 57 Mad 1031[5] and 29 C W N 51,[6] are not very much to the point, yet they do at least show that Courts will not lightly dismiss a plaintiff's suit unless his conduct has been such that he does not deserve the consideration of the Court. If he has behaved in a fair and straightforward manner and the adding of a party would not unduly prejudice the defendants, his suit should not be dismissed because of some technicality. Applying these principles to this case we have to see whether the conduct of the plaintiff has been such that he does not deserve to be allowed the privilege that O. 1, R. 9 gives him. It was of no importance to the defendants at all whether the mortgage was in favour of the tarward or in favour of the plaintiff and Karthiyayini Amma personally. The contest in the trial Court seems not to have turned on this point at all, the evidence being led on the questions whether or not the suit was premature and on the value of the improvements. That being so, it would be most inequitable if the plaintiff were not granted the relief to which he is in equity entitled merely because he stated that he had taken the mortgage on behalf of the tarwad and not for themselves. It is pointed out that even in the lower Appellate Court the plaintiff did not ask that in the event of the learned Subordinate Judge's coming to the conclusion that the mortgage was not for the benefit of the tarwad, he should permit the plaintiff to add the sons of Karthiyayini Amma as parties; but the plaintiff could hardly do so there because the Subordinate Judge having found incorrectly on issue 1, intended dismissing the suit in any event. Mr. Govinda Menon says that he holds a vakalat from Karthiyayini Amma's heirs; but even ignoring that, there seems to be no reason why Karthiyayini Amma's heirs should object to being added as parties; because the plaintiff, even without their consent, has a right to redeem.

A number of cases have been cited before me to show that a Court will not interfere in second appeal in a question of this kind. I need not discuss these cases; for I am quite satisfied that this Court will always interfere in second appeal when a lower Court has wrongly refused to grant an equitable relief. The learned advocate for the appellant denies that the suit of the plaintiff was for partial redemption. He states that the plaintiff was willing to pay the whole of the amount due on the mortgage bond; but did not wish to take possession of certain properties because of the high value of the improvements to the property. I think nevertheless that he is asking for partial redemption; because the amount to be paid upon redemption is not merely the mortgage amount, but the cost of the improvements. Mr. Govinda Menon however admits that the plaintiff must pay for all these improvements and states that he is willing to do so. As the suit is to be remanded in any case I need not now go into the question whether a Court in second appeal would ordinarily allow this remedy to the plaintiff if that were the sole dispute between the parties. Defendant 8 has also appeared by an advocate in this Court and has asked that whatever orders may be passed in this appeal, his rights as a sub-mortgagee should be preserved. If the plaintiff is successful this defendant will be entitled to the value of the improvements he has made upon the land; and the plaintiff does not deny that this defendant possesses that right. The quantum of compensation will of course be determined by the trial Court.

In the result the appeal is allowed and the suit remanded to the trial Court with the following directions: The plaintiff will be permitted to add the heirs of Karthiyayini Amma as parties. If they raise no objection to a decree being passed no further evidence on any issues raised in the suit except that of the value of the improvements will be necessary. In the unlikely event of their resisting the plaintiff's suit, some further issues and evidence may be necessary. The learned District Munsif has already given findings with regard to the value of the improvements on the property covered by the

5. Ramanathan Chettiar v. Annamalai Chettiar, A I R 1934 Mad 367=150 I C 602=57 Mad 1031=66 M L J 451.
6. Kherodamoyi Dasi v. Habib Saha, A I R 1925 Cal 152=82 I C 638=29 C W N 51.

plaint. He will now permit the plaintiff to amend his plaint and ask for the redemption of all the items mortgaged. Evidence may, of course, be adduced with respect to the items not covered by the original plaint. The District Munsif will then pass a decree in accordance with his findings. As the plaintiff has had to appeal not only because of his negligence in failing to add Karthiyayini Amma as a party in the lower Courts, but also because the learned Subordinate Judge gave a wrong decision against him on the question of the interpretation of Ex. A, I order all parties to bear their own costs in the two appellate Courts. Refund of court-fee in both appellate Courts is allowed. Leave to appeal refused.

C.R.K./S.C. *Case remanded.*

A. I. R. 1937 Madras 523

VARADACHARIAR, J.

Secretary of State — Appellant.

v.

R. S. S. Narayana Ayyar and *another* — Respondents.

Second Appeals Nos. 1164 and 1265 of 1931, Decided on 30th October 1936, against decree of Dist. Court, Tinnevelly, in A. S. No. 65 of 1930.

(a) Grant—Inam — Channel coming into existence after inam grant—Ownership in bed—Presumption is in favour of inamdar—Channel serving inam village and villages above and below inam village—Court has to draw inferences as to arrangements at time of construction.

In cases where a channel is shown to have come into existence after the inam grant, the presumption of ownership even in respect of the bed of the channel will be stronger in favour of the inamdar; but the Court will have to draw inferences as to the arrangement under which the channel, serving not merely the Inam village but other villages above and below, is likely to have been constructed: *28 Mad 539, Ref.* [P 525 C 2]

(b) Grant—Inam—Channel beds — Rights and limits of inamdar in channel beds flowing through inam villages explained—Rights of Government owning villages lower down same channel explained—Removal of stones from river bed by inamdar does not amount to damage by itself—Inamdar need not give notice to Government of acts done by him with respect to channel.

The inamdar must be held to have some interest in the bed of the channel, to the extent required to enable him to maintain it in an efficient condition as a source of irrigation for his lands. Further, even if his right to take water for irrigating the Inam lands be put no higher than an easement, he would be entitled under S. 24, Easements Act, to do on the servient tenement (i. e. the bed) all acts necessary to secure the full enjoyment of the easement, subject of course to the limitations indicated in that section. In like manner, the Government by reason of its interest in villages lower down, may be entitled to do certain acts on the bed of the channel within the Inam limits, even if this portion of the bed should be held to be the property of the inamdar. Such acts whether done by the inamdar or by the Government cannot be said to amount to a trespass. The removal of the stones from the channel beds cannot by itself be said to 'damage' the servient heritage. It seems unjustifiable to impose on the inamdar the duty of giving notice to the Government officers before the inamdar could do what he is legally entitled to do, viz., to clear silt or effect repairs to the channel within his limits. [P 528 C 1]

(c) Civil P. C. (1908), S. 79—Suit by Government—Government should not stand in same position as private litigant—It should insist on its officers to see that facts on which action is founded are reasonably true—Private person's offer to indemnify Government for costs should not weigh with Government.

The Government while filing a suit through the Secretary of State against a private person should not regard itself as standing in the same position as a private litigant. In the public interests, it should insist that its officers should take upon themselves a due share of responsibility in satisfying themselves that the allegations on which the suit is sought to be founded are reasonably true and not be led away by emphatic assertions made by private parties or even by their offer of indemnity as to costs. [P 528 C 2]

Govt. Pleader — for Appellant.

T. L. Venkatarama Iyer, L. Krishnaswamy Iyer, R. Sankaran and *T. M. Krishnaswami Ayyar* — for Respondents.

Judgment.—These cross-appeals arise out of the same suit and they may be dealt with together. The suit was instituted by the Secretary of State against the Sri Vyasaraya Swami Mutt (defendant 2) which through its lessee, defendant 1, was in possession of the inam village of Vagaikulam in the Tinnevelly District. The lands in this village are irrigated by an artificial channel known as the "North Kodaimelalagiankal" taking off from the Tambaraparni River. After flowing through a number of ayan villages and inam villages, this channel, at its tenth mile, enters the Vagaikulam village and after flowing through that village for three-quarters of a mile it enters the Government village of Mannarkoil and finally empties itself into certain ayan tanks. There have been prior litigations between the parties as to the extent of the rights possessed by the Mutt to take

water from this channel. But this litigation is of a somewhat different character. The plaint alleged that on 9th and 10th June 1926, defendant 1 deepened the bed of the channel to a depth of one foot three inches to a distance of about 680 feet between the points marked B and C in the plan, Ex. A. It also alleged that he widened the channel by cutting and removing a number of stones which composed the rocky bed of the channel and served to keep the water course within narrow limits. The plaintiff complained that as the result of these acts of defendant 1, the flow of water into channels taking off from this channel and irrigating ayan lands was greatly retarded and diminished and that a larger volume of water flowed into the branch channel irrigating the defendants' inam lands. The plaint accordingly prayed for a preventive injunction restraining the defendants from interfering with the N. K. Channel and for a mandatory injunction directing the defendants to restore the channel bed to the condition in which it was prior to June 1926 when the defendants made the alterations complained of. The right to relief was based on three grounds, namely, (1) injury to the irrigation of ayan lands; (2) ownership of the channel being in the Government; and (3) the paramount authority of the Government to control the channel from its commencement to its end.

The written statements denied the allegations of fact as well as the propositions of law put forward in the plaint. Six issues were framed in the case, of which it is sufficient to refer to issues 1, 2, 4 and 5. Issue 1 raised the question of the ownership of that portion of the N. K. Channel which lies within the inam limits. Issue 2 related to the plaintiff's claim of paramount right. Issues 4 and 5 related to the allegations of fact in the plaint as to the deepening and the widening of the channel by defendant 1 and the consequent interference with the flow of the water. Issue 6 was merely consequential, namely, whether the plaintiff was entitled to the injunctions claimed.

Issues 1 to 3 were by agreement of parties not dealt with in the Courts below, because it was expected that they might in substance be decided by this Court in Second Appeal No. 309 of 1928. I do not think it necessary for the purpose of this case to deal with issue 3 and I therefore make no further reference to it. On issues 4 and 5 the trial Court found against the plaintiff and consequently dismissed the suit. But, on appeal, the learned District Judge while affirming the finding of the trial Court on issue 5, came to a different conclusion on issue 4. He held that the interference by defendant 1 with the bed of the channel had not led to any material diminution in the supply of water to the ayan lands and that the interference was not to the extent alleged in the plaint; but he came to the conclusion that the defendants

> caused the removal of many stones imbedded in the channel of fairly large dimensions and also got one or two of the pivotal stones, ten feet below the point B in the plan cut and removed.

On these findings he refused to grant the mandatory injunction asked for in the plaint, but granted a permanent injunction

> restraining the defendants from interfering in any way with the N. K. Channel except for the purpose of clearing the silt and making such annual repairs thereto as are usual and necessary.

He added that even these repairs

> should be carried out in case where the inamdar has got the right or is under an obligation to do such repairs, only after due and previous intimation to the P. W. Department or officers.

The Secretary of State has preferred S. A. No. 1164 to obtain the mandatory injunction as well. The Mutt has preferred S. A. No. 1265, complaining that even the preventive injunction ought not to have been granted. I see no reason to interfere with the findings of fact of the lower appellate Court that the bed of the channel has been interfered with in the manner and to the extent stated in the passage above extracted but that there has been no material diminution in the supply of water to the ayan lands. The question for determination in the second appeals is, what relief, if any, is the plaintiff entitled to on these findings? On behalf of the Mutt, Mr. Krishnaswami Ayyar has contended that as the rights of the Secretary of State to the flow of water in the channel are only in the nature of easement rights, the suit should have been dismissed when once the Court came to the conclusion that the alleged acts of interference by the defendant had not diminished the flow of water to the ayan lands. To clear the ground, I may add that the case for the Government has not been based on any claim of riparian ownership; in that case, a question may arise whether the mere interference with the bed of the channel by an upper ripa-

rian owner will not justify a claim by the lower owner to have that interference removed, apart from proof of damage resulting therefrom. On behalf of the Government, it has been contended that the Government is the owner of the bed of the channel even within the limits of the inam village and that therefore the acts of interference found by the lower appellate Court constitute trespass, justifying the award both of the preventive injunction and also of the mandatory injunction asked for in the plaint. Alternatively, the claim based upon the paramount right of the Government to control the channel has also been pressed. In reply Mr. Krishnaswami Ayyar has contended that the paramount right relates only to the regulation of the flow of water in the channel by acts done by the Government on their own portion of the channel and would not entitle them to interfere with the bed of the channel within the inam limits or complain of any interference with that portion of the bed by the inamdar. On the question of the ownership of the bed of the channel within the inam limits, he contended that it is the inamdar and not the Government that should be held to be the owner.

I may at this stage mention that the questions which were raised by issues 1 and 2 and which the parties hoped would be decided by the judgment of this Court in S. A. No. 309 of 1928 have not been decided by that judgment, because the learned Judges found it possible to decide that second appeal on their conclusion as to the extent of the easement right possessed by the Mutt. In the ordinary course, it might accordingly have become necessary for me to ask the lower Court to try and decide these issues. But to save time, all the parties agreed before me that I might myself decide these two issues on the evidence on record in this suit as well as in S. A. No. 309 of 1928. The questions raised by the two issues have accordingly been argued before me at some length: but the argument has been more on points of law than on matters of evidence, because barring the entries in the inam register, there is very little evidence bearing upon the question of the ownership of the channel within the inam limits. The original Parvana, a copy of which seems to have been produced before the inam authorities, is not now forthcoming nor even that copy; it is not therefore possible to gather the exact terms in which the grant was couched. Some reference was made to repairs made by the Government to the N. K. Channel; but there is nothing to show that the Government made any repairs to that portion of the channel which lies within the inam limits. I have therefore to decide the question of ownership of the bed of the channel practically as a question of law. I may add that in view of the information gatherable from 28 Mad 539,[1] I am proceeding on the assumption that the N. K. Channel was in existence even before the date of the inam grant to the Vyasaraya Mutt, because this grant appears to have been made only in 1753 while it is stated in 28 Mad 539[1] that the channel was found to have come into existence even before a grant made in 1614. In cases where a channel like the present is shown to have come into existence after the inam grant, the presumption of ownership even in respect of the bed of the channel will be stronger in favour of the inamdar; but the Court will have to draw inferences as to the arrangement under which the channel serving not merely the inam village but other villages above and below is likely to have been constructed.

Dealing with the relief to which the plaintiff was entitled, the learned District Judge observed that even on the footing that the inamdar was the owner of the N. K. Channel within his limits, the interference with the bed was wholly unwarranted and illegal, independently of any question of its effect in diminishing the supply of water to other tanks or lands and independently of the motives operating on the mind of the defendants. I am not able to concur in this unqualified statement of the law. Rather inconsistently the learned District Judge adds, at the end of the paragraph, that the defendants had no right to interfere with the channel by deepening or widening it or by rendering it narrower or more shallow so as to increase or lessen the quantity of water flowing through it and thus affect other lands and landowners. I propose to deal with the case only on the footing that it has been found that the defendants' acts of interference have not materially or appreciably diminished the supply of water to the lands or tanks of other owners.

1. Ambalavana Pandara Sannathi v. Secretary of State, (1905) 28 Mad 539=15 M L J 251.

I do not see how the paramount right of the Government to regulate the distribution of water for purposes of irrigation will give them a right to complain or ask for relief on the above findings, if it be assumed that the bed within the Inam limits belongs to the inamdar. In 32 Mad 141[2] at p. 156, it was recognized that even for the purpose of exercising this right of control, Government cannot commit an act of trespass. It is one thing to say (as observed in the same case on p. 160) that the grant to the proprietor 'was subject to the paramount rights of Government to control' the waters of the stream or channel for purposes of irrigation, but another thing to say that Government can exercise the same rights on the bed of the stream or channel within proprietary limits as on the portion of the bed outside those limits. In 22 M L T 345,[3] Rahim and Srinivasa Ayyangar, JJ. emphasized the limits of the paramount power claimed for the Government, though in the interests of other lands dependent on the particular system of irrigation, they took care to direct the mittadar to keep the channel and the works connected therewith in proper repair and efficient condition. In 42 Mad 239[4] at p. 254, Rahim, J. observed that this paramount authority cannot supersede the rights of the riparian proprietors.

If however the Government can maintain that the bed of the channel even within the inam limits is vested in the Government, any act of interference with it by the inamdar will amount in law to trespass, unless justified by custom or by some implication of a limited grant. This question of ownership of the bed of the channel within the inam limits is not by any means free from difficulty. In the former litigation which culminated in S. A. No. 309 of 1929, the lower Courts assumed that the decisions in 28 Mad 539[1] and 24 M L J 36[5] had in effect been overruled by the Privy Council in 40 Mad 886.[6] I do not think this is a correct reading of the decision in the *Urlam case*.[6] In all the water cess cases that went up to the Privy Council, their Lordships found it possible to uphold the claim of the proprietor by a decision in his favour as to the extent of water right that he was entitled to, independently of any question as to the ownership of the bed of the stream. The decision in 55 Mad 268[7] illustrates this. By a liberal interpretation of the reference to 'engagement' in the Irrigation Cess Act, their Lordships were prepared to hold that the immunity from cess extended to the full right of water supply which the proprietor can claim either by grant or by prescription or as a riparian right. In 55 Mad 268[7] at p. 280 they explain the decision in the *Urlam case* [6] as one relating to 'easement right' determined no doubt with reference to the terms of the Sanad. In 43 Mad 529[8] they preferred to have their decision on an implication of an engagement arising out of a prescriptive easement, though at the end of the judgment they added that they did not intend to differ from the conclusion arrived at by the High Court: *see* 30 M L J 163[9] on the question of the ownership of the bed of the river. The observations in 55 Mad 268[7] establish that the ownership of the stream referred to in the Irrigation Cess Act is the ownership of the bed and not of the volume of the water as an independent entity.

The decisions in 22 M L T 345[3] and 30 M L J 163[9] and of the Full Bench in 42 Mad 239[4] are no doubt authorities for the proposition that in the case of zamindaris, the bed even of natural streams, so far as they lie within zamindari limits, would *prima facie* belong to the proprietor. This view may also be said to be supported by the observations of the Judicial Committee in 40 Mad 886[6] at pp. 900, 903 and 904. The question is, whether the same conclusion holds good in the case of inams. Government have been contending that even in respect of water rights, the *Urlam* decision should not be applied to inamdars; but even if this con-

2. Fischer v. Secretary of State, (1909) 32 Mad 141=2 I C 325=19 M L J 131.
3. Secretary of State v. Palaniappa Pillai, A I R 1918 Mad 608=41 I C 24=22 M L T 345.
4. Chinnappan Chetty v. Secretary of State, A I R 1919 Mad 412=49 I C 673=36 M L J 124=42 Mad 239 (F B).
5. Narayanaswami Naidu v. Kanniappa Naidu, (1913) 24 M L J 36=14 I C 261.
6. Bala Surya Prasada Row v. Secretary of State, A I R 1917 P C 42=41 I C 98=44 I A 166 = 40 Mad 886 (P C).
7. Secretary of State v. Subbarayudu, A I R 1932 P C 46=136 I C 413 = 59 I A 56 = 55 Mad 268 (P C).
8. Secretary of State v. Maharaja of Bobbili, A I R 1919 P C 52=54 I C 154=46 I A 302= 43 Mad 529 (P C).
9. Secretary of State v. Maharaja of Bobbili, A I R 1916 Mad 946 =32 I C 279 = 30 M L J 163.

tention should be held to be untenable, it would not necessarily follow that the question of ownership of the bed should be decided alike in both cases, for the decision in 55 Mad 268[7] shows that the question of water rights may be dissociated from that relating to the ownership of the bed.

In 28 Mad 539[1] and 24 M L J 36[5] weighty reasons have been suggested in favour of the view that where a main channel is the source of irrigation not merely for an inam village but for other Ayan villages also, it must be presumed that the channel was not intended to be comprised in the gift to the inamdar. 28 Mad 539[1] related to the very channel now in question. In 36 M L J 203[10] at p. 207, Sadasiva Ayyar, J. expressed the opinion that the decision in the *Urlam case*[6] overruled the view expressed in these cases in river porambokes and channel porambokes in whole inam villages. I am, with all respect, unable to concur in that opinion. That considerations of the kind referred to in these decisions are not irrelevant to the question is shown by the observations of the Judicial Committee in 40 Mad 886[8] at p. 903. In 23 M L J 109[11] Benson and Sundara Ayyar, JJ. treated the question of the inamdar's ownership of the bed of the channel as one depending on the circumstances of each case and laid stress on the fact that the stream concerned in the case before them was not part of any larger irrigation system maintained by the Government. In 24 M L J 36[5] Sankaran Nair, J. reserved his opinion on this point and in 37 Mad 369*n*[12] at pp. 370 and 371, he expressed his conclusion as a finding on the facts of that case and not as one based on any general principle. In 41 Mad 840[13] reference was made to a Full Bench, in connexion with an inam grant, of the question whether the English rule of construction that a grant carries the bed of an adjoining river *ad medium filum* is applicable in India; the Full Bench gave a guarded answer to the effect that the presumption applied, but it may be strong or weak according to the circumstances. It was however added that the onus of showing that the grant did not convey the bed was on the grantor. Whether the considerations adverted to in 28 Mad 539[1] and 24 M L J 36[5] would suffice to rebut the presumption remains an open question.

The decision in 44 Mad 421[14] has introduced a further difficulty. The presumption of *ad medium filum* ownership of the bed has to be based on the ownership of the banks and the adjoining lands; but in 44 Mad 421,[14] the Judicial Committee has recognized only a qualified kind of ownership in the inamdar, even in respect of the lands comprised in the inam, except when the terms of the grant expressly create a larger right. Assuming it is a grant of the land and not merely of the revenue, they say 'it was not a complete transfer of all that was in the grantor but merely something carved out of his larger interest'. In their view, the only benefit contemplated or intended for the grantee would ordinarily be the 'use of the land for the purposes of cultivation'. In 57 Mad 460,[15] the learned Judges were prepared to treat even this kind of interest as 'ownership' for certain purposes. It may be open to question whether the presumption of *ad medium filum* ownership of the bed of a river or channel skirting or flowing through an inam village could be based on this kind of ownership of the adjoining lands. In 28 Mad 539,[1] the terms of the Sanad relating to the grant of a neighbouring village irrigated by the same channel are set out and they are such as may amount to a grant of full ownership even according to the test indicated in 44 Mad 421.[14] As already stated, the original Parvana or even a copy of it is not available in the present case.

In the above state of the authorities, I should have preferred to place the case before a Bench (or even a Full Bench) if I thought that for the disposal of these Second Appeals, it was necessary to come to a positive conclusion as to the nature

10. Venkatarama Sivan v. Secretary of State, A I R 1919 Mad 765 = 50 I C 360 = 36 M L J 203.
11. Secretary of State v. Venkataratnammah, AIR 1914 Mad 482=15 I C 594 = 37 Mad 364n= 23 M L J 109.
12. Secretary of State v. Ambalavana Pandarasannadhi, A I R 1914 Mad 552 = 18 I C 294 =37 Mad 369n.
13. Venkata Lakshmi Narasamma v. Secretary of State, A I R 1919 Mad 965 = 47 I C 606=41 Mad 840=35 M L J 159 (F B).
14. Secretary of State v. Srinivasachariar, A I R 1921 P C 1=60 I C 230=48 I A 56=44 Mad 421 (P C).
15. Venkatakrishnama Raju v. Suryanarayana Raju, A I R 1934 Mad 373=151 I C 129=57 Mad 460=67 M L J 544.

and extent of the inamdar's interest in the bed of the channel. But it seems to me that this case can be disposed of on narrower grounds. Even on the principle stated in 28 Mad 539[1] and the qualified ownership recognized in 44 Mad 421,[14] the inamdar must, it seems to me, be held to have some interest in the bed of the channel, to the extent required to enable him to maintain it in an efficient condition as a source of irrigation for his lands. Further, even if his right to take water for irrigating the inam lands be put no higher than an easement, he would be entitled under S. 24, Easements Act, to do on the servient tenement (i. e., the bed) all acts necessary to secure the full enjoyment of the easement, subject of course to the limitations indicated in that section. In like manner, the Government, by reason of its interest in villages lower down, may be entitled to do certain acts on the bed of the channel within the inam limits, even if this portion of the bed should be held to be the property of the inamdar. Such acts, whether done by the inamdar or by the Government, cannot be said to amount to a trespass. On the findings, I cannot hold that what the inamdar has done in the present case was done for any other purpose than to make that portion of the channel efficient as a source of irrigation. It is in this view that I am unable to concur in the opinion of the learned District Judge that the motive or purpose of the inamdar in doing these acts is immaterial. The removal of the stones cannot by itself be said to 'damage' the servient heritage. The gravamen of the plaintiff's complaint was that the defendant's acts interfered with the supply of water to the ayan villages or at least increased the supply to the inam lands. But this allegation has been found against by both the Courts. It seems to me unjustifiable to impose on the inamdar the duty of giving notice to the plaintiff's officers before the inamdar could do what he is legally entitled to do, viz., to clear silt or effect repairs to the channel within his limits. The result is that S. A. No. 1164 is dismissed, S. A. No. 1265 is allowed and the suit dismissed with costs throughout, of defendant 2. Time for payment of costs, 3 months.

Before taking leave of the case, I must express my dissent from the way the learned District Judge has criticized the District Munsif's treatment of the part played by P. W. 6 in this litigation. I quite agree that in the decision of the merits of the case, such considerations have no place; but they are relevant to the question of the award of costs. More than that, I would emphasize that in the matter of starting a litigation of this kind, the Government should, in my opinion not regard itself as standing in the same position as a private litigant. In the public interests, it should insist that its officers should take upon themselves a due share of responsibility in satisfying themselves that the allegations on which the suit is sought to be founded are reasonably true and not be led away by emphatic assertions made by private parties or even by their offer of indemnity as to costs. Leave granted.

C.R.K./B.D. *Order accordingly.*

A. I. R. 1937 Madras 528

HORWILL, J.

P. P. Sundararaja Ayyangar — Petitioner.

v.

P. L. Mannarsami and *another* — Opposite Parties.

Civil Revn. Petn. No. 343 of 1935, Decided on 4th January 1937, from decree of Dist. Munsif, Tanjore, in S. C. S. No. 610 of 1934.

Partnership Act (1932), Ss. 69 and 74 — Applicability—Suit by unregistered partnership after Act came into force for recovery of loan borrowed before Act — Such suit is not maintainable.

Though S. 74, Partnership Act, keeps intact any rights that may have accrued before the Act came in force, it does not affect the enforcement of that right by means of a suit which is governed by S. 69 of the Act. So a suit by an unregistered partnership brought after the Act came into force for the recovery of money borrowed before the Act is not maintainable. [P 529 C 1]

R. Kesava Iyengar — for Petitioner.

K. V. Sesha Iyengar — for Opposite Parties.

Order.—This was a suit by an unregistered partnership against a debtor. The only question raised in the suit and in this petition is whether in view of the fact that the money was borrowed before the Indian Partnership Act came into force the suit is maintainable in the face of S. 69 of the Act.

Section 69 makes it clear that no suit of this description can be brought after the Act comes into force. It is argued that this is controlled by S. 74; but S. 74,

in my opinion, although it keeps intact any rights that may have accrued before the Act came into force does not affect the enforcement of that right by means of a suit which is governed by S. 69. By virtue of S. 1 of the Act, S. 69 came into force one year after the rest of the Act and undoubtedly the purpose of this is to give persons a year's grace in bringing suits of this description or in getting themselves registered. In view of the plain wording of S. 69, I find that the learned District Munsif was wrong in holding that this suit was maintainable and in granting a decree. The petition is therefore allowed with costs throughout and the suit dismissed.

C.R.K./W.D. *Petition allowed.*

A. I. R. 1937 Madras 529

MOCKETT AND HORWILL, JJ.

Amina Bibi — Petitioner.

v.

Kadir Batcha Rowther —

Opposite Party.

Civil Revn. No. 1413 of 1935, Decided on 20th January 1937, from order of Addl. Sub-Judge, Coimbatore, D/- 23rd August 1935.

(a) Court-fees Act (1870), S. 7 (iv) (c)—Claim for declaration and consequential relief—Relief falling under S. 7 (iv) (c) as well as under other specific classes of suits — Court-fees are to be paid under that specific provision and not under general provision of S. 7 (iv) (c).

A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief *prima facie* comes within Cl. (iv), sub-cl. (c), S. 7, Court-fees Act; but if at the same time it comes within any of the other classes of suits specified in the section, it must be treated as a suit of that description and dealt with accordingly : *A I R 1915 Mad 948 (F B)* and *27 Mad 480, Foll.*; *A I R 1933 Mad 42* and *A I R 1933 Mad 93, Dissent.*; *A I R 1929 Mad 529* and *A I R 1931 Mad 24, Expl.* [P 529 C 2]

(b) Court-fees Act (1870), S. 7 (iv) (Madras Amendment)—Effect of — Amendment has not changed law as regards applicability of sections — It merely settles lower limit to court-fee payable under certain circumstances coming under S. 7 (iv).

By the Madras amendment to S. 7 (iv), Court-fees Act, it was never intended by the Legislature to alter the law as to the applicability of the sections of the Court-fees Act, but merely to settle a lower limit to the amount of court-fee payable under certain circumstances which come within the mischief of S. 7 (iv) of the Act. [P 530 C 2]

1937 M/67 & 68

R. Desikan — for Petitioner.

N. Srinivasa Iyengar — for Government Pleader.

T. R. Ramachandran — for Opposite Party.

Horwill, J.—A suit was brought for a declaration that a certain property gifted to the plaintiff by her husband, who subsequently became an insolvent, was her property and for possession of the property which had been taken possession of by the Official Receiver as part of the estate of her insolvent husband. The question that has been referred to us is whether the consequential relief of possession is to be valued according to S. 7 (iv) (c), Court-fees Act, or S. 7 (v). There is a long line of authority for the position that where the consequential relief is such as to fall directly under some other section of the Court-fees Act, the suit has to be valued under that special section and not under the general head of consequential relief, which would make it fall under S. 7 (iv) (c). This principle was enunciated as long ago as in 27 Mad 480[1] by Boddam and Bhashyam Ayyangar, JJ. and seems to have been accepted as axiomatic in the Full Bench case 38 Mad 922.[2] At the very outset of the judgment of the Bench it is laid down :

> A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief *prima facie* comes within Cl. iv, sub-cl. (c), S. 7, Court-fees Act; but if at the same time it comes within any of the other classes of suits specified in the section, it must be treated as a suit of that description and dealt with accordingly.

This decision of the Full Bench case has been followed consistently in this Court. It is contended that this expression of opinion by the Full Bench was *obiter*, but I have no doubt that it was a fully considered opinion in answer to the terms of the reference made to it; and even though it be *obiter*, I respectfully consider it to be a correct expression of the law which had been laid down in the earlier Madras cases and has been followed in a number of cases since. Venkatasubba Rao, J. in 68 M L J 369[3] refers to this opinion and adopts it, and it came before

1. Chinnammal v. Madarsa Rowther, (1904) 27 Mad 480.
2. Arunachalam Chetty v. Rangaswamy Pillai, A I R 1915 Mad 948=28 I C 79=38 Mad 922 =28 M L J 118 (F B).
3. Ramakrishnayya v. Seshamma, A I R 1935 Mad 346=156 I C 840=68 M L J 369.

the same Judge again in 58 Mad 1051,[4] where it was argued that as it was a consequential relief it should fall under S. 7 (iv) (c). That argument was repelled again by the weight of the authority just referred to. Since that decision the same principle has been upheld by Varadachariar, J. in 70 M L J 398[5] which was followed by Beasley, C. J. in C. R. P. No. 803 of 1935, where he says that because the plaintiff asked for possession, it must come under S. 7 (v) and not under S. 7 (iv) (c).

As against this current of authorities, four cases have been quoted. One is 29 M L W 760,[6] to which Venkatasubba Rao, J. was a party. He refers to this case in 68 M L J 369[3] and says that in the earlier case it was held that where there was a prayer for possession, if it was a consequential relief, it would fall under S. 7 (iv) (c), but that that suit was one relating to jurisdiction and the question whether it fell for the purpose of court-fee under S. 7 (iv) (c) or under S. 7 (v) was neither raised nor considered. Of the other cases, the earlier is 36 M L W 793,[7] in which Pandalai, J. expressed the opinion that if possession was a consequential relief it fell under S. 7 (iv) (c); but the reason given by him for that decision was one which, with all due respect for the learned Judge's opinion, I cannot accept. He says that the suit was primarily one for possession and the declaration sought was only ancillary to the prayer for possession. This in my opinion seems to be an excellent reason for holding that the case comes under S. 7 (v) and not under S. 7 (iv) (c); and the learned advocate for the petitioner concedes the position that if the main prayer is one for possession and the prayer for declaration is only ancillary to it, S. 7 (v) and not S. 7 (iv) (c) applies. In 61 M L J 39,[8] the third case relied on by the petitioner, the question whether S. 7 (v) or S. 7 (iv) (c) applied was not decided. The plaintiff in that case appealed and the applicability of S. 7 (v) was not considered because it was clear that under S. 7 (v) he would have to pay a higher court-fee than he had already paid, and the only question that arose before that Court was whether the plaintiff would be permitted to pay a lesser court-fee than that leviable under S. 7 (iv) (c). The last case quoted on behalf of the petitioner is 56 Mad 314,[9] to which my learned brother was a party. That case was rather a peculiar one in which an inamdar sought to oust a tenant from possession, not so much because he wished to obtain possession but in order to assert his right to the kudivaram. In so far however as the learned Judges who decided that case applied a principle which seems in conflict with that applied by the Full Bench in 38 Mad 922,[2] I am of opinion that the test applied in 56 Mad 314,[9] is not correct.

In view of the fact that there is a very strong current of opinion in this Court and that the expressions of opinion to the contrary are not in my opinion of considerable importance, I have no doubt that the petitioner must pay court-fee under S. 7 (v) upon the total value of the property involved. It has been argued that the Madras amendment to S. 7 (iv) has altered the law as to the interpretation of the clauses of S. 7 (iv); but it seems to me clear that it was never intended by the Legislature to alter the law as to the applicability of the sections of the Court-fees Act, but merely to settle a lower limit to the amount of court-fee payable under certain circumstances which came within the mischief of S. 7 (iv) of the Act. This petition is therefore dismissed. As regards costs, this petition is one between the plaintiff and the Government. The respondent is in no way interested in the result of the appeal. In fact, his interests, if any, are the same as the plaintiff's. I therefore dismiss the petition with the costs of the Government pleader only. The respondent will bear his own costs.

Mockett, J.—I agree. An argument has been addressed to us that a different view of this topic has been taken by the other High Courts in India. Cases have been cited showing that that is so. I think it is much too late in the day in view of the trend of authorities in this Presidency to ask us to depart from the view taken in

4. Maroof v. Ayyakannu, A I R 1935 Mad 569=157 I C 94=58 Mad 1051=68 M L J 755.
5. Sellammal v. Jothimani Nadar, A I R 1936 Mad 411=161 I C 679=70 M L J 398.
6. Ramalinga Mudaliar v. Ramaswami Iyer, A I R 1929 Mad 529=119 I C 577=29 M L W 760.
7. Koraga Gowda v. Somappa Gowda, A I R 1933 Mad 93=140 I C 585=36 M L W 793.
8. Venkatlal v. Kosaldasu Bavaji, A I R 1931 Mad 24=130 I C 449=61 M L J 39.
9. *In re* Sobhanadri Rao, A I R 1933 Mad 42=140 I C 462=56 Mad 314=63 M L J 759.

Madras. The law governing the matter is clearly stated in the Full Bench decision 38 Mad 922.[2] As I was a party to the decision in 56 Mad 314,[9] I think I should express something more than a bare agreement with what my learned brother has said. In that case it will be observed that there was neither the argument which has been so fully put before us now, nor even the reference to the Full Bench decision. In the very special circumstances of that case we took the view that as the primary object of the suit was for a declaration, S. 7 (iv) (c) was applicable. But after hearing the present argument, it does appear to me that in view of the undoubted claim for possession which followed the decision in that case, 56 Mad 314[9] does not appear to be consistent with the view expressed in the Full Bench decision in 38 Mad 922.[2] The case law has been summarized by Venkatasubba Rao, J. in 58 Mad 1051[4] and I agree with the views expressed therein. I agree that this Civil Revision Petition should be dismissed with costs of the Government pleader.

C.R.K./B.D. *Petition dismissed.*

A. I. R. 1937 Madras 531

MOCKETT AND HORWILL, JJ.

R. Krishnamurthy Ayyar — Petitioner.

v.

Pasupuletti Munuswami and *another* — Opposite Parties.

Civil Revn. No. 1741 of 1935, Decided on 20th January 1937, from order of Dist. Munsif, Tirupati, D/- 25th October 1935.

Rateable distribution — Immoveable property given as security for satisfaction of decree—If it creates charge in favour of decree-holder it is not available for rateable distribution to other judgment-creditors.

Where an immoveable property is given as security for the satisfaction of the decree it is a question of investigation in each case as to whether it is intended that a charge should be given on any property. If it is found that the property is charged and is security to the decree-holder, then it is not available for rateable distribution to third parties : *A I R 1918 Mad 442* ; *A I R 1919 Mad 607* and *A I R 1920 Mad 409, Rel. on* ; *A I R 1918 Mad 1158, Expl.* [P 532 C 1, 2]

T. K. Srinivasathathachariar — for Petitioner.

A. C. Sampath Iyengar — for Opposite Parties.

Mockett, J. — The petitioner is the decree-holder in S. C. S. No. 167 of 1933. The decree was against two defendants. It ordered them jointly and severally to pay a sum of money and with regard to defendant 2 it said :

> It is further ordered that the decree against defendant 2 shall stand stayed in case he pays on the 5th of every month commencing from 5th July 1933, at the rate of Rs. 10 per mensem until the decree is satisfied ; in case of default of any instalment this stay order will cease. The stay order will also have effect only on defendant 2 furnishing security of immovable property for the decree amount and agreeing to pay interest at 9 per cent. per annum on or before 5th July 1933.

A security bond was executed by defendant 2 and it referred to certain immoveable property and stated :

> I will be paying without default the said decree amount as per order of Court by the 5th of each month. In case of default of any instalment as aforesaid, the balance that may then be due after giving credit to payments so far made, may be recovered in one lump sum from me and from my properties described in the schedule hereunder and I can have no objection thereto. Until the aforesaid decree amount is fully realized I have kept the aforementioned property belonging to me viz., my house worth about Rs. 1,000 as security. I shall not alienate in any manner the said house until the aforesaid decree amount is fully satisfied.

In our view that surety bond and the decree clearly created a charge on the property concerned in favour of the decree-holder. Now respondent 1 filed an application for rateable distribution in this case and that was allowed by the District Munsif on the ground shortly that no charge was created on the property. The other questions raised in this revision petition were apparently not argued. It was decided on the question of charge or no charge. Mr. Srinivasathathachariar has argued that on the authority of three decisions of this High Court this property is not available for rateable distribution. We consider that proposition is amply supported by the cases he cited and there appears to be no real difference of opinion in the authorities in this High Court as has been suggested by Mr. Sampath Iyengar. Two of the cases are reported in 41 Mad 327,[1] and the other, 41 Mad 1053.[2] At p. 327 of 41 Mad,[1] a Bench consisting of Wallis, C. J. and Kumaraswami Sastri, J. considered much the same ques-

1. Subramania Chettiar v. Raja of Ramnad A I R 1918 Mad 442=43 I C 187 = 41 Mad 327=34 M L J 84.
2. Ramiah Iyer v. Gopala Aiyar, A I R 1919 Mad 607 = 49 I C 20 = 35 M L J 355 = 41 Mad 1053.

tion which we have to consider now and at p. 332 the learned Judges held as follows:

> The effect of immoveable property being given as security is something more than attachment because it makes the property applicable solely in discharge of the judgment debt and not liable to rateable distribution among other judgment creditors,

and on the facts in that case it was held that the immoveable property in question had been given as security and that a charge was therefore created upon it. In the other case at p. 1053 the position was most carefully considered by Ayling and Coutts-Trotter, JJ. Coutts-Trotter, J. in giving the judgment of the Court refers to a statement of the law as given in 41 Mad 327[1] to which we have just referred and cites that very passage obviously with approval. The effect of both these cases does not seem to be very difficult. It amounts to nothing more than this that it is a question of investigation in each case as to whether it was intended that a charge should be given on any property. If it is found that the property is charged and is security to the decree-holder, then it is not available for rateable distribution to third parties. 41 Mad 327 has been followed in another decision of this High Court in 11 M L W 6.[3] There does not therefore seem to us to be any room for difficulty. But some difficulty has been raised in this matter by Mr. Sampath Iyengar who has argued this case on behalf of respondent 1 because he says that in a Madras decision, in 32 M L J 503[4] at p. 505, the Bench, while accepting the position that money may be made security for a decree debt, queried whether the same principles may be applicable to immoveable property. At p. 505 the following appears:

> The case may be different, though it is not necessary to express any opinion with regard to that question, if what is furnished as security is specific property such as land. In such a case it might be possible to contend that the defendant is not in fact the owner of the property but somebody else and that the title of the real owner would not be lost. But money stands on a different footing.

In that case a complication had arisen because the money given as security belonged to a joint family. But the query raised by the learned Judges in that case is in our opinion entirely disposed of by all the three authorities to which we have referred and it is clear from them that those learned Judges at least found no difficulty in accepting the position that immoveable property can be made security under circumstances such as these equally as in the case of money. It is suggested that S. 73, Civil P. C., presents a difficulty here. Proviso (c) is not applicable because immoveable property in this case was not sold in execution of the decree ordering its sale for the discharge of an incumbrance thereon. Therefore, says Mr. Sampath Iyengar, the plain words of the section apply and the assets have to be distributed to all persons having any claims thereto. That appears to us to beg the question because that argument must be on the basis that land cannot be given as security. Indeed we think that Mr. Sampath Iyengar was bound to take up the attitude that the decisions to which we have referred are wrong; otherwise the answer which they give, *viz.*, that the property is not available for rateable distribution is clearly an answer to the very wording of S. 73 (1). The whole question when considering rateable distribution in a matter of this kind is to consider whether the property is open to the other decree-holders and the effect of the authorities to which we have referred is that if it is charged as security for a specific decree it is not so open.

The result of these conclusions is that this Civil Revision Petition will be allowed with costs. We only desire to add one further word. This matter originally came before a single Judge and on the representations of the respondent it was posted before a Bench. The result is that it has not reached us for a very long time. It was admitted in February and was referred to a Bench last September and now comes up to us for disposal, in January 1937. Ordinarily we should have referred the petitioner to his remedy of a suit under S. 73 but under the specific circumstances we considered it would be a hardship for us to do so and it is only under those special circumstances that we have decided to deal with the matter under S. 115, Civil P. C.

C.R.K./B.D. *Petition allowed.*

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3. Janaki Nagaswami v. Ramaswami, AIR 1920 Mad 409=56 I C 267=11 M L W 6.
4. Gopalaiyar v. Thiruvengadam Pillai, A I R 1918 Mad 1158=38 I C 481 = 32 M L J 503.

A. I. R. 1937 Madras 533

VARADACHARIAR, J.

Veerana Goundan and *another* —
Appellants.

v.

Kittaya Goundan and *others* —
Respondents.

Second Appeal No. 22 of 1933, Decided on 26th November 1936, against decree of Sub-Judge, Dindigul, in A. S. No. 83 of 1931.

Landlord and tenant—Arrears of rent due by one tenant — Mere fact that certain survey number in possession of another tenant is wrongly entered in pattah of former tenant will not justify landlord in bringing that property to sale — Policy underlying S. 147, Madras Estates Land Act, cannot be extended to such case.

It cannot be laid down as a general principle that whatever may be the real ownership the entry of particular survey number in a particular tenant's pattah will justify the landlord in bringing that item to sale for arrears of rent even though the land was in possession of another tenant who was himself a pattadar under the landlord, merely because the latter had not taken steps to get the pattah rectified. The mistake is one for which the landlord is as much responsible as the tenant. The policy underlying S. 147, Madras Estates Land Act, does not warrant the extension of the same by analogy to a case like this because in the case contemplated by S. 147 the landlord may not be aware of the transfer and the law therefore rightly throws on the transferee the obligation to get himself recognized. But in a case of incorrect entries in the pattah there is reason to insist on the landlord being careful and no reason for throwing the consequences thereof on the tenants, especially when more often than not the tenants may be ignorant. [P 534 C 1]

K. Rajah Iyer — for Appellant.

T. L. Venkatarama Iyer —
for Respondents.

Judgment. — This second appeal arises out of a claim by the plaintiff that he is entitled to some 55 cents of land out of what was purchased by defendant 1 in a rent sale held by the Zamindar on the footing that these lands also formed part of the pattah lands of defendants 2 and 3. The plaintiff's main contention was that the lands really belonged to and had all along been in the possession of defendants 4 and 5 from whom he obtained them on transfer, but by some mistake of the zamin authorities the survey numbers relating to the holdings of defendants 2 and 3 on the one hand and defendants 4 and 5 on other have been inserted by mistake in their respective pattahs. There is no scope for the application here of the provisions of Ss. 146 and 147, Estates Land Act, because it is not sought to bind the plaintiff by the result of proceedings taken against defendants 4 and 5. The trial Court found that the plaintiff's suggestion that the land really belonged to defendants 4 and 5 though its survey number has been wrongly entered in the pattah of defendants 2 and 3 had not been made out. In that view of course it was justified in dismissing the plaintiff's suit. But the appellate Court has come to the conclusion that defendants 2 and 3 were never entitled to and had never been in possession of the said plot of land but that it had all along been in the possession of defendants 4 and 5 and their predecessors-in-title till it passed into the possession of the plaintiff some years before the rent sale in pursuance partly of the usufructuary mortgage and partly of the sale from defendants 4 and 5. The learned Subordinate Judge has also found that the survey number of the suit lands had been entered by mistake in the pattah of defendants 2 and 3 instead of in the pattah of defendants 4 and 5. He held that as a matter of law the mere entry of the wrong survey number in the pattah of a ryot will not entitle the landholder to sell that land when it really belonged to and was in the possession of another tenant. The auction purchaser has filed this second appeal.

The evidence in the case is so shabby that one cannot resist the suspicion that the defendants have not placed the whole truth before the Court. The plaintiff became entitled to the land only recently and could speak only to recent events including his own possession. His possession for sometime before the rent sale has been admitted by the defendant's witnesses and no plausible explanation has been attempted to account for that possession. The learned Judge was therefore justified in accepting the other evidence adduced on the plaintiff's side that prior to the transfer of possession to the plaintiff the suit land had been in the possession of defendants 4 and 5 for sometime and prior thereto in the possession of defendant 4's vendor. Defendants 2, 3 and 4 are closely related and I am not prepared to hold that the plaintiff must suffer for any unwillingness on the part of defendant 4 to speak the whole truth. There is also some ground for the suspicion of the learned Subordinate Judge that the rent sale must have been the result of

collusion between the village officers and defendants 1 to 3 taking advantage of the mistakes in the pattah and survey numbers.

On the above findings of fact, I do not think the auction purchaser can maintain the purchase merely on the proposition of law that whatever may be the real ownership the entry of a particular survey number in a particular tenant's pattah will justify the landlord in bringing that item to sale, even though the land was in the possession of another tenant who was himself a pattadar under the landlord, merely because the latter had not taken steps to get the pattah rectified. The mistake is one for which the landlord is as much responsible as the tenant. The policy underlying S. 147, Estates Land Act, does not warrant the extension of the same by analogy to a case like this because in the case contemplated by S. 147 the landlord may not be aware of the transfer and the law therefore rightly throws on the transferee the obligation to get himself recognized. But in a case of incorrect entries in the pattah there is reason to insist on the landlord being careful and no reason for throwing the consequences thereof on tenants especially when we remember that more often than not the tenants may be ignorant. A different principle will put it in the power of unscrupulous village officers to manipulate such mistakes. I am not prepared therefore to lay it down as a general proposition of law that the mere fact of a particular survey number being found in the pattah of one tenant and not in the pattah of the tenant who is actually in possession of land will suffice to justify the landholder bringing the property to sale for arrears of rent due by the former tenant. I therefore see no reason to interfere with the decree of the lower appellate Court and I accordingly dismiss the second appeal with costs of respondent 1. Leave refused.

C.R.K./S.C. *Appeal dismissed.*

A. I. R. 1937 Madras 534

PANDRANG ROW, J.

In re *Ramaswami Iyer* — Petitioner.

Criminal Revn. Case No. 707 and Petn. No. 659 of 1936, Decided on 18th January 1937, from order of First Class Bench Magistrate, Madura, in S. C. No. 7637 of 1936.

(a) Madras Towns Nuisances Act (3 of 1889), S. 3 (5)—Seller of gramophone records playing records inside his shop for prospective purchaser — Collection of crowd in street outside and consequent obstruction to thoroughfare—Obstruction not intended by seller—Held no offence was committed.

A seller of gramophone records played records inside his shop for the benefit of the prospective buyer. The playing of the records attracted a crowd of people in the street outside the shop and thus caused obstruction to the thoroughfare. There was nothing to show that the seller played the records wilfully to cause obstruction in the street :

Held : that no offence was committed : *Crl. R. C. No. 476 of 1935, Rel. on.* [P 534 C 2]

(b) Criminal Trial—Duty of Magistrate—Magistrate should administer law as it stands —Considerations of want of politeness of accused with police are irrelevant.

The Magistrates must know that their duty lies in administering the law as it stands, and in the performance of this duty they should not allow their minds to be diverted by irrelevant considerations such as want of politeness on the part of the accused in his behaviour towards the Sub-Inspector of Police. [P 535 C 1]

O. V. Balaswami — for Petitioner.

Public Prosecutor — for the Crown.

Order.—The petitioner in this case is a seller of gramophone records in Madura Town. He has been convicted under S. 3, sub-s. 5, Towns Nuisances Act of 1889, the act alleged against him being that he was having some gramophone records played inside his shop which attracted a crowd in the street outside and thereby caused obstruction. This statement of the case is enough to show that there can be no justification for the conviction. S. 3, sub-s. 5 clearly shows that it is only when wilful obstruction is caused in any public street, road, thoroughfare or place of public resort that an offence is committed. In this particular case it is clear that there was no act done by the accused in any public street, road, thoroughfare, or place of public resort. What he did was inside his own shop and it would also appear that he had the records played on the gramophone for the benefit of a prospective buyer and there is nothing to show that he wilfully did it in order to cause obstruction in the street outside. In an almost similar case, Crl. R. C. No. 476 of 1935, King, J. has held that the conviction under S. 3, sub-s. 5 of the Act, cannot stand. There the act alleged was the playing of gramophone music inside the accused's house attracting a crowd in the street in front of his house. This is a case in which there should have been no

charge by the police and certainly no conviction by the Magistrate. It should have been obvious that no offence had been committed and it is astonishing to find the police charging the accused and the Magistrate convicting the accused in respect of an act which cannot possibly be an offence. The accused had done nothing criminal and yet he has been harassed by a prosecution and a trial which underwent 6 or 7 adjournments and put to considerable vexation and expenses. The Magistrates have thought it fit to observe that the accused 'could have politely given his name' to the Sub-Inspector when he questioned him about the matter and "avoided all the sensation". The Bench Magistrates must know that their duty lies in administering the law as it stands, and that in the performance of this duty they should not allow their minds to be diverted by irrelevant considerations such as want of politeness on the part of the accused in his behaviour towards the Sub-Inspector of Police. The case discloses a state of affairs which is very disquieting and it is to be hoped that these words of mine will prevent such harassment of innocent persons in future. The conviction and the sentence are set aside and the accused is acquitted; the fine, if paid, must be refunded.

C.R.K./B.D. *Conviction set aside.*

A. I. R. 1937 Madras 535

PANDRANG ROW, J.

In re *Sundara Mudaliar* and *others* — Petitioners.

Criminal Revn. Case No. 560 and Petn. No. 514 of 1936, Decided on 14th January 1937, from order of Joint Magistrate, Ramnad, in C. A. No. 8 of 1936.

Penal Code (1860), S. 188—Offences under S. 188, Penal Code and S. 32, Police Act — Knowledge of order is essential ingredient.

Knowledge of the order is a necessary ingredient of offences punishable under S. 188, Penal Code, and also of offences under S. 32, Police Act: *AIR 1932 Cal 286* and *A I R 1927 Cal 28, Rel. on.*

[P 535 C 2]

K. S. Jayarama Iyer and *G. Gopalaswami* — for Petitioner.

Public Prosecutor — for the Crown.

Order.—The petitioners, eight in number, were charged and convicted by the Second Class Magistrate, Mudukulatur, of an offence punishable under the second part of S. 188, I. P. C. The case against them was that they took part in a procession in Abiraman village on 9th August 1935 at 9-45 p. m. without taking a license as required by an order promulgated by the District Superintendent of Police, Ramnad, under S. 30 (2), Police Act, early in May 1935. The main defence of the petitioners was that they had no knowledge of this order of the District Superintendent of Police and they examined a number of defence witnesses to the effect that they also — the defence witnesses — had no knowledge of the order. The trying Magistrate did not however definitely find whether the petitioners had or had not knowledge of the order in question, but merely remarked that the defence witnesses were interested. In appeal, the joint Magistrate of Ramnad was of opinion that the only point for him to decide was whether the accused had knowledge of the order. He was of opinion that mere proof of publication of the order by tom-tom is not sufficient to lead to the inference that the accused had knowledge of the order so far as the charge under S. 188 (2), I. P. C., was concerned. He thought however that such knowledge was not required to be proved in respect of an offence punishable under S. 32, Police Act. In other words, he drew a distinction between S. 188, I. P. C., and S. 32, Police Act, so far as the element of knowledge as an essential ingredient of the offence is concerned. There is really no foundation for this distinction, as will be seen from the decision of the Calcutta High Court in 58 Cal 879.[1] It is seen from this decision as well as from another decision of the Calcutta High Court, in 54 Cal 152,[2] that knowledge of the order is a necessary ingredient of both offences, namely, the offences punishable under S. 188, I. P. C., and S. 32, Police Act. It must therefore be said that the modification ordered by the Joint Magistrate of the conviction under S. 188, I. P. C., into one under S. 32, Police Act, cannot be supported in law. There being no clear finding that any of the petitioners, the accused in the case, had knowledge of the order, the disobedience of which is

1. Devendranath Mandal v. Emperor, A I R 1932 Cal 286=1932 Cr C 212=133 I C 192=32 Cr L J 1005 = 58 Cal 879 = 35 C W N 187.
2. Ramdas Singh v. Emperor, A I R 1927 Cal 28=99 I C 36=28 Cr L J 4=54 Cal 152=44 C L J 250.

charged against them, their convictions cannot be sustained. They are accordingly set aside and the sentences imposed upon them are also set aside and they are acquitted of the offences charged against them. The fines, if paid, must be refunded to them.

C.R.K./B.D. *Convictions set aside.*

A. I. R. 1937 Madras 536

GENTLE, J.

Khan Bahadur H. M. and *D. H. Bhiwandiwalla & Co.* — Plaintiffs.

v.

Secretary of State — Defendant.

C. S. No. 378 of 1933, Decided on 15th September 1936.

(a) Government of India Act (1915), S. 106 (2) —Importation of goods in India and assessment of revenue on it are matters of revenue —High Court cannot interfere with such matter in its original jurisdiction.

A case which deals with the importation of goods into India, and the fixing of the duty or revenue to be paid in respect of such importation is a case clearly dealing with a matter of revenue. Any question regarding such matter cannot be dealt with by a High Court sitting in its original jurisdiction, its jurisdiction being barred by S. 106, Government of India Act (1915) : *A I R 1919 Mad 715* and *A I R 1927 Mad 689, Rel. on.* [P 537 C 2]

(b) Sea Customs Act (1878), Ss. 188 and 191—Statute providing remedy for wrong arising under statute — Recourse to Court cannot be taken—Dispute regarding decision of Customs Officer — Central Board of Revenue is proper authority to deal with it— Its decision is final subject to revision under S. 191—Dispute cannot be entertained by Court.

When the statute has provided a remedy for any wrong arising under the statute that remedy must be followed and recourse to the Courts is not possible since the remedy given by the statute amounts to an ouster of the jurisdiction of the Courts. S. 188, Sea Customs Act, provides the remedy and the tribunal to which an appeal has to be made if a grievance is believed to exist in regard to any decision or adjudication of a Customs Officer and the section further provides that every decision of the tribunal mentioned, namely the Central Board of Revenue, shall be final subject to revision under another section, namely S. 191 of the Act. Therefore no suit by way of appeal or revision will lie to a civil Court from the decision of the Central Board of Revenue : *12 Mad 105*; *31 Bom 604* ; *A I R 1931 Mad 574* and *A I R 1934 Mad 516, Rel. on.* [P 538 C 1]

K. Krishnaswamy Ayyar for *Venkataseshayya* — for Plaintiffs.

Advocate-General and *R. Ramamurthi* — for Defendant.

Judgment.—This is a suit brought by the plaintiffs who are a firm of merchants in Madras against the Secretary of State for India in Council represented by the Collector of Sea Customs, Madras, in which they claim a declaration that the order of the Central Board of Revenue dated 11th January 1933 assessing the plaintiffs to duty at the enhanced rate prevailing on 31st August 1932 is contrary to law, *ultra vires* and against the Sea Customs Act and for an order directing the defendant to refund to the plaintiffs an agreed amount alleged to be the sum paid in excess of the correct sum for import duty on account of the enhanced duty imposed, that is to say, the difference between the higher and lower rates of duty.

The suit is brought under these circumstanstances : On 28th August 1932 S. S. 'Rohana' arrived in Madras carrying 35 cases of cotton printed shirtings which the plaintiffs desired to import into this country. It also carried 25 cases of cotton twill which the plaintiffs similarly desired to import. In order to import goods into this country, it is necessary, under the Sea Customs Act, to deliver a Bill of Entry giving particulars of the goods to be imported including in Cols. 6 and 7, rate and market value of the goods. It is alleged that usually the Bill of Entry form is first lodged with Cols. 6 and 7 in blank and a 'market value slip' is attached upon which is written the value which the importer places upon the goods. This 'market value slip' is placed before the Appraiser and he either agrees or disagrees with the value alleged; if he agrees, then that value is the one which is entered subsequently in the Bill of Entry form: if he disagrees then he places a different value and the value so placed is no doubt subject to negotiation between the importer and the Appraiser. But eventually there is always a value entered in Cols. 6 and 7. The object of this method being adopted is this : if the importer, in Cols. 6 and 7, places a wrong value upon the goods which is less than their real market price, the importer is liable to a penalty which is indicated in the Sea Customs Act, because he then declares in the Bill of Entry the value which he says the goods bear, and it being a wrong value he is liable to the penalty; but by means of this slip the importer does not declare according to the provisions of the Act the value, and if the sum

he mentions on the slip is less than the proper amount he does not render himself liable to the infliction of a penalty.

In regard to the consignment of 35 cases the plaintiffs, on 26th August, presented to the Customs authorities a Bill of Entry with a market value slip and this was returned by the Appraiser on 31st August with the value placed upon the goods by the plaintiffs in the market value slip increased to some extent, which increased value was apparently accepted by the plaintiffs. In regard to the second lot of goods, namely 25 cases of cotton twill, the Bill of Entry was presented on 29th August 1932 similarly with a market value slip and was returned on the same day also with a sum higher in value as the proper market price than the amount entered by the plaintiffs. In respect of both the Bills of Entry the plaintiffs, I am assuming, accepted the increased value and entered this sum in cols. 6 and 7 of the Bill of Entry form. On the night or the early morning of 30th August the duty upon these goods was enhanced and as a consequence a higher amount of duty was demanded by the customs authorities than would have been payable prior to 30th August 1932. This increased amount of duty was paid under protest, the plaintiffs taking up the position that because of delay in the office of the Appraiser or some such excuse they should have been charged with the lower instead of the higher rate of duty. The plaintiffs carried their complaint to the Central Board of Revenue. This was done in pursuance of S. 188, Sea Customs Act, which provides as follows :

> Any person deeming himself aggrieved by any decision or order passed by an officer of Customs under this Act may, within three months from the date of such decision or order, appeal therefrom to the Chief Customs authority or, in such cases as the Local Government directs, to any officer of Customs not inferior in rank to a Customs Collector and empowered in that behalf by name or in virtue of his office by the Local Government.
>
> Such authority or officer may thereupon make such further enquiry and pass such order as he thinks fit confirming, altering or annulling the the decision or order appealed against :
>
> Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation, penalty or rate of duty than has been adjudged against him in the original decision or order.
>
> Every order passed in appeal under this section shall subject to the power of revision conferred by S. 191 be final.

The Central Board of Revenue considered the appeal by the plaintiffs on 11th January 1933 and dismissed it. Against the maintainability of this suit the learned Advocate-General has taken two preliminary objections. The first is under S. 106 (2), Government of India Act, 1915, and the second is in respect of Ss. 188 and 191, Sea Customs Act. In regard to the first objection the wording of S. 106 (2), Government of India Act, is as follows :

> The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

At the moment I am sitting in the original jurisdiction of this High Court, this matter in my view is entirely one of revenue. It deals with the importation of goods into this country and the fixing of the duty or revenue to be paid in respect of such importation and such duty when paid is placed to revenue of this country, and I can see no clearer case of a matter of revenue than the one which is now before me. In my view the first preliminary objection of the learned Advocate-General taken under this subsection prevails. I shall refer to one or two authorities to which my attention has been directed. In 35 M L J 23,[1] this very objection was taken and Coutts-Trotter, J., as he then was, in the course of his judgment decided that even an agreement between a tax payer and the Collector where the Collector in fact had repudiated the agreement, could not be the subject of a suit in this Court. In 50 Mad 449,[2] which came before Sir Murray Coutts-Trotter, C. J., and Beasley, J. as he then was, the same objection was taken. That was a case where smuggled goods were sold and the proceeds of the sale were devoted to the revenue of the country and proceedings arose out of the matter. At p. 455 in dealing with this objection the learned Chief Justice says :

> Finally the point is taken on behalf of the Secretary of State that this is a matter affecting the revenue and that S. 106 (2), Government of India Act, covers the matter. On that subject, I have nothing to add to what I said in my own considered judgment which is reported in *Best & Co., Ltd. v. Collector of Madras*,[1]

1. Best & Co., Ltd. v. Collector of Madras, A I R 1919 Mad 715=48 I C 790=35 M L J 23.
2. Govindarajulu Naidu v. Secy. of State, A I R 1927 Mad 689=105 I C 576=53 M L J 355 =50 Mad 449.

which is the case which I have already referred to, namely 35 M L J 23.[1] Without going into the reasons given by the learned Judges in the two authorities which deal very fully with the point, I am perfectly satisfied that the objection under S. 106 (2), Government of India Act, prevails in this case.

There is however a further objection which in my view also prevails. When the statute has provided a remedy for any wrong arising under the statute, that remedy must be followed and recourse to the Courts is not possible since the remedy given by the statute amounts to an ouster of the jurisdiction of the Courts. S. 188, Sea Customs Act, to which I have already referred, provides the remedy and the tribunal to which an appeal has to be made if a grievance is believed to exist in regard to any decision or adjudication of a Customs Officer and the section further provides that every decision of the tribunal mentioned, namely the Central Board of Revenue, shall be final subject to revision under another section, namely S. 191, Sea Customs Act. Again I have been referred to several decisions in 12 Mad 105,[3] 31 Bom 604,[4] 54 Mad 928[5] and 57 Mad 857.[6] I do not intend or propose to go fully into the reasons given in all those judgments. The learned Judges in those cases have dealt extensively with the reasons for which they arrived at the conclusion that when the statute does provide a tribunal to which any grievance arising under the Act has to be taken that tribunal is the one by which the grievance is to be decided. What the plaintiffs apparently are trying to do by this suit is to appeal from the decision of the Central Board of Revenue. Mr. Krishnaswami Ayyangar has referred to one or two authorities in which it was held that the jurisdiction of the Court to entertain matters arising out of decisions given by tribunals coming into existence by reason of the Act concerned is not conclusive. In all the cases to which he has referred it is clearly stated that the decision of the tribunal concerned was conclusive provided all the requirements of the Act were fulfilled. There is no such proviso in S. 188, Sea Customs Act. It is not suggested that either the Collector in Madras or Central Board of Revenue have refused to carry out their duties provided under the Act; if they had done so then this Court might have been invoked to order them to do so. They carried out their duties and came to a decision and that decision to my mind is final subject to revision under S. 191 of the Act. The Sea Customs Act itself does provide the remedy and the tribunal to decide disputes under the Act. This Court has no jurisdiction. In my view this as well as the first preliminary objection prevails. The result is, this suit is dismissed with costs.

C.R.K./B.D. *Suit dismissed.*

3. Ramachandra v. Secy. of State, (1889) 12 Mad 105.
4. Bhaishankar v. Municipal Corporation of Bombay, (1907) 31 Bom 604=9 Bom L R 417.
5. Iswaranda Bharathi Swami v. Board of Commrs. for Hindu Religious Endowments, Madras, A I R 1931 Mad 574=133 I C 8=61 M L J 117=54 Mad 928.
6. Rangachari v. Secy. of State, A I R 1934 Mad 516=154 I C 884=57 Mad 857=67 M L J 123.

✻ A. I. R. 1937 Madras 538

VARADACHARIAR AND KING, JJ.

Kotikelapudi Venkatramayya—
Appellant.

v.

Digavalli Seshamma and *others*—
Respondents.

Appeal No. 132 of 1931, Decided on 7th January 1937, from decree of Court of Sub-Judge, Kurnool, in O. S. No. 3 of 1928.

✻ (a) Hindu Law—Joint family—Claim to property held by individual member as separate and self-acquired—Person claiming it as joint must first prove that it was acquired from family nucleus—Onus, then, shifts on party alleging it to be self-acquired to prove that it was acquired without aid of family property.

A party alleging that property held by an individual member of a joint family is family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. It is only after this is shown that the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate: *A I R 1930 Mad 662* and *1930 M W N 1016, Rel. on*; *32 Bom 479* and *13 Bom L R 133, Ref.* [P 541 C 2]

(b) Evidence Act (1872), S. 32 (7)—Statements of fact in will —When admissible in evidence—Such statements justify scrutiny in light of other evidence—But that does not mean that they are inadmissible.

Statements of fact in a will which come under Cl. 7 of S. 32, Evidence Act will be admissible only if they are statements of relevant fact and are contained in documents relating to the trans-

action mentioned in S. 13, Cl. (a): *27 Mad 228, Disting.*; *A I R 1930 P C 18* and *15 Bom 565, Ref.* [P 543 C 1]

Statements of that kind will of course justify scrutiny in the light of the other evidence in the case because they are self-serving; but that is different from saying that they are inadmissible in evidence. [P 543 C 2]

W. Kothandaramayya and *N. A. Krishna Iyer*—for Appellant.

P. Satyanarayana Rao—for Respdts.

Varadachariar, J.—The appellant instituted the suit on the footing that he had become entitled to the suit properties by the rule of survivorship, on the death of his uncle, one Subbarayudu, in July 1919. Subbarayudu left a will, Ex. XVIII dated 12th July 1913 and defendants 1 to 6 claim as legatees under that will. Questions were raised in the lower Court as to the genuineness of this will and after elaborate trial, the learned Subordinate Judge found that the will was genuine; but as the plaintiff's claim by survivorship, if well founded, would by itself suffice to defeat the operation of the will even if it were true, his learned Counsel here did not attack the lower Court's finding on the question of the genuineness of the will and confined his arguments to the plaintiff's claim under the rule of survivorship.

The question argued before us is substantially that raised by the 4th issue in the case. The latter part of that issue related to a contention that even if the suit properties were in any sense and to any extent the self-acquired properties of Subbarayudu, he had thrown them into the common stock and thereby made them joint properties. This aspect of the matter has not been pressed before us. On behalf of the appellant Mr. Kothandaramayya's main argument was that at a time when the plaintiff was only an infant, Subbarayudu must on the death of the plaintiff's father have come into possession not merely of the 5 acres of ancestral lands admittedly belonging to the family in their native village but also of a substantial sum of cash which must have formed a nucleus for Subbarayudu's subsequent earnings. In the lower Court, an argument seems to have been advanced to the effect that even the income from the family lands in the village could have been substantial, but the learned Subordinate Judge has found that the lands did not yield anything more than a few rupees in those days and even these few rupees were not shown to have come into the hands of Subbarayudu at any time, as he was serving as a public servant in a place far away from his native village. This part of the lower Court's finding has not been challenged before us either.

The story sought to be developed on the plaintiff's side in the course of the evidence was that about the time of the plaintiff's father's death, i. e., in 1876, some amount, put by one witness at about Rs. 1,600 and by another witness at about Rs. 5,000 stood in deposit in the plaintiff's father's name with a merchant of Cocanada known as Chinna Gopalam and that some years after the plaintiff's father's death this amount was withdrawn by Subbarayudu. It is contended that the evidence of P. Ws. 1 to 3 read in the light of Ex. D clearly establishes this part of the story. It may be conceded that if it is proved that this sum of Rs. 5,000 or any similar amount stood in deposit in Somaraju's name at about 1876 and came into Subbarayudu's hands after Somaraju's death, it will be a very important circumstance sufficient to throw upon Subbarayudu and those claiming under him the onus of proving that Subbarayudu's subsequent acquisitions are not traceable to that fund and have not been mixed with that fund. Attention has therefore been directed to a critical examination of this part of the plaintiff's story.

At the outset, it seems to us that the learned Subordinate Judge was justified in looking upon this part of the story with great suspicion, because it was not suggested even in the rejoinder statement filed by the plaintiff on 24th August 1928. It seems to us that the lower Court rightly suspected that this part of the story must be an after-thought suggested by Ex. D, which is a letter purporting to have been sent to Subbarayudu in November 1884 wherein reference is made by Chinna Gopalam to some deposit standing with him in Subbarayudu's name and asking him for directions as to its disposal.

We may mention in passing that an attempt was made in the lower Court to lead further documentary evidence in support of this deposit by examining Chinna Gopalam's son, but as the witness was not able to appear before the lower Court and a commission for his examination was dismissed as made too late, that part of the evidence is not on record. In the interests of justice however we have

looked into that matter to see what was attempted to be proved through that witness. It is made clear by the affidavit filed by that witness, in connexion with the evidence proposed to be given by him, that all that the materials in his possession could prove was that in June 1885 there stood in deposit with his father to the credit of Subbarayudu a sum of Rupees 3,000 and that after one or two withdrawals this account was finally closed in September 1885. For the purpose of this appeal, we are willing to take these facts as proved, but we do not think these facts by themselves will advance the plaintiff's case very far.

If we could believe the positive evidence adduced by the plaintiff through P. Ws. 1 to 3, the position would no doubt be better but we are satisfied that their evidence is not reliable. P. W. 1 is, on his own statement, not likely to have been more than 15 or 16 at the time of the alleged conversation which he says he heard taking place between Gopalam and Somaraju, and we are not impressed with the reason which he gave for his having been present in Somaraju's house at the time of the alleged conversation; and his story as to the later conversation in 1883 or 1884 between Subbarayudu and the plaintiff's mother at which it is said that Subbarayudu asked the plaintiff's mother's permission to withdraw this amount is even less convincing. The same remark applies to P. W. 3. One cannot help feeling a suspicion that his services had been availed of in this case merely because he was probably the son of a clerk of Chinna Gopalam. On his own evidence, he must have been a student reading in school at the time of the conversation that he purports to speak to between Somaraju and Chinna Gopalam and later on between Subbarayudu and Chinna Gopalam's clerk. No probabilities appear in favour of his having been present at the time of the alleged conversation. P. W. 2, who says he was a pial-school teacher in the pial attached to the house in which Somaraju was living just at the time of his death, would not even commit himself to any definite statement as to his age and coming from a Brahmin who claims to have been a pial-school teacher for the best part of his life, it is not easy to believe the statement that he does not know the year of his birth. When the value of his evidence turns upon his age at the time of the alleged conversation and the likelihood or probability of his having attended to it, it is not in our opinion safe to act upon the evidence of a person who on his mere estimate might have been 20 or 21 at the time but who would not permit his estimate to be canvassed by giving some more details as to the date of his birth and his age. There is also the circumstance that according to the story of some of these witnesses and the plaintiff's present story the plaintiff knew many years ago of these conversations and of the fact of this deposit though not all the details relating to the amount thereof. If that part of his case is true, it is difficult to believe that the plaintiff would not have put it at the forefront of his case. In view of his omission to disclose it till a very late stage, we are unable to attach any importance to the story related by P. Ws. 1 to 3.

Failing credible positive testimony on the point, Mr. Kothandaramayya next falls back upon two lines of argument. As a matter of evidence and probabilities, Mr. Kothandaramayya contends that the deposit which is shown to have existed with Chinna Gopalam in 1884 as per Ex. D could not have been made by Subbarayudu from any funds of his own and he therefore asks us to infer that it must have been of funds derived either from his father or from his brother or at least a part of the same must have come from them. When we remember the relative positions of the father and the brother of Subbarayudu on the one side and of Subbarayudu himself on the other, we are not able to accept this contention. Eliminating the nominal income derived from the ancestral immoveable property the utmost that could be said to have been shown by the evidence as to the position of Subbarayudu's father is that he was a village schoolmaster earning Rs. 10 or 12 a month and in view of the needs and expenses of his family and the marriages that he had to celebrate, the learned Subordinate Judge was justified in the conclusion at which he had arrived that he could hardly have contributed in any degree to whatever might have been deposited in Subarayudu's name with Chinna Gopalam. Even as regards Somaraju, the indisputable documentary evidence in the case shows that the maximum salary that he drew at the time of his death was only Rs. 30 per mensem and he died in 1876 comparatively at an early stage. On the other hand, Subbarayudu

was drawing at least Rs. 70 per mensem in 1876, Rs. 150 per mensem in 1878 and Rs. 200 per mensem from 1881 to 1883. In this state of facts, there is no justification for thinking that a sum of Rs. 3,000 deposited in Subbarayudu's name with China Gopalam in 1884 could not have come from Subbarayudu's own earnings. If Chinna Gopalam's account books prior to 1884 could be made available, it would certainly have been very useful to establish the truth but unfortunately Chinna Gopalam's son in his affidavit precludes all further investigation into that matter by a statement that the prior accounts have been thrown into the sea.

Some reliance was placed on behalf of the appellant upon the account that Subbarayudu had with P. W. 16's family and P. W. 15, the clerk of that family was examined at very great length with reference to the accounts of P. W. 16's family, to show the transactions that Subbarayudu had with P. W. 16's family. We do not think that part of the evidence is of any value for the case at all. It is true that after 1890 Subbarayudu was frequently depositing moneys with that family and drawing moneys from that account. Prior to 1890 his dealings with that family were only occasional purchases of jewels on credit. It is argued by Mr. Kothandaramayya that from this we ought to infer that Subbarayudu had no moneys to deposit at all at or about that time and this argument is sought to be supported by a statement in the deposition of P. W. 15 of what Subbarayudu is said to have told the witness in the course of a conversation, namely that before he became the Deputy Collector of Adoni (about 1891), Subbarayudu was not in a position to save anything at all. Taking that statement to be true, we do not think it proves much. The witness himself says that Subbarayudu made a reservation in respect of moneys that he spent on marriages and so on. It is admitted by the plaintiff that in 1883 or 1884 Subbarayudu spent Rs. 7,000 or Rs. 8,000 on the marriage of his daughter and the *Upanayanam* of the plaintiff. We have already referred to the sources available to Subbarayudu for putting by moneys required for the purpose of a function like that and we do not think the statement of P. W. 15 supports the argument that Subbarayudu could not have made the deposit with China Gopalam from out of his earnings.

It is next said that the evidence establishes that Subbarayudu was a man of expensive habits. But the evidence also shows that in spite of his expensive habits he did save very considerable sum. But there is no reason for presuming that the expensive habits came into vogue in the earlier years of his service. As we have already observed, the very fact that he was able to spend Rs. 7,000 or 8,000 on marriages is an indication that he must have been prudent enough to put by some amounts towards meeting the expenses of that function.

It was next argued as a matter of law that it was for the defendants to prove positively that the amount that stood to Subbarayudu's credit with Chinna Gopalam in 1884 was his separate property and did not constitute joint family property. Reliance was placed in this connection upon the statement in Mulla's Hindu Law, S. 233, to the effect that where it is proved or admitted as to a Hindu family that it possesses joint property, the presumption of law is that all the property of which it is possessed is joint and that if any member claims any portion of the property as his separate property, the burden lies upon him to show that it was acquired by him in circumstances which would constitute it his separate property. There are no doubt observations of this tenor in some of the reported cases, but with all respect we think that this is too broad a statement of the presumption. In a line of cases in this Court beginning with 27 M L J 677,[1] it has been recognized that the presumption has to be stated with some further limitations and qualifications. Many of the cases bearing upon that point have been referred to in the judgment of Ananthakrishna Iyer, J., in A I R 1930 Mad 662,[2] where the learned Judge points out that a party alleging that property held by an individual member of a joint family is family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. The learned Judge takes care to add that, it is only after this is shown that the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from

1. Narayana Rao v. Seshamma, A I R 1915 Mad 426=26 I C 33=27 M L J 677.
2. Sankaranarayana Mudaliar v. Tangaratna Mudaliar, A I R 1930 Mad 662=126 I C 609.

the family estate. To the cases cited in this judgment we may also add 1930 M W N 1016.[3] An observation of Beaman, J., in 32 Bom 479[4] at p. 492 would seem to sound the other way, but the learned Judge himself stated the proposition in more guarded terms in 13 Bom L R 133[5] at page 135. We notice that none of the later Madras cases has been referred to in Sir D. F. Mulla's book in this context. As we have already pointed out, no serious attempt has been made to show that Subbarayudu's deposit with Chinna Gopalam in 1884 or any of Subbarayudu's subsequent acquisitions could have reasonably come out of the ancestral lands.

Reference was next made to certain entries in the accounts of P. W. 16's family relating to some Savings Bank deposit in the plaintiff's name of a sum of Rs. 600 odd and a story was built with reference thereto that it represented certain moneys given for the plaintiff's benefit into the hands of Subbarayudu by the plaintiff's aunt, the moneys having come into her hands partly from her father and partly from presents given to the plaintiff at the time of his *Upanayanam*. We are not impressed with the evidence relating to this part of the story. There is no doubt a statement in Ex. DDDDD that that amount was withdrawn from a Savings Bank account that stood in the plaintiff's name. But in view of the indications appearing from the evidence that Subbarayudu made deposits in the names of various people, this by itself cannot be made much of when we find that the amount so withdrawn is subsequently taken into an account standing in the name of Subbarayudu's wife. It is also important to remember the time at which this transaction is said to have taken place. It was just about the time when the plaintiff had applied to Subbarayudu for some money stating that he was pressed by debts and the plaintiff admits that Subbarayudu did not pay him more than Rs. 25 at the time and that the plaintiff had to discharge his debts by the sale of his concubine's jewels. If in circumstances of that kind Subbarayudu admitted to the plaintiff that he had with himself Rs. 600 odd belonging to the plaintiff and the plaintiff was asked to fill in the withdrawal form to enable Subbarayudu to withdraw that amount, it is scarcely likely that the plaintiff would have quietly taken Subbarayudu's refusal to help him at that time.

The conduct of the plaintiff seems to us to be a matter of some significance in this case, not merely at that particular time in connection with the particular item but with reference to the case generally. Even if it should be assumed that the plaintiff is entitled to invoke some presumption of Hindu law in his favour, the weight of such presumption and the nature of the evidence required to rebut the same will vary according to the circumstances of each case; and the stale nature of the plaintiff's claim must certainly count against him. This suit has been filed just on the last day of the expiry of the 12 years' period after Subbarayudu's death. The fact that the plaintiff is suing as a pauper is a double-edged circumstance. Poverty may no doubt be a justifiable explanation in certain circumstances but suing as a pauper equally suggests that this is a mere speculative suit which the provisions of the law relating to pauper suits sometimes encourage. The conduct of the plaintiff during Subbarayudu's time is of even greater significance. If during the best part of Subbarayudu's time, he had treated the plaintiff as one having any legal rights to the properties in his possession, the plaintiff might well claim that there was no occasion for him to go to a Court of law. But the plaintiff's evidence makes it clear that Subbarayudu never countenanced any such claim. For many years, the plaintiff was admittedly out of favour with Subbarayudu. On more than one occasion he applied to Subbarayudu in very submissive terms for help and Subbarayudu did not accede to his request. It is therefere not the case of a person who had been treated as a co-parcener but of one whose claims have never been recognized. In those circumstances, even if the plaintiff could invoke any presumptions in his favour, it will be too much to expect from Subbarayudu's representatives any more positive evidence than they have found it possible to produce in this case. The learned Subordinate Judge also points out that by reason of the

3. Satchidanandan v. Subbarazu, 1930 M W N 1016.
4. Karsondas Dharamasey v. Gangabai, (1908) 32 Bom 479=10 Bom L R 184.
5. Dwarkaprasad v. Jamnadas. (1911) 13 Bom L R 133=9 I C 948.

plaintiff's delay in instituting this suit for so many years even after Subbarayudu's death, many other persons who could have given useful evidence on points material to the case have also died.

We may refer in this connection to the objection, taken on behalf of the appellant, to the use made by the lower Court of the statements contained in Subbarayudu's will. Relying upon the judgment of Sundaram Chettiar, J., in 1930 M W N 1016,[3] the learned Subordinate Judge has treated certain statements in Subbarayudu's will as relevant evidence. Before us, Mr. Kothandaramayya has questioned this view and he relied in support of his argument upon the observations in 27 Mad 228.[6] Sundaram Chettiar, J. was prepared to go so far as to think that the observation in 27 Mad 228,[6] as to the inadmissibility of such statements should not be regarded as good law after the judgment of the Privy Council in 58 M L J 245.[7] We do not think it necessary to go so far as that. Statements of fact in a will like that of Subbarayudu must come under Cl. 7, S. 32, Evidence Act, but in this view they will be admissible only if they are statements of relevant fact and are contained in documents relating to the transaction mentioned in S. 13, Cl. (a). The observation in 27 Mad 228[6] is distinguishable, as the statements then in question could hardly be described as statements of fact. The will there in question contained a bald statement that three-fourths of the properties dealt with thereby were the self-acquired properties of the testator. As pointed out in the judgment, it was fairly clear from the evidence that the testator had acquired the properties by developing his original ancestral properties. The learned Judges accordingly observe that it was merely a statement of the belief of the testator, honest though it might be, that the property thus acquired by him was his self-acquired property.

The judgment of the lower Court, as stated in the report of that case, emphasizes the distinction recognized in 15 Bom 565,[8] between a statement relating to a relevant fact and a statement in respect of a fact in issue, for the purpose of admissibility under S. 32, Cl. 7. Whether the learned Judges meant to adopt that distinction or they were of opinion that the statement in the will then in question was not a statement of fact but merely a statement of opinion, it is not easy to say, because their observations upon this point are contained in a single sentence. But either of those grounds would suffice to distinguish that case from one like the present. We may also add that as early as 1921 M W N 560,[9] statements similar to those now in question, contained in a mortgage deed were held admissible under S. 32, Cl. 7 : *see* also 54 Mad 576,[10] 61 M L J 887,[11] and 10 Beng L R 263.[12] Mr. Kothandaramayya drew our attention to an observation of the Privy Council in 15 M L W 404,[13] where their Lordships treated a statement in a will as irrelevant. No reference is made in that judgment to S. 32 apparently because the statement there could not be said to have been made in documents of the kind described in Cl. 7, i. e., a document relating to a transaction falling under S. 13, Cl. (a). We are accordingly of opinion that statements of fact contained in Subbarayudu's will were rightly held by the lower Court to be admissible in evidence. Statements of that kind will of course justify scrutiny in the light of the other evidence in the case because they are self-serving ; but that is different from saying that they are inadmissible in evidence.

In the present case, the facts established by the evidence on the one side or the other substantially go to corroborate the truth of the statements in the will. We may therefore safely accept those statements so far as they go as substantially correct, though Mr. Kothandaramayya is right in saying that those statements throw no light upon the character of the deposit made by Subbarayudu with Chinna Gopalam. An argument was faintly suggested that Subbarayudu was educated at

6. T. Venkataratnam v. T. Seshamma, (1904) 27 Mad 228.
7. Virayya v. Adenna, A I R 1930 P C 18 = 121 I C 205=58 M L J 245 (P C).
8. Vandravan Jekisan v. Manilal Chunilal, (1891) 15 Bom 565.
9. Nallasiva Mudaliar v. Ravan Bibi, A I R 1921 Mad 383 = 70 I C 389 = 1921 M W N 560.
10. Nagammal v. Sankarappa Naidu, A I R 1931 Mad 264=131 I C 9=61 M L J 19=54 Mad 576.
11. Appaswami Pillai v. Ramu Tevar, A I R 1932 Mad 267=136 I C 340=61 M L J 887.
12. Hurronath Mullick v. Nittanund Mullick, (1873) 10 Beng L R 263.
13. Pattabhirama Rao v. Narayanamoorthy, A I R 1922 P C 102=100 I C 835=15 M L W 404 (P C).

the expense of his paternal uncle Sriramulu and that that circumstance was sufficient to attract the operation of the rule relating to the partibility even of gains made by learning thus acquired. There is very little proof of Subbarayudu having been educated at Sriramulu's expense. We do not think Exs. A and B serve to establish that fact. On the other hand, even apart from the recitals in the will, there is a substantial volume of positive evidence that Subbarayudu was educated by his paternal aunt's husband. Even assuming for the sake of argument that he received help from Sriramulu, it would not be of much use to the plaintiff's case because the evidence is more in favour of the view that Sriramulu was a divided uncle though it does not clearly appear when he became divided. Again on the plaintiff's own showing, Sriramulu was having a lucrative practice as a vakil and if Subbarayudu had really been educated out of Sriramulu's earnings as a vakil, that would not suffice to impress Subbarayudu's earnings with the character of joint property. In this view it is unnecessary to consider Mr. Kothandaramayya's argument as to whether Subbarayudu's education was an education of a 'special' kind or not within the meaning of the rule of Hindu law.

The appeal accordingly fails and is dismissed with costs. The appellant will pay the court-fee payable to Government on the Memorandum of Appeal.

C.R.K./B.D. *Appeal dismissed.*

A. I. R. 1937 Madras 544

VENKATARAMANA RAO, J.

Krishnan Nair — Appellant.

v.

Kambi — Respondent.

Second Appeal No. 334 of 1932 and Civil Misc. Petn. No. 2451 of 1936, Decided on 26th November 1936, against decree of Sub-Judge, Ottappalam, in A. S. No. 93 of 1930.

(a) Malabar Law—Tarwad—Management—Strong and cogent evidence necessary to establish custom entitling seniormost female member to manage tarwad in preference to seniormost male member—It is unsafe to infer such custom from single instance.

Strong and cogent evidence must be given to establish a custom entitling the seniormost female member to manage in preference to the seniormost male. It would be unsafe to infer a custom from the single instance of a seniormost female having been allowed to manage the property for a considerable length of time, and the acquiescence of the male members in such management. [P 546 C 1]

(b) Evidence—Admissibility—Documents—Second appeal — In ejectment suit tenant pleading third person's title to leased property—Pending appeal from ejectment suit, judgment in suit between landlord and such third person deciding landlord's right to property leased — Such judgment held was admissible in evidence in second appeal in ejectment suit.

In an ejectment suit, the tenant pleaded the right of a third person to the leased property as against that of the plaintiff landlord. Pending the Second Appeal from the decision in the ejectment suit, in a suit between such third person and the landlord, judgment was delivered whereby the plaintiff was declared entitled to property leased. The plaintiff applied for receiving this judgment in evidence in second appeal :

Held : that the judgment determining the right of plaintiff to the leased property, as against the person whose title the tenant was setting up, was admissible in evidence even at the stage of second appeal from the decision in ejectment suit: *A I R 1919 Mad 17, Foll.* ; *31 Mad 415, Disting.* [P 546 C 1]

(c) Res judicata—Parties and representatives—Lessor and lessee—Doctrine of res judicata relates to prohibiting retrial of issue— Time when Judge decides such issue is material and not date of commencement of litigation—Rule applies even in appellate proceedings—Lessee bound by judgment against lessor if not obtained by fraud or collusion — In ejectment suit tenant setting up title of third person as against landlord—Pending appeal in ejectment suit, landlord held entitled to leased property in suit against such third person—Lessee, held was bound by decision on title against such third person even in second appeal from ejectment suit.

The doctrine of res judicata so far as it relates to prohibiting the re-trial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. The rule of res judicata is not limited to the Court of first instance but it applies equally to the procedure of the first and second appellate Courts and indeed, even to miscellaneous proceedings. [P 546 C 1, 2]

A lessee is bound by a judgment against his lessor in the absence of any fraud or collusion on his part. A lawful judgment, therefore which deprives the landlord of the estate deprives the tenant of necessity of his subordinate right. [P 546 C 2]

Where therefore in a suit for ejectment the tenant sets up the title of a third person to the leased property as against the landlord suing him in ejectment and pending the second appeal from the decision in ejectment suit, a suit between the landlord and such third person decides that the landlord is entitled to leased property and not the third person, such decision is binding on the tenant even though he is not party to such suit and the tenant is concluded by the decision on title given in such judgment against the third

person whose title he pleads in the ejectment suit : *33 Mad 459, Expl.*; *A I R 1919 Mad 37*; *11 All 148* and *A I R 1936 Mad 190, Rel. on.* [P 547 C 1]

(d) Landlord and Tenant — Ejectment — Denial of title — Tenant setting up title of third person as against plaintiff — Plaintiff can show that in suit against such third person his title was negatived—Whatever would estop by record, deed or in pais such third person would equally estop tenant pleading jus tertii.

In a suit in ejectment where the defendant relies on the title of a third party having no other title to rely on, it is always open to the plaintiff to displace the title of the person so set up by showing that he was a party to the litigation which has negatived that title. Whatever would estop or bar the person whose title is set up must also bar the person pleading *jus tertii*, whether the estoppel is by record, deed or in *pais* : *A I R 1921 Mad 248, Ref.* [P 547 C 1]

P. Govinda Menon — for Appellant.

K. Kuttikrishna Menon and *P. A. Krishnakutti Nair* — for Respondent.

Judgment.—This is a suit in ejectment and for recovery of arrears of rent. It was instituted originally by one Achutha Nair as manager of his tarwad. The subject matter of the suit related to four items of property. It was alleged that items 1 to 3 were leased to the defendant's father in Chingom (1908-1909) 1084 with a munpattom of Rs. 40 under a lease deed executed by him in favour of Kunji Amma, the then senior female member of the tarwad on behalf of the tarwad, as the senior male member Govinda Menon was then employed elsewhere. Item 4 was alleged to have been leased orally in 1086 also to the defendant's father by one Gopalan Nair who was then managing the tarwad on behalf of the said Govinda Menon. Kunji Amma died before suit. As the defendant who is in possession of the property after the death of his father refused to surrender possession or pay rent from 1104 to the plaintiff, this suit was instituted. The said Achuthan Nair died pending suit and the next senior male member Krishnan Nair was added as plaintiff 2 in the suit. The main defence is that the leases were granted by Kunji Amma who was the senior-most female member, that there is a custom in the tarwad under which the right of management vested in the senior-most female member, that after the death of Kunji Amma the right of management vested in Nanu Amma who is the senior-most female member alive, that he has attorned to her and paid and has been paying rent to her and claimed to hold under her and therefore was not bound to surrender possession. The findings of both the Courts are that both the leases were given by Kunji Amma but in regard to the custom and the right to the management of the tarwad properties both the Courts differed.

The learned District Munsif found that there was no custom which entitles the seniormost female member of the tarwad to manage the property in preference to the senior-most male and gave a decree to the plaintiff as prayed for. The learned Subordinate Judge took a different view. He was of opinion that the custom has been made out. His reasoning is based on the fact that for a period of nearly 40 years Kunji Amma, the senior-most female member was allowed to manage the tarwad and such management was acquiesced in by the male members and that Nanu Amma was after her the manager in whom the tarwad property vested and the plaintiff had no title to maintain the suit, but he however found that if the plaintiff was the person entitled to the management of the tarwad properties he was entitled to possession of properties items 1 to 3. This finding of the learned Subordinate Judge as to custom is attacked in second appeal and it seems to me that the finding is unsatisfactory. The suit tarwad formed a branch of a main tarwad from which it separated by a deed of partition, Ex. D, in or about 12th July 1877. The said deed of partition distinctly provides that Govinda Menon, the senior-most male member, should be manager of the branch to which Kunji Amma belonged. But for some reason or other Kunji Amma was allowed to manage the tarwad. There is no other instance given of a female member managing the tarwad. Strong and cogent evidence must be given to establish a custom entitling the senior-most female member to manage in preference to the senior-most male. It would be unsafe to infer a custom from the single instance of a senior-most female having been allowed to manage the property for a considerable length of time. The elements which would be required to establish a valid custom cannot be said to have been established in this case. But I think it is unnecessary to rest my decision on this ground as the

case can be satisfactorily disposed of on another ground.

It has been brought to my notice by Mr. Govinda Menon, who appears for plaintiff 2 (appellant), in this case that, since the filing of the present appeal, in two litigations to which Nanu Amma and the present plaintiff 2 were arrayed as plaintiff and defendant it was finally decided that the right of management vests only in the senior-most male member and that there was no custom established to entitle the senior-most female to manage in preference to the senior-most male and that plaintiff 2 was the rightful manager of the tarwad. Mr. Govinda Menon has made an application for the documents in support thereof being received in evidence. They are judgments in A. S. Nos. 68 and 69 of 1934 on the file of the Sub-Court at Ottappalam. Mr. Kutti Krishna Menon has objected to the reception of the said documents on the ground that in second appeal they cannot be admitted relying on the decision in 31 Mad 415.[1] It seems to me that the said decision is distinguishable and this case is governed by the ruling in 1919 M W N 455[2] where under similar circumstances a judgment was admitted in second appeal. In 31 Mad 415[1] the case related to a question of fact and further the documents were available in the trial Court unlike in this case where the judgments sought to be admitted were pronounced after the filing of the appeal in this Court. I must therefore take notice of the fact that there has been such an adjudication and mould the decision accordingly. Therefore following the said decision in 1919 M W N 455,[2] I allow the said documents to be filed. It seems to me that the said documents conclude the issue as to the title of Nanu Amma set up by the defendant. If Nanu Amma had been a party to this litigation there can be no question that the said judgments will operate as *res judicata* between her and plaintiff 2 and the fact that the said judgments were delivered since the filing of this appeal is immaterial. The principle applicable is thus stated by Mahmood, J. in 11 All 148[3] at p. 162:

> The doctrine so far as it relates to prohibiting the retrial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue.....So far as the justification of this view from the provisions of the Civil Procedure Code is concerned, I may say that the rule contained in S. 13 is not limited to the Courts of first instance, that it applies equally to the procedure of the first and second appellate Courts by reason of Ss. 582 and 587 respectively, and, indeed even to miscellaneous proceedings by reason of the general provisions of S. 647 of the Code.

This principle was accepted and applied in 1919 M W N 455[2] in second appeal and recently by Varadachariar, J. in 70 M L J 223[4] in a civil revision petition. The question is, will the defendant, not being a party to the said judgments, be bound by them? The view of Dr. Bigelow is that a lessee would be bound by a judgment against his lessor in the absence of any fraud or collusion on his part. He explains the principle thus:

> To make a man privy to an action he must have acquired an interest in the subject matter of the action either by inheritance, succession or purchase from a party subsequent to the action or he must hold the property subordinately.....
> ...The case of privity by subordination may be illustrated.....by the common law illustration feoffer and feoffee. That is Coke's illustration. A more familiar one to lawyers of the present time is afforded by the relation of landlord and tenant. A lawful judgment which deprives the landlord of the estate deprives the tenant of necessity of his subordinate right.

In 33 Mad 459,[5] Miller and Sankaran Nair, JJ. point out that there is no English authority in support of this view. They refer to the view of Hukumchand according to which

> a tenant of the defendant in ejectment, who acquired his lease before the commencement of a suit is not estopped as to his term by a judgment in the suit against his lessor.

But the learned Judges leave the question open as they were of opinion that Dr. Bigelow's principle would not apply to the case of a permanent heritable tenure. In such a case they thought that as the tenancy cannot be determined by notice nor will it be terminated by efflux of time, the interest of the lessee is not subordinate to that of the lessor. Where therefore there is no question of any outstanding term or where the term of lease has expired or where the tenancy is determinable at will and the lessee is bound to

1. Secy. of State v. Manjeshwar Krishnaya, (1908) 31 Mad 415.
2. Gaddam Paramasivudu v. Mulakala Subbanna, A I R 1919 Mad 17=52 I C 625=1919 M W N 455.
3. Balkishen v. Kishan Lal, (1889) 11 All 148=1889 A W N 42.
4. Rangacharlar v. Rangaswami Iyengar, A I R 1936 Mad 190=161 I C 219=59 Mad 777=70 M L J 223.
5. Seshappaya v. Venkataramana Uppadya, (1910) 33 Mad 459=5 I C 732=20 M L J 752.

surrender possession when called upon to do so by the lessor or anyone who succeeds to him, there is no reason why the principle enunciated by Dr. Bigelow should not be applied. In this case the finding is, as already stated, the defendant was bound to surrender possession to plaintiff if he was the rightful manager. It seems to me therefore that the defendant is concluded by the judgment against Nanu Amma. Even if it be held that the defendant cannot be said to be claiming strictly under Nanu Amma, since he has chosen to rely on the title of Nanu Amma, and made it a part of his defence it would be open to the plaintiff to repudiate the said title. In a suit in ejectment where the defendant relies on title of a third party having no other title to rely on, it is open to the plaintiff to rely upon whatever would displace the title of the said third party and defeat the claim. In 44 Mad 778[6] at p. 801 Kumaraswamy Sastri, J. explained the principle applicable to a case of this description thus:

> In all cases of *jus tertii* the person who sets up the rights of a third party is bound to prove that the third party has or had the rights alleged and it is always open to the other party to displace the title of the person so set up by showing that he was a party to the litigation which has negatived that title. Whatever would estop or bar the persons whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or in pais.

Thus whatever would estop by record, deed or in *pais* Nanu Amma would estop equally the defendant. Mr. Kutti Krishna Menon relied strongly on the said decision in 44 Mad 778,[6] itself as negativing this view. But in 44 Mad 778 [6] the case was not viewed by the learned Judges therein as a case of a defendant setting up a *jus tertii*. The Secretary of State in that case was denying the title of the plaintiff and not making the title of the rival claimant to the office in question in that case as part of his title. The plea of the defendant in this case must therefore be negatived. Since the defendant has paid the rent bona fide to Nanu Amma, he will not be liable for any arrears of rent nor for any rent paid subsequently up to date. I reverse the decree of the lower Court and pass a decree directing delivery of possession of the suit properties to the plaintiff. In the circumstances of this case, I direct each party to bear his own costs throughout. Leave refused.

C.R.K./W.D. *Decree reversed.*

6. Secy. of State v. Syed Ahmed Badsha Sahib, A I R 1921 Mad 248=67 I C 971=44 Mad 778=41 M L J 223 & 278 (F B).

A. I. R. 1937 Madras 547

KING, J.

Nanu Nair — Petitioner.

v.

Puthan Veettil Karthyayini Amma — Opposite Party.

Criminal Revn. Case No. 654 and Petn. No. 609 of 1936, Decided on 26th February 1937, from order of Joint Magistrate, Palghat, D/- 4th June 1936.

Criminal P. C. (1898), S. 488 — Adopted child does not fall within phrase 'his legitimate or illegitimate child'—Adoptive father is not liable to pay maintenance to such child under S. 488.

An adoptive child does not fall within the phrase 'his legitimate or illegitimate child' and hence the adoptive father is not liable under S. 488, Criminal P. C., to pay maintenance to his adopted child : *A I R 1926 Lah 532, Ref.*

[P 547 C 2]

O. K. Nambiar — for Petitioner.

Public Prosecutor — for the Crown.

Order.—The question here is whether an adoptive father is liable under S. 488, Criminal P. C., to pay maintenance to his adopted child. There appears to be no direct authority on the point. In 7 Lah 365,[1] however, it was held that a step-father is not bound to pay maintenance to his step-son even though apparently before he deserted his wife he had in fact been maintaining the step-son. While sympathizing with the point of view taken by the learned Joint Magistrate I must, I think, look to the strict words of the section—and from them it seems clear that an adopted child does not fall within the phrase 'his legitimate or illegitimate child'. The order is accordingly set aside so far as it awards maintenance for the child.

C.R.K./V.B.B. *Order set aside.*

1. Abdur Rahim v. Mt. Amir Begum, A I R 1926 Lah 532=94 I C 354=27 Cr L J 610=27 P L R 539=7 Lah 365.

A. I. R. 1937 Madras 548

FULL BENCH

BEASLEY, C. J., VARADACHARIAR AND KING, JJ.

Secretary of State — Appellant.

v.

Bayisetti Veeranna and *others* — Respondents.

Letters Patent Appeal No. 10 of 1936, Decided on 17th December 1936, against the judgment of Pandrang Row, J., D/- 23rd October 1935.

Madras Irrigation Cess Act (7 of 1865), S. 1, Proviso 2—Words "Irrigated by using without due authority" contemplate voluntary user—Ryotwari holder receiving water from breach in channel unknowingly—Water cess cannot be levied.

The expression "irrigated by using without due authority" in Proviso 2 to S. 1, Madras Irrigation Cess Act can reasonably be held only to contemplate a voluntary user, that is, with a preconceived purpose or at least an intention so to use the water. In substance, the provision in respect of unauthorized or improper user is one in the nature of a penalty and the mere fact that the sub-clause (b) of the enacting portion of the section was intended to apply even to cases of involuntary irrigation will not justify putting upon the language of the proviso a construction which is wholly at variance with the implication of the word 'use' or the reference to 'due authority'. [P 548 C 2]

Where, therefore, a ryotwari holder of the wet land received water from a breach in the channel while the source of irrigation assigned to these lands was sluice in the channel and the holder had nothing to do with the breach and was not even aware of it :

Held: that the water cess could not be levied from the holder : *A I R 1936 Mad 42, Foll.* [P 548 C 1, 2]

Govt. Pleader — for Appellant.

O. T. G. Nambiar — for Respondents.

Varadachariar, J. — This Letters Patent appeal arises out of a suit for recovery of water cess which the plaintiff alleges was illegally levied from him. The facts found are that the wet lands of the plaintiff who is a ryotwari holder received water for about 24 hours in August 1926 through a breach in the channel while the source of irrigation assigned to these lands was a sluice in the channel and that the plaintiff had nothing to do with the breach and was not even aware of it. On these findings of fact, our learned brother Pandrang Row, J., before whom this second appeal came in the first instance, followed the judgment of a Division Bench since reported in 59 Mad 107,[1] and held that the plaintiff was not liable to be charged to water cess. This Letters Patent appeal was posted before a Bench of three Judges as it was represented on behalf of the Government that the decision in 59 Mad 107,[1] required further consideration. The matter has now been argued before us fully by the learned Government Pleader, and we are indebted to Mr. Nambiar who had kindly agreed to represent the other side as *amicus curiæ*. It is not disputed that the case is directly governed by the decision in 59 Mad 107[1] so far as the effect of the second Proviso to S. 1, Madras Irrigation Cess Act, is concerned. There are certain observations in that judgment, bearing upon the relative scope of Cls. (a) and (b) of S. 1 of the Act and their relation to each other to which the learned Government Pleader took exception. It is not necessary for the purposes of this case for us to express any opinion upon the correctness or otherwise of those observations. Assuming for the moment that the present case falls under Cl. (b) it is sufficient to say that we agree with the opinion of the learned Judges so far as their interpretation of the second proviso to the section is concerned, namely, the one relating to the immunity of ryotwari holders of land classified as wet.

The expression 'irrigated by using without due authority' can reasonably be held only to contemplate a voluntary user, that is, with a preconceived purpose or at least an intention so to use the water. In substance, the provision in respect of unauthorized or improper user is one in the nature of a penalty and the mere fact that Cl. (b) of the enacting portion of the section was intended to apply even to cases of involuntary irrigation will not justify putting upon the language of the proviso a construction which is wholly at variance with the implication of the word 'use' or the reference to 'due authority'. As pointed out by the learned Judges who decided 59 Mad 107[1] a course of decisions in this Court had uniformly held that the word 'used' appearing in different portions of the Act clearly contemplated voluntary user. When in 1900, the Legislature proposed to enable the Government to levy cess even in respect of involuntary irrigation, the Legislature did not indicate

1. Kanniappa Mudaliar v. Secy. of State, A I R 1936 Mad 42=159 I C 13=59 Mad 107=69 M L J 728.

its intention to depart from the proper or declared significance of the word 'used' but adopted a different phraseology in Cl. (b) to cover cases of involuntary irrigation. We are, therefore, of opinion that even the policy of the legislation of 1900 would not justify us in putting upon the expression "using without due authority" a different interpretation from that adopted in the earlier cases. The Letters Patent appeal fails and is dismissed.

C.R.K./P.R. *Appeal dismissed.*

*** * A. I. R. 1937 Madras 549**

FULL BENCH

BEASLEY, C. J., VENKATARAMANA RAO AND LAKSHMANA RAO, JJ.

Swaminathan — Petitioner.

v.

Official Receiver, Ramnad and *another* — Opposite Parties.

Civil Revn. Petn. No. 113 of 1935, Decided on 15th March 1937, from order of Sub-Judge, Devakottai, D/- 6th December 1934.

*** * Civil P. C. (1908), O. 33, R. 1—"Person",—Meaning of—Word 'person' includes Official Receiver in insolvency — Official Receiver can therefore sue in forma pauperis if he satisfies necessary conditions.**

Suits under Civil P. C. can be instituted not only by natural human beings but also by artificial persons such as a corporation or an idol and also by persons like executors, administrators, trustees and Official Receivers who represent the estate of another. Prima facie, therefore, having regard to the scheme of the Code, the context and object of the enactment would not exclude an Official Receiver from the category of persons within the meaning of O. 33, R. 1, Civil P. C. If the principle of law is that a natural person in his own right is a different person when he is representing the estate of another, the test is whether in that representative character and as owner of that estate he is a pauper within the meaning of the explanation to O. 33, R. 1.

[P 550 C 1 ; P 551 C 1]

An Official Receiver in insolvency can therefore sue in *forma pauperis* if he satisfies the necessary conditions : *7 Mad 390, Foll.; A I R 1918 All 177, Rel. on ; A I R 1930 Rang 259, Dissent.* ; *Case law discussed.* [P 551 C 1]

K. S. Venkatarama Iyer — for Petitioner.

K. V. Krishnaswami Iyer, C. A. Seshagiri Sastri, R. Kesava Iyengar and *T. D. Srinivasachari* — for Opposite Parties.

Venkataramana Rao, J.—The question raised in this Civil Revision Petition is whether an Official Receiver, in whom the estate of an insolvent vested under S. 28, Cl. 2, Provincial Insolvency Act by virtue of an order of adjudication made by the Court, can institute a suit as a pauper for the recovery of the said estate. The decision turns upon the construction of O. 33, R. 1, Civil P. C., which runs thus :

Subject to the following provisions, any suit may be instituted by a pauper.

Explanation : A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject matter of the suit.

The point now in controversy is whether an Official Receiver is a 'person' within the meaning of the above Explanation. There is no definition of 'person' in the Civil Procedure Code. Prima facie, the interpretation of the said term in the General Clauses Act would apply, according to which a 'person' shall include any company or association or body of individuals, whether incorporated or not. This connotes that 'person' would include both natural and legal persons. This is in strict accordance with the conception of a person in law. In his book of 'Jurisprudence', 8th Edn., at p. 329, Salmond observes thus :

So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition. Persons as so defined are of two kinds, distinguishable as natural and legal.

He further points out that a natural person is capable of a double personality. At p. 335, he explains it thus :

It often happens that a single human being possesses a double personality. He is one man but two persons. *Unus humo* it is stated, *plures personas sustinet.* In one capacity or in one right, as English lawyers say, he may have legal relations with himself in his other capacity or right ..... This double personality exists chiefly in the case of trusteeship. A trustee is a person in whom the property of another is nominally, i. e., technically vested, to the intent that he may represent that other in the management and protection of it. A trustee, therefore, is for many purposes two persons in the eye of the law. In right of his beneficiary he is one person, and in his own right he is another.

An Official Receiver satisfies this conception of a 'person.' The estate of the

insolvent is vested in him to the intent that he may represent the insolvent and realize the estate and administer it in accordance with the provisions of the Act. He is thus clothed with the representative character of trustee. As Lord Selborne pointed out in 5 A C 857[1] at p. 861 :

> There can be no question that the word 'person' may and ..... prima facie does, in a public statute, include a person in law ; that is, a corporation, as well as a natural person. But although that is a sense which the word will bear in law, and which, as I said, perhaps ought to be attributed to it in the construction of a statute unless there should be any reason for a contrary construction, it is never to be forgotten, that in its popular sense and ordinary use it does not extend so far.

The same view was taken by Lord Blackburn at pp. 868 and 869. Unless therefore the context and the object of the enactment requires otherwise, 'person' in O. 33, R. 1, Civil P. C., should have the extended meaning given to it in law. Under O. 33, R. 1, any suit may be instituted by a pauper, that is the intended plaintiff in a suit can be a pauper. Suits under the Code of Civil Procedure can be instituted not only by natural human beings but also by artificial persons such as a corporation or an idol and also by persons like executors, administrators, trustees and Official Receivers who represent the estate of another. Prima facie, therefore, having regard to the scheme of the Code, the context and object of the enactment would not exclude an Official Receiver from the category of persons within the meaning of the said rule. But it is contended that by reference to the necessary wearing apparel in the Explanation and the necessity of the presentation of the application by the applicant in person, it can only contemplate a natural person. We think this contention is sufficiently met by the observations of Kumaraswamy Sastri, J., in 41 Mad 624.[2] Dealing with the argument with reference to the wearing apparel he observes thus :

> The explanation simply allows deduction of the value of wearing apparel and can only mean that if the applicant has necessary wearing apparel he can deduct its value. We do not think it can be construed to mean that only persons who in law can possess wearing apparel, can sue as paupers. .....

In regard to the physical presence of the applicant and his examination contemplated in the Code, the learned Judge observes thus :

> Rule 3, O. 33, Civil P. C., in our opinion only prohibits a pauper who is competent in law to appear in person from taking advantage of R. 1 of O. 3, Civil P. C., and appearing by a pleader or recognized agent instead of being present personally. It does not cover cases where from the nature of the case physical presence is impossible or where the law, owing to any disability, directs that all acts required by the Code should be performed by a next friend.

In a very clear decision of the Madras High Court the word 'person' was understood as including persons in a fiduciary character. In 7 Mad 390[3] in accordance with this interpretation an administrator was held entitled to sue in *forma pauperis*. This interpretation was never departed from excepting in one case decided by Jackson, J., in 88 I C 91[4] where the learned Judge seems to follow the decision in 36 Bom 279[5] which has taken a contrary view. In 48 M L J 390[6] it was pointed out following 7 Mad 390[3] that the word 'person' in O. 33, R. 1, indicates a juridical person and that an executor can sue in *forma pauperis*. This is also the view taken by Kumaraswami Sastri, J. in A I R 1928 Mad 66,[7] (a case of an executor) and in 41 Mad 624[2] (a case of an official liquidator). In a recent decision dealing with a case of mutawalli reported in 100 I C 264,[8] Ghose and Cammiade, JJ., observed that the capacity of a person suing in a representative character must be kept distinct from his personal capacity and that a mutawalli, trustee or a shebait can be allowed to sue in *forma pauperis*. The argument that was strongly pressed upon us and based on A I R 1930 Rang 259[9] is that as the property vests in the Official Receiver and he is the legal owner of the insolvent estate,

1. Pharmaceutical Society v. London and Provincial Supply Association, (1880) 5 A C 857 =49 L J Q B 736=43 L T 389=28 W R 957 =45 J P 20.
2. Perumal Goundan v. Thirumalrayapuram Jananukoola Dhanasekhara Sanka Nidhi Ltd., A I R 1918 Mad 362=45 I C 164=41 Mad 624=34 M L J 421.
3. *In re* Bill, (1884) 7 Mad 390.
4. *In re* A. S. Radhakrishna Iyer, A I R 1925 Mad 819=88 I C 91.
5. Manaji Raguji v. Khandoo Baloo, (1912) 36 Bom 279=11 I C 724=13 Bom L R 577.
6. Sivagami Ammal v. Gopalaswami Odayar, A I R 1925 Mad 765=87 I C 372=48 M L J 390.
7. Ammakanammal v. Damodara Mudaliar, A I R 1928 Mad 66=109 I C 258.
8. Mabiakhatun v. Sheikh Satkari, A I R 1927 Cal 309=100 I C 264=45 C L J 68.
9. S. M. Mitra v. Corporation of the Royal Exchange Assurance, A I R 1930 Rang 259= 126 I C 650.

he cannot be allowed to sue in *forma pauperis*. The test is not whether a person is the legal owner, but whether as legal owner he is a pauper or not. If the principle of law is that a natural person in his own right is a different person when he is representing the estate of another, the test is whether in that representative character and as owner of that estate he is a pauper within the meaning of the explanation to O. 33, R. 1.

The said decision again does not draw a distinction between legal ownership vesting in a person by virtue of his fulfilling the representative character and so long as he fulfils the representative character and the legal ownership vesting in a person by virtue of succession or inheritance. The case in 16 A L J 440[10] also is in favour of the view that an Official Receiver can sue as a pauper. The case in 36 Bom 279[5] relied on is the one where Daver, J. held that an executor was not entitled to sue in *forma pauperis* on the ground that he in his individual capacity was not a pauper. The ground assigned was that :

> The privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation.

This decision proceeds on the assumption that the 'person' referred to in the explanation to O. 33, R. 1 can only refer to a person suing in his own right and not a person suing in a representative character or to an artificial person. The learned Judge notices in the same case that it was conceded before him that an executor could not institute a suit in *forma pauperis*. This is the English rule but that rule is not applicable in India, as pointed out in 7 Mad 390[3] which we prefer to follow. We are therefore of the opinion that the Official Receiver in this case can be allowed to sue as a pauper, provided he fulfils the conditions laid down in the explanation to O. 33, R. 1, Civil P. C. The case is therefore remanded to the lower Court for the determination of the question whether the petitioner satisfies the condition laid down in the explanation to O. 33, R. 1, Civil P. C., and for disposal accordingly. Costs will abide the result.

C.R.K./K.B. *Case remanded.*

10. Mohamed Zaki v. Municipal Board of Mainpuri, A I R 1913 All 177=47 I C 577=16 A L J 440.

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* A. I. R. 1937 Madras 551

FULL BENCH

BEASLEY, C. J., VENKATARAMANA RAO AND LAKSHMANA RAO, JJ.

Parvataneni Lakshmayya —

Petitioner.

v.

Official Receiver, Masulipatam —

Opposite Party.

Civil Revn. Petn. No. 1121 of 1934, Decided on 16th March 1937, from order of Dist. Court, Masulipatam, in C. M. A. No. 41 of 1933.

*** Civil P. C. (1908), S. 60 (1) (c) — Agriculturist—Meaning of—Agriculturist is person really dependent for his living on tilling soil and unable to maintain himself otherwise.**

To determine whether a person is an agriculturist within the meaning of S. 60, Civil P. C., the test is not "main source of income" neither is it "sole source of income". Having regard to the scheme of the section exempting from attachment as it does tools of artisans, and where the judgment-debtor is an agriculturist his implements of husbandry, etc., it seems that the protection is intended to be given to those who are real tillers of the land and that an agriculturist in the section is a person who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. Main, chief, or principal sources of income are not the proper tests. A man's main source of income may be from tilling the soil but his other source or sources of income may be more than sufficient to maintain him. The fact that a man's income from tilling the soil may be larger than his income from his ownership of land or other sources does not make him an agriculturist within the meaning of the section. At the same time there is no reason for depriving an agriculturist of the exemption under the section because he may have invested money in a business or businesses and may derive some income therefrom or do coolie work and add to his earnings in bad times : *Case law discussed.* [P 553 C 2]

P. Satyanarayana Rao—for Petitioner.

V. Govindarajachari — for Opposite Party.

Beasley, C. J.—The only question raised in this Civil Revision Petition is whether the insolvent is an "agriculturist" within the meaning of S. 60 (1) (c), Civil P. C., and this petition has been posted before a Bench of three Judges because in 49 Mad 227,[1] Devadoss and Waller, JJ. took the view that in order to constitute an agriculturist within the meaning of that section agriculture must be the sole source of living, whereas in A I R 1927 Mad 342[2]

1. Muthuvenkatarama Reddiar v. Official Receiver, South Arcot, A I R 1926 Mad 350=92 I C 399=50 M L J 90=49 Mad 227.
2. Gopalam Garu v. Gopalakrishnayya Garu, A I R 1927 Mad 342=92 I C 416.

Devadoss and Wallace, JJ. held that in order to constitute an agriculturist it is enough if his chief source of income is agriculture. These decisions are obviously in conflict. In the present case, the facts are that the petitioner's income was derived from agriculture, as a mahazadar enjoying kists paid by his ryots, from a motor business and a tobacco trade. He became insolvent and it was claimed that his house was not liable to sale because of S. 60 (1) (c), Civil P. C. The Subordinate Judge held that the petitioner was not an agriculturist within the meaning of that section and the District Judge affirmed that decision on appeal. By reason of S. 60 (1) (c), Civil P. C.,

> houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him

shall not be liable to attachment or sale; and by reason of S. 28 (5), Prov. Insol. Act, the property of the insolvent which vests in the Official Assignee is not to include property which is exempted by the Code of Civil Procedure from liability to attachment and sale in execution of a decree. We will, first of all, take the cases cited which support the view that in order to constitute an "agriculturist" within the meaning of S. 60 (1) (c), Civil P. C., it is enough if his chief source of income is agriculture: 7 Rang 766[3] was the first case cited on the petitioner's behalf; but it does not really assist his argument because there both a house in the village and also a hut in a field belonging to an agriculturist and occupied by him were held to be exempt from attachment. It was assumed that the occupier was an agriculturist and it was held that the house although situated in a village and not in the field was with the hut equally exempt from attachment under the provisions of S. 60 (1) (c). That case therefore does not decide the point here. 11 Rang 372,[4] next cited, was upon the point of whether houses belonging to and occupied by an agriculturist otherwise than in connexion with his calling are exempt from attachment under that section and does not decide the point before us. In that case, 49 Mad 227[1] was cited but only upon the point under discussion by the Full Bench and not on the present one. Next, reference was made to some decisions of the Allahabad High Court and all of them are upon this point. In 35 All 307[5] the appellant was both a zamindar and a cultivator of land and the question was whether he was an agriculturist, and on p. 308 the test applied was

> what is his main source of income and whether or not he is an agriculturist within the strict sense of the term and occupies the house as such,

and it was stated that he had to show that his main source of income was cultivation and not zamindari and that he was in the strict sense of the term an agriculturist. This, it was held that, he had failed to do. In 33 I C 727[6] the test applied was whether his chief occupation and chief means of livelihood were agriculture. It appears that the judgment-debtor there was both an agriculturist and a zamindar, his zamindari being infinitesimal in amount and he was held to be an agriculturist. In 52 All 1027,[7] a Division Bench applied the test of whether the main source of income was agriculture. The same test was employed in A I R 1927 All 601,[8] i. e., main source of income. As in the other Allahabad cases the party alleging himself to be an agriculturist was also a zamindar and a proposition of law was propounded by the lower appellate Court that a pure and simple zamindar is to be taken as an agriculturist in the absence of any legal definition to the contrary. On second appeal Iqbal Ahmad, J. however, expressed the opinion that the presumption is the other way and that a zamindar must be taken to be a zamindar unless his main source of income is proved to be from cultivation. In A I R 1931 All 20,[9] also a case of a zamindar obtaining his livelihood from cultivation as well as from the zamindari, the main source of income test appears to have been accepted by Niamatullah, J. though he says that the fact that he cultivates his own land and thereby maintains himself and his family will not necessarily

3. Ma E Se v. Ma Bok Son, A I R 1930 Rang 129 =121 I C 777=7 Rang 766.
4. Bank of Chettinad Ltd. v. Ko San Ok, A I R 1933 Rang 227 = 145 I C 326 = 11 Rang 372 (F B).
5. Jamna Prasad Raut v. Raghunath Prasad, (1913) 35 All 307=19 I C 125=11 A L J 437.
6. Shafian v. Hamid-ul-lah Khan, A I R 1916 All 332=33 I C 727=14 A L J 240.
7. Sabha Ram v. Kishan Singh, A I R 1931 All 112 = 133 I C 478=1930 A L J 1599= 52 All 1027.
8. Bachan Singh v. Bhika Singh, A I R 1927 All 601=106 I C 49.
9. Dharam Singh v. Shah Mal Singh, A I R 1931 All 20=132 I C 809.

make him any the less an agriculturist and that on the other hand, if land which he cultivates and has let to tenants is considered to be sufficient for his maintenance, he will not be considered to be an agriculturist only, because he cultivates the whole of what he owns. He then discusses the facts of the case and states that:

> The fact that the appellants own 27 pakka bighas of land is in my opinion an indication of the extent to which they are maintained by sources other than agriculture pure and simple. This amount of land if let to tenants will fetch sufficient though somewhat reduced income for the maintenance of the appellants. On the whole I think that they cannot be considered to be agriculturists within the meaning of S. 60 (1) (c).

Next, two decisions of the Lahore High Court were cited, namely, A I R 1928 Lah 132[10] and A I R 1936 Lah 737.[11] In the former case, it was held that by "agriculturist" is meant one who earns his livelihood wholly or principally by agriculture or ordinarily engages personally in agricultural labour. In the latter case it was held that an agriculturist means a professed cultivator and a farmer or husbandman. In that case the judgment-debtor did not himself till the land and earn his living thereby wholly or partly and he was held not to be an agriculturist. But on p. 739 Coldstream, J. makes some observations which with respect we cannot agree with. He there expresses the opinion that there is no justification in the wording of the section for holding that for the purpose of that section the term excludes a large landowner or a person who does not depend solely or mainly on cultivation for his livelihood. In our opinion such a person would not be an agriculturist in the strictest sense in which the section should be applied. We are supported in this view by 12 Bom 363.[12] There West, J. says that:

> It was for agriculturists in the strictest sense and for an agriculturist in that sole character that the protection of S. 266 (c), Civil P. C. [the equivalent of the present S. 60 (1) (c)] was intended.

On the other side, there is the decision of the Calcutta High Court in 63 I C 681[13] where the same view as that taken in 49 Mad 227[1] was expressed. There it was held that where a judgment-debtor's only source of living is not by cultivation of land he is not an agriculturist within the meaning of S. 60 (1) (c). After a consideration of the authorities referred to, we have come to the conclusion that the test is not "main source of income" neither is it "sole source of income". We think that having regard to the scheme of the section exempting from attachment as it does tools of artisans, and where the judgment-debtor is an agriculturist his implements of husbandry, and such cattle and seed-grain as may in the opinion of the Court be necessary to enable him to earn his livelihood, and his houses and other buildings occupied by him, protection is intended to be given to those who are real tillers of the land and that an agriculturist in the section is a person who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. Main, chief, or principal sources of income are not, in our view, the proper tests. A man's main source of income may be from tilling the soil but his other source or sources of income may be more than sufficient to maintain him. The fact that a man's income from tilling the soil may be larger than his income from his ownership of land or other sources does not seem to us to make him an agriculturist within the meaning of the section. At the same time we see no reason for depriving an agriculturist of the exemption under the section because he may have invested money in a business or businesses as alleged in the present case and may derive some income therefrom or do coolie work and add to his earnings in bad times. The test of sole source of income if applied would deprive him of the benefit of the section and we prefer the test which we have already laid down, viz., that he must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise. The case is accordingly sent back to the lower Court for disposal in the light of our observations: the costs of this petition will abide the result there.

C.R.K./S.C. *Order accordingly.*

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10. Abdulla v. Anjuman Dehi, A I R 1928 Lah 132=106 I C 45.
11. Gur Bakhsh Singh v. Chand Darshan Lal, A I R 1936 Lah 737=164 I C 690=38 P L R 933.
12. Jivan Bhaga v. Hirav Bhaiji, (1888) 12 Bom 363.
13. Surangini Deby v. Kedarnath Chandra, (1921) 63 I C 681.

A. I. R. 1937 Madras 554

HORWILL, J.

Nalam Thalupulamma and *another* — Petitioners.

v.

Kondepudi Mangamma — Opposite Party.

Civil Revn. Petn. No. 1738 of 1933 and Appeal No. 98 of 1934, Decided on 2nd February 1937, from order of Dist. Munsif, Ramachandrapur, D/- 21st June 1933.

(a) Civil P. C. (1908), O. 34, R. 12 — Scope — Prior mortgagee applying under O. 34, R. 12 — Sum claimed by him cannot be paid to him merely on summary inquiry under O. 34, R. 12 but after full enquiry into validity of his mortgage—O. 34, R. 12 does not contemplate full inquiry into claims of person not party to suit but merely incidental inquiry—Executing Court would be making wrong exercise of its discretion if it makes full inquiry.

Order 34, R. 12, Civil P. C., does not contemplate an inquiry whether a person who is a stranger to the suit is a prior mortgagee or not. It contemplates the admitted existence of a prior mortgagee and lays down the procedure to be adopted in bringing the mortgaged properties to sale, the prior mortgagee being given the option of having the property sold subject to his mortgage or free from his mortgage. The sum claimed by the prior mortgagee or the full value of his mortgage should not be paid to him without a prior adjudication after full trial regarding the validity of the mortgage. This money cannot be paid over to him after a summary inquiry under this rule. The executing Court has to make certain inquiries of an incidental nature; but it cannot be said that this inquiry into the rights of a stranger to the suit is in the nature of the incidental inquiry in execution. O. 34, R. 12 does not contemplate a full inquiry into the claims of a person who is not a party to the suit but who applies under O. 34, R. 12, and if the executing Court makes such inquiry in order that an order may be passed under O. 34, R. 12 in favour of such person, the executing Court would be exercising its discretion wrongly. [P 554 C 2; P 555 C 1]

(b) Civil P. C. (1908), O. 34, R. 12 and S. 2 (2)—Prior mortgagee applying under O. 34, R. 12 after passing of decree—This cannot make him party to such decree — Order under O. 34, R. 12 even if passed after full inquiry is not decree within S. 2 (2).

The mere filing of an application by a prior mortgagee under O. 34, R. 12, Civil P. C., after a decree has been passed cannot make him a party to the decree even if it be said that a mortgage suit does not end until the property has been brought to sale. An order therefore passed under O. 34, R. 12 even after full inquiry does not amount to a decree within the meaning of S. 2 (2) of the Code. [P 554 C 2]

K. Bhimasankaran — for Petitioners.

Ch. Raghava Rao — for Opposite Party.

Order.—The petitioner obtained a mortgage decree and in execution the respondent came forward alleging that she was a prior mortgagee and requesting the Court under O. 34, Rr. 12 and 13, Civil P. C., to sell the property free of her mortgage and to apply the proceeds of the sale first in discharging her own debt. The petitioner objected to this procedure, alleging that her mortgage was nominal and collusive, not supported by consideration and invalid. The District Munsif of Ramachandrapur after a summary inquiry held that *prima facie* the petitioner had proved that she was a prior mortgagee and granted the petition. It is frankly conceded by Mr. Raghava Rao on behalf of the respondent that the order of the learned Munsif as it stands is wrong. Clearly the sum claimed by the respondent or the full value of her mortgage should not be paid to her without a proper adjudication after full trial regarding the validity of the mortgage. This money cannot be paid over to her after a summary inquiry of this kind. It is however pleaded that this revision petition should be allowed and the petition remanded for a full and proper inquiry under O. 34, R. 12. In the first place I do not think that O. 34, R. 12 contemplates an inquiry whether a person who is a stranger to the suits is a prior mortgagee or not. O. 34, R. 12 contemplates the admitted existence of a prior mortgagee and lays down the procedure to be adopted in bringing the mortgaged properties to sale, the prior mortgagee being given the option of having the property sold subject to his mortgage or free of his mortgage. In the latter case he is entitled to have his mortgage discharged out of the proceeds of the sale.

It is true that the executing Court has to make certain inquiries of an incidental nature; but it cannot be said that this inquiry into the rights of a stranger to the suit is in the nature of an incidental inquiry in execution. An order passed under O. 34, R. 12 is not appealable at all. It is suggested that an order passed under O. 34, R. 12 after a full inquiry would amount to a decree within the meaning of S. 2 (2), Civil P. C., but this cannot be so; for the respondent was not a party to the suit. The mere filing of an application after a decree has been passed cannot make her a party to the decree, even if, as Mr. Raghava Rao contends, a mortgage suit does not end until the property has been brought to sale. Moreover, S. 2 (2) makes a special reference to two sections of the Civil Procedure Code, orders under

which, can be treated as decrees. It is most unlikely that the Legislature would have both overlooked the possibility of a full adjudication of the rights of the parties, under O. 34, R. 12 in the definition of S. 2 (2), and have failed to provide for an appeal from an order passed under this rule deciding important rights. I have already said that I am satisfied that O. 34, R. 12 does not contemplate an inquiry of this nature; but if it did, I should consider that an executing Court, whose primary duty it is to execute, would be exercising its discretion wrongly to go into a full inquiry into the claims of a person who is not a party to the suit in order that an order may be passed under O. 34, R. 12 in his favour. In any event, therefore, the order of the lower Court was wrong and has to be set aside; and I am not prepared to order the Court to make a further inquiry into the petition. C. M. P. No. 44 of 1933 is dismissed with costs and this Civil Revision Petition allowed with costs.

Appeal against Appellate Order No. 98 of 1934.

The appeal is not maintainable. It is therefore dismissed with costs.

C.R.K./W.D. *Order accordingly.*

A. I. R. 1937 Madras 555

VENKATASUBBA RAO, J.

Palkudi Kuppal Naicker — Appellant.

v.

Lakshmi Ammal and *others* — Respdts.

Second Appeal No. 281 of 1933, Decided on 16th March 1937, against decree of Sub.Judge, Tuticorin, in A. S. No. 71 of 1931.

(a) Hindu Law— Succession — Step-sister's son is in line of succession.

Under the Hindu law a step-sister's son though a remote heir is in the line of succession : *15 Mad 300, Rel. on.* [P 555 C 2]

(b) Hindu Law — Reversioners — Suit for impeaching limited owner's act can be brought by remote reversioner if nearest one colludes with limited owner or fails to sue.

When the nearest reversioner has colluded with the limited heir whose act is impeached or has precluded himself by his conduct from suing, the suit for impeaching limited owner's act may be brought by a remote reversioner. [P 555 C 2]

(c) Specific Relief Act (1877), S. 42 — Sale by widow in 1920 — Sale depending on mortgage of 1909 — Suit by reversioner for declaration in 1930 — Relief held could not be granted.

Where a suit for declaration by a reversioner was brought in 1930, attacking the alienation by the widow of the last maleholder which was a sale made in 1920 and which again depended upon the validity of a mortgage of 1909 :

Held : that the relief under S. 42, Specific Relief Act, being discretionary could not be granted, the suit having been brought in respect of transaction 21 years old. [P 556 C 1]

R. Krishnaswami — for Appellant.

V. K. Mahadeva Sastri and *A. B. Viswanathan* — for Respondents.

Judgment. — I agree with the lower Court, that the plaintiff's suit ought to fail, but I am not prepared to agree with its reasoning. There is the finding here, which is not attacked, that the plaintiff is the step-sister's son of Akka Naicker, the last maleholder. His widows are still alive and in view of the recent Full Bench decision in Appeal No. 443 of 1930, there can be no doubt that the case is governed by the Hindu Law of Inheritance (Amendment) Act, 1929; but it is unnecessary to decide whether a step-sister's son is among the heirs intended to be benefited under S. 2 of that Act. I proceed upon the assumption that while a sister's son comes within that section, a step-sister's son does not; but how does that make any difference here? Under the Hindu law, as unaffected by and independent of the Act mentioned above, a step-sister's son, though a remote heir, is in the line of succession : 15 Mad 300[1] and Mulla's Hindu Law, Edn. 8, p. 46. Granting then that the plaintiff is not the nearest but remote reversioner, the question arises, does the suit lie or not? Defendant 5 is the sister of the last maleholder and defendants 3 and 4 are her sons. The sale impeached was made in favour of defendant 3, and it is alleged in the plaint that it was brought about by one of the widows of the last maleholder acting in collusion with defendants 3, 4 and 5. True the plaintiff does not expressly say in his plaint that he has brought the suit in his capacity of a remote reversioner; but there are sufficient allegations in it, which bring the case within the rule, that when the nearest reversioner has colluded with the limited heir, whose act is impeached or has precluded himself by his conduct from suing, the suit may be brought by a remote reversioner.

I am prepared, therefore, differing from the lower Courts, to view the plaint in that light. But still, in my opinion, the plaintiff ought not to be granted any relief in this suit. It is discretionary with the Court to grant or not a declaratory decree;

1. Subbaraya v. Kylasa, (1892) 15 Mad 300.

that is the effect of S. 42, Specific Relief Act. The suit was brought in 1930 and the alienation attacked is a sale which was made in 1920 and that again depends upon the validity of a mortgage created in 1909. The question is simply, would the Court, in the exercise of a sound judgment, grant a declaration in respect of a transaction which was 21 years old on the date of the plaint? I may observe that the mortgage of 1909 was in favour of Audiappa, the husband of defendant 5, and the father of defendants 3 and 4 and that he had died by the date of the suit. The plaintiff, when he filed it, was 54 years old and what possible reason could he have had for deferring action for such a long period? On this ground the lower Court's judgment dismissing the suit is upheld and the second appeal is dismissed. In the circumstances, I make no order as to costs. Leave to appeal is refused.

C.R.K./S.C. *Appeal dismissed.*

A. I. R. 1937 Madras 556

KING, J.

Venkataramana and *others* — Appellants.

v.

Narayana Vaijappa Bhandary and *others* — Respondents.

Second Appeal No. 65 of 1933, Decided on 25th November 1936, against decree of Dist. Court, South Kanara, in A. S. No. 61 of 1932.

(a) Insolvency — Liquidator — Liquidator is vested with same property as that which Official Receiver gets during administration of insolvent's estate.

There is no distinction between the property of an insolvent which vests in the Official Receiver and the property of an insolvent which, at the termination of his insolvency, vests by the order of the Court in a liquidator. A liquidator is vested with the same property as an Official Receiver would get during the administration of the insolvent's estate and that property includes any power which the insolvent father, might possess of disposing of the share of his sons. [P 556 C 2]

(b) Hindu Law — Joint family — Father — Father's power to sell his son's share to satisfy his own debts — For exercise of this power father need not be manager.

There is no justification for any limitation of the father's power to sell his son's share to satisfy his own debts to a situation in which the father is also the manager : *A I R 1937 Mad 140, Expl.; 1936 Foll.; A I R 1928 Mad 735, Expl.; 1936 M W N 866, Not foll.* [P 557 C 1]

B. Sitarama Rao — for Appellants.

K. P. Sarvothama Rao and *T. Krishna Rao* — for Respondents.

Judgment.—The appellants in this case are the three sons of defendant 2. They, their father and their grandfather, defendant 1, formed an undivided joint Hindu family. Defendant 2 entered into a partnership with others in business and he and his partners were adjudicated insolvents. The insolvency was terminated by the acceptance by the Court of a scheme of arrangement and the insolvent's property was vested in a liquidator, who proceeded to sell to defendant 3 one-half share in the family property, that is to say, the shares of defendant 2 and of his sons. This is a suit by the plaintiff's against defendant 3 in which they claim that defendant 3 has acquired title not to one half-share of the family property but only to one-eighth, that is the share of defendant 2 exclusively. This contention was upheld by the Court of first instance but has been set aside by the District Judge of South Kanara.

The first argument in this second appeal is that there is some distinction between the property of an insolvent which vests in the Official Receiver and the property of an insolvent which, at the termination of his insolvency, vests by the order of the Court in a liquidator. No authority was quoted in favour of this distinction and I can see no grounds upon which it can be based. Clearly a liquidator is vested with the same property as an Official Receiver would get during the administration of the insolvent's estate and that property includes any power which defendant 2, the father, might possess of disposing of the share of his sons.

The second and main argument in this appeal was that, because the father was not the manager of the family, he could exercise no power of any kind to dispose of any of the family property. In support of this argument, I have been referred first of all to a ruling in 51 Mad 417.[1] The question at issue in that case was whether after a partition the power which the father of a family had possessed before partition of selling his sons' shares could pass in an insolvency to the Official Receiver and be exercised by him. It was held that the filing of a partition suit put an end to the power and that therefore the Official Receiver also, to whom passed only the property of the

1. *In re* Baluswami Ayyar, A I R 1928 Mad 735 =112 I C 541=55 M L J 175=51 Mad 417 (F B).

insolvent, could not exercise it. It was unnecessary in that case to decide whether the father whose power was being discussed was before the partition the manager of the family or not. At p. 430, it is no doubt stated by Ramesam, J. that the basis of a Hindu father's right to sell his sons' share in the joint family property for antecedent debts is twofold, and the second condition laid down is that the property must be joint family property of which the father was the manager. But Ramesam, J. at p. 436 goes on to show that where there are a father and his sons in a joint family, the father is always the manager of his own and of his sons' shares. There can therefore be no support discovered in 51 Mad 417[1] for the argument now put forward. The matter has come up again recently before two Benches of this Court in the present year. In the first case, which is reported in 1936 M W N 866,[2] it was held though, if I may say so with respect, without any detailed analysis of the powers of the father or of the manager of the family, that a father has no right to mortgage his sons' shares in the family property when he is not himself the manager. In the other and later ruling in 44 M L W 738,[3] 1936 M W N 866[2] is dissented from and a clear distinction is drawn between the power of the father and the power of the manager and it is stated quite positively that there is no justification for any limitation of the father's power to sell his sons' share to satisfy his own debts to a situation in which the father is also the manager. It seems to me with great respect that the decision of the learned Judges in 44 M L W 738[3] is right and that I should follow it.

The result is that this second appeal is dismissed with costs of respondent 1. The appellant must pay the court-fees to Government.

C.R.K./S.C. *Appeal dismissed.*

2. Rayalu Ayyar v. Vairavan Chettiar, 1936 M W N 866.
3. Shanmukam v. Nachu Ammal, A I R 1937 Mad 140=(1937) 1 M L J 278=44 MLW 738.

A. I. R. 1937 Madras 557

MOCKETT AND LAKSHMANA RAO, JJ.

V. Ramanna Shetty — Petitioner.

v.

Inspector of Local Boards, Madras and *another* — Opposite Parties.

Civil Misc. Petn. No. 4729 of 1936, Decided on 21st January 1937.

(a) Madras Local Boards Act (14 of 1920), Election Rules, R. 10 (b) (ii) and (iii)—R. 10 (b) contemplates difference between election and effect of election—Supplying of petrol by candidate to private car used for election and hiring bus for conveying voters to poll—Election held was procured or induced by corrupt practices under R. 10 (b) (ii) and (iii)—Proviso to R. 10 applies only when corrupt practice is committed by person other than candidate himself.

Under R. 10 (b) of Election Rules under Madras Local Boards Act two circumstances are contemplated. With regard to the procuring or inducing, it is the election of the returned candidate that is in contemplation; with regard to the material effect, it is the result of the election that is contemplated. The rule contemplates a difference between the election and the result of the election. And it would be seen that the word 'election' is very much wider than the words 'the result of the election,' and contemplates something more like the conduct of the election as differentiated from the purely isolated fact of the result. [P 558 C 2]

Where a candidate who was elected as a member of the District Board had supplied petrol to two private cars which were used for the purposes of his election and had hired a bus for the purposes of conveying voters to the poll, the Election Commissioner declared the election void. On application for the *writ of certiorari* :

Held : that the election was procured or induced by corrupt practices mentioned in R. 10 (b) (ii) and (iii) ; [P 559 C 1]

Held further : that the proviso to R. 10 did not apply as it could be used only when the corrupt practice committed by somebody other than the candidate himself. [P 559 C 1]

(b) Election—Setting aside—Person getting elected by corrupt practice—That his rivals also used corrupt practice does not help him.

Where a person is elected by corrupt practices, his election is liable to be set aside, and the fact that such practices have been used by the rival candidates also does not help him because such practices on both sides do not have the effect of cancelling out each other. [P 559 C 1]

K. Rajah Iyer and *B. Sanjeeva Shetty* — for Petitioner.

N. Srinivasa Ayyangar, B. Sitarama Rao and *K. Y. Adiga* — for Opposite Parties.

Mockett, J.—The petitioner was elected as a member of the District Board of South Kanara for the Kundapur Circle. His election was declared void by the Election Commissioner. He comes before us for a *writ of certiorari* to quash that order. The facts are very simple. A large number of corrupt practices were alleged against the petitioner but he was absolved from all those allegations except under one main heading. Under the rules with regard to the validity of elections held under the Madras Local Boards Act, 1920, there is R. 10 which materially bears on the question before us. It is as follows:

If, in the opinion of the Election Commissioner, (a) the returned candidate or his agent or any other person with the connivance of such candidate or agent, has committed, or abetted the commission of any election offence falling under S. 58 of the Act or under Ch. 9-A, I. P. C., or (b) the election of the returned candidate has been procured or induced or the result of the election materially affected, by any of the following corrupt practices : (1) Any election offence falling under S. 58 of the Act or under Ch. 9-A, I. P. C., when committed by a person who is not a candidate or his agent or a person acting with the connivance of a candidate or his agent : (ii) any payment or promise of payment to any person whomsoever on account of the conveyance of any elector to or from any place for the purpose of recording his vote : (iii) the hiring, employment, borrowing or using for the purposes of the election of any boat, vehicle or animal usually kept for letting on hire or for the conveyance of passengers by hire, the election of the returned candidate shall be void.

It was alleged that the petitioner was guilty of corrupt practices under both (ii) and (iii). Under (ii) it was alleged that he had supplied petrol to two private cars which were used for the purpose of his election and under (iii) that he had hired a 22 seater motor bus, and had used it for the purpose of conveying voters to the poll. The finding of the Election Commissioner with regard to that can be shortly summarised. With regard to the allegation under (ii) he said that the supplying of petrol to those cars under the circumstances alleged did not amount to corrupt practice under Cl. (ii), but we take a different view with regard to that, and we consider that such a course of action will come under the head of a payment or promise of payment to any person whomsoever, etc., as defined in Cl. (ii) on account of the conveyance of an elector to or from any place. With regard to (iii) his finding was that the motor bus and cars were used during the election day for the purpose of taking voters to the poll, and he drew the inference that those voters might be taken to have voted for the petitioner who had supplied the cars. He also found that the same corrupt practices had been adopted by the respondent when he too had hired and used motor vehicles for the purpose of taking voters to the poll contrary to the provisions of R. 10. He held that the result of the election had not been materially affected by the corrupt practices alleged but that the election had been procured and induced by those practices and on the latter ground declared the election void. Now, it is most important to consider the exact wording of R. 10 (b). It will be observed that two circumstances are contemplated. With regard to the procuring or inducing it is the election of the returned candidate that is in contemplation ; with regard to the material effect, it is the result of the election that is contemplated. On the grounds that both sides had indulged in these wrong practices and also having regard to the majority, the Commissioner held that the result had not been materially affected. With regard to the other aspect, he took the view that he must exclude from his consideration, in order to arrive at a decision, the fact of the wrongful use of vehicles by the respondent. The argument before us by Mr. Rajah Iyer for the petitioner amounts to this, and it must amount to this, that if the result has not been materially affected, it is impossible to say that the election has been procured or induced.

It is necessary to examine this rule, because it will be seen that two positions must be proved. First of all, the fact of the wrongful practice prohibited; secondly, the effect of procuring or inducing the election or the fact of the result being materially affected. We consider that with regard to the result being materially affected, there was material on the record on which the Commissioner might arrive at the conclusion at which he did arrive, but we are equally clear that there was ample material on the record on which he could arrive at the finding that the election was 'induced'. It is quite clear that the rule contemplates a difference between the election and the result of the election. And it would be seen that the word 'election' is very much wider than the words 'the result of the election', and contemplates something more like the conduct of the election as differentiated from the purely isolated fact of the result. Now, can it be doubted, especially in a small constitutency like this, when a 22 seater motor bus and cars were used for the period of a day for taking voters to the poll that the election of the successful candidate has not been procured or induced by these facts ? No authorities have been cited to us which are of any assistance. We have therefore to construe this rule according to its meaning as it seems to us, and we have emphasized that the rule is directed to two totally different circumstances, namely, the election itself and the result of the election.

It was argued before the Commissioner that the proviso to R. 10 had some bearing on this question. That proviso however can only be used when the corrupt practice is committed by somebody other than the candidate himself. Therefore, the proviso is not material except that it is interesting to see that even under the circumstances contemplated by the proviso, namely, the commission of a corrupt practice by an agent or some other person without the candidate's connivance, relief is only allowed when those corrupt practices are trivial, unimportant and of a limited character. There is no such provision in R. 10 (a) (i) to (iii). Unquestionably the finding here is that this corrupt practice was not of a limited character but was very much the opposite, owing to the circumstances we have referred to. The result is in our opinion one for satisfaction because it would be most undesirable that it should go forth from this Court that if corrupt practices on both sides are proved, that should have the effect, as it were, of cancelling out each other and give a sort of unlimited license to people to do all those things which they are expressly prohibited from doing under the rules relating to elections. The result is that this petition will be dismissed with costs of respondent 2 which we fix at Rs. 100 which will be paid by the petitioner. It may be added that on the facts no possible question of jurisdiction can arise and for that reason also this petition must fail.

C.R.K./S.C. *Petition dismissed.*

A. I. R. 1937 Madras 559

MOCKETT AND HORWILL, JJ.

Chairman, Municipal Council, Rajahmundry — Petitioner.

v.

Nyapathi Subba Rao—Opposite Party.

Civil Revn. Petn. No. 1630 of 1931, Decided on 19th January 1937, from decree of Sub-Judge, Rajahmundry, in S. C. S. No. 210 of 1930.

Tax—Refund—Money, which a person is not bound to pay if paid under compulsion or threatened or actual seizure can be recovered—Conventional threat in ordinary notices of demand is not threatened seizure—Appellate authority dismissing appeal against levying of profession tax — Assessee continuing to pay tax for certain years without protests and then bringing suit for refund—Payment held was voluntary and suit was not maintainable.

If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. Threatened seizure does not apply to the conventional threat contained in the ordinary notices of demand. Threat must be a real threat operating on the mind of the payer without which he would not have paid : *A I R 1934 Mad 420* ; *Maskwell* v. *Horner*, (*1915*) *3 K B 106* and *Slater* v. *Burnley Corporation*, (*1888*) *59 L T 636*, *Rel. on.* [P 560 C 1]

A person appealed against the levying of profession tax but the appellate authority dismissed the appeal. He apparently being dissatisfied with this decision continued to pay the tax for a number of years without any protest and then brought a suit for the refund of the tax paid by him :

Held : that the suit was not maintainable as the payment was voluntary. [P 560 C 2]

P. V. Rajamannar and *K. Subba Rao* — for Petitioner.

N. Rama Rao and *P. Panini Rao* — for Opposite Party.

Mockett, J.—The petitioner is the Municipal Council, Rajahmundry, by its chairman and the respondent is said to be a gentleman who is a large land owner and who also does considerable money lending business. He sued the Municipal Council for refund of payment of profession tax for the periods 1926 to 1930.

Before us, the only point for decision, which goes to the root of the whole matter, is this : It is contended by the learned counsel for the Municipality that this suit does not lie because the payments sought to be recovered were voluntary payments and such voluntary payments being in the nature of a gift cannot be recovered. The following history of this case is relevant. With regard to the two half years 1926-1927, the respondent filed appeals before the appellate authority which were disposed of on 18th January 1928, summarily. He apparently being dissatisfied with those decisions continued to pay this tax from that time until 1930 and filed this suit in July 1930. No protest accompanied the payments, but the learned Judge has found on the facts that the payments were made under protest and ordinarily in a revision petition even under S. 25, Provincial Small Cause Courts Act we should not go behind any questions of fact. But this is a matter of some importance, and on the face of the judgment it is perfectly clear to us that these payments were voluntary in the sense that word is understood in a matter of this sort

and that so far from showing that they were made under protest the very circumstances set out by the learned Judge emphasize that they were voluntary payments. It is quite clear that the respondent preferred the procedure provided by the Act by way of appeal and however dissatisfied with the result he thought fit to go on making payments for four years until he was inspired with the idea of filing this suit four years after, in 1930. He has relied on the fact that the notice states that in default of payment, his property will be distrained. The whole question of what is and is not a voluntary payment has been exhaustively considered by Pandalai, J. in the case of 67 M L J 566[1] at pp. 569 to 573. I desire to record my complete agreement with that part of his judgment dealing with that particular topic where it will be seen that the principal cases are considered. One decision should be specially referred to and that was (1915) 3 K B 106,[2] where the Court of appeal reversing the decision of Rowlett, J. dealt with the question of voluntary payments. Dealing with the question of compulsion Lord Reading, C. J. at p. 118 says:

> If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received.

It will be observed that the compulsion is of urgent and pressing necessity or of seizure, actual or threatened. As to what is actual or threatened seizure, Cave, J. in 59 L T 636[3] at p. 639 points out that threatened seizure does not apply to the conventional threat contained in the ordinary notices of demand because, as he says, "If that were so, no payment of rent to a landlord would be a voluntary payment". It is evident that the threat must be a real threat operating on the mind of the payer without which he would not have paid. I do not think that description can be made to apply to many of the formal documents which are sent to people demanding payment. In my view generally as to this topic it is in each case a question of fact as to whether the payment was or was not voluntary, and in the case before us, it is perfectly clear that not only is there no evidence that the payment was under protest and involuntary but that the opposite was the fact, namely, that it was made voluntarily. That being so, it is unnecessary to consider any of the other points raised in this petition which in my judgment should be allowed with costs.

Horwill, J.—I agree.

C.R.K./B.D. *Petition allowed.*

1. Municipal Council, Tuticorin v. Ralli Brothers, A I R 1934 Mad 420=150 I C 890=67 M L J 566.
2. Maskwell v. Horner, (1915) 3 K B 106=84 L J K B 1752=113 L T 126=79 J P 406=13 L G R 808=59 S J 429=31 T L R 332.
3. Slater v. Burnley Corporation, (1888) 59 L T 636=36 W R 831=53 J P 70.

A. I. R. 1937 Madras 560

HORWILL, J.

V. S. Subramania Asari — Petitioner.

v.

Ramaswami Pillai — Opposite Party.

Civil Revn. No. 694 of 1935, Decided on 26th January 1937, from order of Dist. Munsif, Villupuram, D/- 18th January 1935.

(a) Practice—High Court—Revision against order of review instead of first order—High Court is not precluded from passing order it deems fit.

The mere fact that the petitioner preferred to file a civil revision petition against the order passed on the review application and not on the first order does not preclude the High Court from passing an order which it deems to be in the interests of justice. [P 561 C 2]

(b) Limitation Act (1908), Art. 166 — Art. 166 is general provision applying to many applications under Civil P. C. and not only to applications under O. 21, Rr. 89 to 91 —Article does not override special provisions of Civil P. C. — O. 34, R. 5, Civil P. C. prevails over Art. 166.

Article 166, Limitation Act, is a general provision applying to many applications under the Civil Procedure Code and not only to applications under O. 21, Rr. 89 to 91. It cannot therefore override the special provisions of any particular section or rule of the Civil Procedure Code to the contrary. If therefore O. 34, R. 5 gives a time other than that provided by Art. 166, the special provision must prevail. [P 561 C 2]

(c) Civil P. C. (1908), O. 21, R. 92—Passing of order under O. 21, R. 92 confirms sale—It is not lapse of 30 days after sale that confirms sale.

Order 21, R. 92, Civil P. C., contemplates the passing of an order of confirmation and it is the passing of this order which makes the sale absolute; so that it is not lapse of 30 days that confirms the sale but the passing of an order which cannot be passed within 30 days. [P 561 C 2; P 562 C 1]

K. Rajah Iyer and *T. A. Ramaswamy Reddiar* — for Petitioner.

V. Viswanatha Sastry — for Opposite Party.

Order. — The respondent in this application is the mortgagee and the petitioner the mortgagor. The mortgagee brought a suit for sale and obtained a preliminary decree and then a final decree. A sale of the property was held and 32 days later the petitioner put in an application purporting to be under O. 21, R. 89, to set aside the sale, depositing the whole mortgage amount plus five per cent. for the auction-purchaser and costs. The Court held that under Art. 166 (although the provisions of the Limitation Act is not mentioned) the application was not in time and dismissed it. The petitioner then filed a review petition stating that his application was not one under O. 21, R. 89, but one under O. 34, R. 5. No serious objection to the hearing of this review application was made on the ground that a review did not lie; and after full discussion of the applicability of O. 34, R. 5; O. 21, Rr. 89 to 92, and Art. 166, Limitation Act, the Court passed an order dismissing the review petition. Against the order on the review petition this Civil Revision Petition has been filed.

It is argued in support of the lower Court's order that a review petition before a Judge other than the one who passed the first order was not maintainable; but I do not think that that is now of any great importance because no serious objection was raised on this ground before the lower Court and the Court dismissed the application not on that technical ground but on the ground that under O. 21, R. 92 and Art. 166, Limitation Act, the original application was properly dismissed. The petitioner could no doubt have filed a Civil Revision Petition against the original order, with another petition to excuse delay and under the circumstances, in view of the fact that he had been bona fide engaged in the prosecution of the review petition, the delay would most probably have been excused. He would of course have adopted that procedure if the learned District Munsif had dismissed the review application on the ground that a review did not lie. In view of the fact that the District Munsif went into the point fully in the second application and there was no consideration of the applicability of O. 34, R. 5 in the first application, a Civil Revision Petition was not unnaturally preferred against the second petition. The mere fact that the petitioner preferred to file a Civil Revision Petition against the order passed on the review application and not on the first order ought not to preclude this Court from passing an order which it deems to be in the interests of justice.

On the question as to how far O. 34, R. 5, modifies the procedure to be adopted in applications to set aside sales, I think it must first be stated that Art. 166, Lim. Act, a general provision applying to many applications under the Code and not only to applications under O. 21, Rr. 89 to 91, cannot override the special provisions of any particular section or rule of the Civil Procedure Code to the contrary. If therefore O. 34, R. 5 gives a time other than that provided by Art. 166 the special provision must prevail. O. 34, R. 5 states that where at any time before the confirmation of the sale made in pursuance of a final decree certain moneys are deposited in Court, the plaintiff shall be ordered to hand over the document referred to in the decree and to do the other things which are necessary to support the defendant's title to the hypothecated property. The learned District Munsif says that under O. 21, R. 92, the Court in circumstances like the present as well as in general where the application has not been put in under O. 21, Rr. 89 to 91, is bound to order confirmation of the sale. That no doubt is a correct interpretation of O. 21, R. 92; but the fact remains that until the order is passed no confirmation takes place and, as will be seen from the wording of O. 21, R. 92 and S. 65, Civil P. C., until confirmation takes place the sale does not become absolute, which means, as various decisions have laid down, that the property remains with the judgment-debtor. It is argued that where O. 34, R. 5 speaks of the confirmation of sale, it must mean the date on which the sale can be confirmed. That is not what O. 34, R. 5 says. I see no reason why the section should not be given its plain interpretation. The District Munsif seems to be of opinion that as the Court is bound to confirm the sale after 30 days, the sale automatically becomes confirmed after 30 days. That argument might be valid if the wording of O. 21, R. 92 did not make it clear that automatic confirmation did not take place. O. 21, R. 92 contemplates the passing of an order of confirmation and it is the passing of this order which makes the sale absolute; so that it is not the lapse of 30 days that confirms the sale but the

passing of an order which cannot be passed within 30 days. I am therefore of opinion that the District Munsif was wrong in holding that this application was out of time. It was made before the sale had been confirmed and therefore under O. 34, R. 5 the Court was bound to order the plaintiff to receive the sum of money tendered and to give up the documents contemplated by O. 34, R. 5 which support his title.

As all these proceedings have been instituted in a large measure on account of the negligence of the petitioner, I think it would be unfair to mulct the respondent with all the costs. The petitioner will get his costs in this Court but in the other proceedings each party will bear his own costs.

C.R.K./V.B.B. *Application allowed.*

A. I. R. 1937 Madras 562

BEASLEY, C. J.

Chidambaram Municipality — Petitioner.

v.

P. Venugopal Pillai — Opposite Party.

Civil Revn. Petn. No. 1690 of 1935, Decided on 8th February 1937, from judgment of Dist. Munsif, Chidambaram, D/- 18th September 1935.

Madras District Municipalities Act (5 of 1920), Sch. 4, Rr. 29 and 30—Interpretation — Requirements of notice under R. 29 are confined to enforcement of payment by distraint or criminal prosecution—Such notice is not necessary as condition precedent to filing of civil suit under R. 30 (3)—A demand however should be made to person liable to pay tax before suit is filed against him for recovery.

The requirements as to notice contained in R. 29, Madras District Municipalities Act, are only confined to the enforcement of payment by distraint or prosecution in the criminal Court. No notice such as is specified in R. 29, Sch. 4 need be given by the Municipality as a condition precedent to the filing of a suit in the civil Court to recover the tax. Of course a demand ought to be made upon the person liable before a suit is filed, that is to say, a suit ought not to be filed without some notice being given to the defendant or the person liable to pay, of the intention to do so and a request for payment. [P 563 C 1, 2]

C. S. Rama Rao Sahib—for Petitioner.

R. Viswanathan — for Opposite Party.

Order.—The question here is not free from difficulty. The suit was by the Chidambaram Municipality to recover house tax and water tax for the year ending 31st March 1934 in respect of houses belonging to defendant. The point to be decided here is whether the suit was maintainable by the Municipality in the absence of a proper and legal notice of demand previously served upon the defendant by the Municipality. There were other points raised but it is this question which has given rise to this petition. The learned District Munsif has held that the plaintiff-Municipality did not sufficiently prove that it had served what it was alleged was the required notice upon the defendant and that in the absence of such proof, the Municipality was not entitled to file the suit. The question of whether the notice was really served is one of fact and therefore if it had been the only question, the lower Court's judgment could not be interfered with, although I am bound to say that there appears to me to have been certainly *prima facie* proof that the defendant was served with a notice of his liability to pay the tax and the defendant did not go into the witness-box and deny the receipt of the notice merely contenting himself with a denial in his written statement. But the question here is whether, even if such a notice of demand has not been given, the Municipality is entitled to sue. The statute imposes a clear liability to pay tax in respect of property and therefore there is that statutory liability. The question is whether there are any rules which provide that as a condition precedent for the enforcement of that liability upon the owner of property there must first have been a demand in compliance with the rules. The only rules relating to the collection of taxes are rules 29 onwards in Sch. 4, District Municipalities Act. R. 29 provides for a notice or a bill to be served upon a person containing

(a) a statement of the period and a description of the occupation, property or thing for which the tax is charged ; and (b) a notice of the liability incurred in default of payment.

When is a notice in that form required? R. 29 says that this notice or bill is to be served before the provisions of R. 30 are to be enforced. R. 29 (1) reads :

The (executive authority) shall serve upon such person a bill for the sum due before he proceeds to enforce the provisions of R. 30.

What is provided for in R. 30 ? First of all, there is the very summary and salutary provision that, if the amount due on account of any tax is not paid within 15 days from the service of the notice,

the tax may be recovered by distraint under warrant and sale of moveable property of the defaulter. That is R. 30 (1). Sub-r. (2) of the same rule provides that :

If for any reason the distraint, or a sufficient distraint, of the defaulter's property is impracticable the executive authority may prosecute the defaulter before a Magistrate.

Sub-r. (3) says :

Nothing herein contained shall preclude the council from suing in a civil Court for any tax due to it under this Act.

There is another sub-rule to which reference must be made, viz., sub-r. (3), R. 29 ; and it is as follows :

Where a notice, bill or direction referred to in sub-r. (1) has not been served or given either in the half year in which the tax became due or in the succeeding half year the tax for the half year first mentioned in this sub-rule shall not be demanded.

Having set out the material rules, two points of view present themselves, namely (1) does this provision with regard to the serving of a notice or sending of a bill form a condition precedent to the enforcing of the very salutary provisions of R. 30, or (2) is it a condition precedent also to any claims made in a civil suit ? R. 30 provides a very special procedure for the collection of the tax, i. e., by distraint of moveable property and prosecution in the Magistrate's Court ; and it is to be enforced where there has been a failure to comply with the demand or bill after 15 days. In my view, sub-r. (3), R. 30 means merely that this very special procedure is not to take away the right of the Municipality to sue in a civil Court in the ordinary way—a right that it has like any other individual. My conclusion is that the requirements as to notice are only confined to the enforcement of payment by distraint or prosecution in the criminal Court : and certainly sub-r. 2 (b), R. 29 which requires that the bill must contain "a notice of the liability incurred in default of payment" is a reasonable and necessary provision if it relates to these two liabilities, but I see no necessity for persons liable to pay tax being told that they may be sued for it in the civil Court if they do not pay that which they are liable to pay under S. 81 of the Act. I do not think that sub-r. (3), R. 29 really presents difficulty or gives support to the respondent's contention. In my view, what is there meant is that no distraint or criminal prosecution can be made in respect of the tax which is due for any half year as regards which the bill or notice has not been served. I am of opinion therefore that no notice such as is specified in R. 29 need be given by the Municipality as a condition precedent to the filing of a suit in the civil Court to recover the tax. Of course a demand ought to be made upon the person liable before a suit is filed, that is to say, a suit ought not to be filed without some notice being given to the defendant or the person liable to pay of the intention to do so and a request for payment. In the present case, the special officer of the Municipality wrote to the defendant a letter dated 28th July 1934 as follows :

Sir,

A sum of Rs. 145-13-2 is due from you as house tax for the items and periods mentioned below. Please remit it at once as it is already long overdue.

And on 13th August 1934, the defendant replied as follows :

Sir,

With reference to your letter which was duly received by me on 1st August 1934 I shall remit the amount of my house tax before the end of September 1934. Please excuse for the delay.

In my opinion, this point was wrongly decided in the lower Court. The Civil Revision Petition is allowed with costs and the order of the lower Court set aside and a decree passed in favour of the plaintiff Municipality for the amount claimed with costs.

C.R.K./K.B. *Revision allowed.*

A. I. R. 1937 Madras 563

HORWILL, J.

S. M. Mosa Sahib—Appellant.

v.

Darisa Subbamma and *another*—Respondents.

Appeal No. 152 and Civil Revn. Petn. No. 465 of 1936, Decided on 4th February 1937, against order of Sub-Judge, Cuddappah, D/- 28th November 1935.

Civil P. C. (1908), S. 151 and O. 1, R. 10—Inherent powers — Court is entitled under S. 151 to do justice by giving effect to agreement entered into between parties—Suit by plaintiff for recovery of her money used by defendant 2 as agent of defendant 1 for latter's business—On agreement between parties plaintiff agreeing to accept whatever was found due on accounting by commissioner—On account certain sum found due from defendant 1 to defendant 2—Defendant 1 resiling from agreement—Application by plaintiff for transposition of defendant 2 as plaintiff 2—Defendant 1, held, could not be allowed to resile from agreement freely

entered into by him — Decree in terms of amount found due could be passed by transposition of defendant 2 as plaintiff 2 though O. 1, R. 10 did not apply.

It is always the policy of the Court to enforce if possible any agreement entered into between the parties ; and in special circumstances where a grave injustice would be done if the Court did not exercise its inherent powers, the Court is entitled under S. 151, Civil P. C., to do justice by giving effect to the agreement of the parties.

[P 565 C 1]

The plaintiff, the mother of defendant 1, brought a suit for recovery of a sum of money belonging to her and used by defendant 2 as agent of defendant 1 for purpose of his principal's business. During the pendency of the suit it was agreed between the parties that the plaintiff should take whatever was found due on an account being taken by a Commissioner between defendants 1 and 2, and that a decree might be passed for the amount found due. On account being taken, it was found that a certain sum of money was due by defendant 1 to defendant 2. Plaintiff filed an application under O. 1, R. 10, Civil P. C., for transposition of defendant 2 as plaintiff 2. Defendant 1 thereupon resiled from the agreement and the Court went on with the trial as if no agreement had taken place :

Held : that defendant 1 should not have been allowed to resile from the agreement entered into freely by him to pay whatever might be found due by him and to avoid having the debt embodied in a decree. Although such procedure is not contemplated by the Civil Procedure Code it has been constantly recognized by the Courts : *A I R 1936 Mad 856, Rel. on.*

[P 564 C 2]

Held also : that when defendant 1 agreed to pay defendant 2 or plaintiff such sum as might be due on taking accounts, he impliedly agreed to such changes being made in the nature or frame of the suit as to give effect to the finding of the Commissioner. Defendant 2 could, therefore, be transposed as plaintiff 2 though provisions of O. 1, R. 10 did not in terms apply in order that a decree could be passed in terms of the Commissioner's report.

[P 565 C 1]

P. Govinda Menon for *B. Pocker* — for Appellant.

Kasturi Seshagiri Rao — for Respondents.

Judgment.—Defendant 2, the son of the plaintiff, was a servant or agent of defendant 1. Defendant 2 used a sum of money belonging to his mother for the purpose of the business of defendant 1 ; and the plaintiff brought this suit against her son and his principal to recover this sum. It appeared from the accounts of defendant 1 kept with defendant 2 that the account of defendant 2 with defendant 1 was credited with this amount. Defendant 1 objected to the maintainability of the suit on the ground that it was really a matter between himself and defendant 2 and that there was no privity of contract between him and the plaintiff. On 10th August 1934 the plaintiff put in a petition for the appointment of a Commissioner to settle the accounts of defendants 1 and 2, as she was willing to take whatever was found due on an accounting. Both the defendants endorsed this application with a statement that they had no objection to the appointment of a Commissioner and that each was willing to pay the other what might be found due from the one to the other upon account being taken, and that the Court might pass a decree for the amount found due. A Commissioner was appointed and he sent in a report to the Court to the effect that a certain sum of money was due by defendant 1 to defendant 2 on accounts. The Court was then faced with the difficulty of granting a decree in favour of somebody who was not the plaintiff. A petition was, therefore, put in by the plaintiff to transpose defendant 2 as plaintiff 2. An objection was raised on the ground that O. 1, R. 10, did not apply and that, therefore, no such transposition could be made. Defendant 1 attempted to resile from the agreement and the Court went on with the trial as if no agreement had taken place. In appeal the Subordinate Judge came to the conclusion that this agreement ought to have been supported by the Court and that the District Munsif should have transposed defendant 2 as plaintiff 2 if necessary for the ends of justice. He, therefore, remanded the suit for fresh disposal on the basis of the agreement.

There can be no doubt at all that defendant 1 should not be allowed to resile from the agreement entered into freely by him to pay whatever might be found due by the Commissioner and to avoid having that debt embodied in a decree. Although the procedure adopted is not contemplated by the Procedure Code, it has been constantly recognized by Courts. One case in which such an agreement was upheld is reported in 71 M L J 281,[1] in which Pandrang Row, J. referred to English and Indian decisions and held that by the agreement the Court became an arbiter and that if the parties agreed to accept the arbitration of the Court they were bound by it even though the procedure of the Court was *extra cursum curiæ* and not contemplated by the Procedure Code.

1. Makudam Mohammad v. Mohammad Sheik Abdul Kadir, A I R 1936 Mad 856=164 I C 611=71 M L J 281.

The real difficulty in this case is due to the fact that the amount is found due in a suit brought by the plaintiff for a sum of money due to defendant 2 as a result of account taking between defendant 1 and defendant 2. It is quite true that O. 1, R. 10 will not in terms apply to a case of this kind; and if there had been no agreement between the parties the District Munsif would undoubtedly have been justified in refusing to transpose defendant 2 as plaintiff 2. Notwithstanding the other provisions of the Procedure Code, it is always the policy of the Court to enforce if possible any agreement entered into between the parties; and in special circumstances where a grave injustice would be done if the Court did not exercise its inherent powers, I have no doubt that the Court is entitled under S. 151, Civil P. C., to do justice by giving effect to the agreement of the parties. When defendant 1 agreed to pay defendant 2 or plaintiff such sum as might be due on taking accounts, he impliedly agreed to such changes being made in the nature or frame of the suit as to give effect to the finding of the Commissioner. I, therefore, agree with the lower appellate Court that the learned District Munsif was wrong in allowing defendant 1 to resile from the agreement and in refusing to pass a decree in terms of the report of the Commissioner. It is argued that the agreement entered into would not comply with the provisions of O. 23, R. 3, which requires a decree to be passed only so far as the agreement relates to the suit. I do think there is much force in this objection because the suit related to a sum of money lent by the plaintiff to defendant 1 through her son, and the object of the inquiry by the Commissioner was to ascertain whether the whole of that sum or if not what part of it, was payable to the plaintiff.

The order of the appellate Court is not that the decree should be passed in terms of the Commissioner's report, but merely that a decree should be passed in the light of its remarks that the agreement was a valid one and that there could be no objection to the transposition of the parties if necessary in the interests of justice. That was a correct order. This appeal is, therefore, dismissed with costs. Leave is granted. A C. R. P. has also been filed by way of caution. The C. R. P. is unnecessary and is dismissed; but in view of the fact that costs have been awarded in the Civil Miscellaneous Appeal there will be no order as to costs.

C.R.K./K.B. *Appeal and Revision dismissed.*

A. I. R. 1937 Madras 565

GENTLE, J.

William Hudson — Petitioner.

v.

Mrs. K. M. Webster — Opposite Party.

O. M. S. No. 9 of 1936, Decided on 20th January 1937.

(a) Divorce Act (1869), Ss. 18 and 19—Bigamous marriage—Binding marriage subsists between parties unless and until it is set aside on any ground for setting aside marriage—Essential of valid marriage between Christians is that any party to it should not have spouse living at time of marriage—Existence of spouse makes marriage void ab initio unless earlier marriage is set aside previous to such marriage—Marriage cannot be in full force unless it is valid.

A ceremony of marriage ordinarily constituting a binding marriage between the parties subsists unless and until it is set aside on one or other of the grounds which justify annulling or setting aside a marriage. Before a valid marriage can be celebrated both parties to such marriage must be either single or divorced or a widow or a widower and then only are they competent to enter into a valid marriage. If at the time of celebration of the marriage ceremony one or other of the parties had spouse living the earlier marriage not having been set aside, the latter marriage is void *ab initio*, in other words it is no marriage at all. The law in England that a party to a marriage of which the other party is incompetent to join in the celebration of a valid ceremony because of the existence of a previous husband or wife, is entitled without any recourse to any Court to marry any one else because that particular marriage is not in law a marriage at all applies equally well to marriages between Christians in India inasmuch as no Christian can marry another person in the lifetime of an earlier spouse unless the previous marriage has been set aside. This position cannot be interfered with in regard to a marriage celebrated in India as provided by S. 88, Christian Marriage Act.

[P 566 C 2 ; P 567 C 1, 2 ; P 568 C 1]

Unless therefore the marriage is a valid marriage it cannot be a marriage which is in full force within the meaning of S. 19, Divorce Act.

[P 567 C 2]

(b) Pleadings— Admissions — Matrimonial jurisdiction—Court is loath to act upon admissions even if they are sufficient to grant relief to petitioner.

In the Court of matrimonial causes the Court is most loath to act upon any admissions even if they may be sufficient to grant relief to the petitioner. [P 568 C 1]

(c) Divorce Act (1869), S. 19 (4)—Petition to declare marriage void—Burden of proof—Petitioner must show that earlier marriage

of opposite party was in full force and not set aside at the time of his marriage.

Where a petition to declare a marriage null and void is made under S. 19 (4), Divorce Act, the burden of proof lies upon the petitioner that the previous marriage of the opposite party was in full force and effect and was not set aside at the time when his marriage took place with the opposite party. [P 568 C 2]

V. Thyagarajan and *G. A. Pais* — for Petitioner.

E. Antony Lobo and *T. R. Ramachandran* — for Opposite Party.

Order.—This is a petition by Mr. William Hudson praying that the ceremony of marriage which he celebrated with the respondent on 20th April 1935, should be declared null and void on the ground that at the time of such celebration of marriage there was in full force and existence a marriage between the respondent and Mr. Webster at that time. The petitioner was previously married and his wife, who was the sister of the respondent, died in February 1934. Later in that year the petitioner contemplated marriage with the respondent. He knew from his relationship by marriage with her and the fact that she had stayed with himself and his wife on a number of occasions that she had gone through a ceremony of marriage with Mr. T. A. Webster. The respondent had left Mr. Webster some time before February 1934 and was living with the petitioner, and his then wife. The respondent had told him that a previous wife of Mr. Webster whom that gentleman at the time he went through a ceremony of marriage with the respondent believed to be dead, and whom he had not seen for more than seven years, had been discovered to be alive at the time of the ceremony of marriage between the respondent and Webster and was still alive in the year 1934 or thereabouts. The petitioner, some time later in 1934 consulted a lawyer in Bangalore and I understand, was accompanied by the respondent when he went to seek his advice. The facts of the matter were put before the lawyer who advised that a marriage between the petitioner and the respondent could not amount to a criminal offence, but it would be advisable to await the result of proceedings which were then being taken in the Court of the learned Judicial Commissioner at Ajmer by Mr. Webster to obtain a declaration that his marriage with the respondent was null and void.

The petitioner in his evidence says that before the month of March 1935 the respondent, having received either a letter or a telegram, purported to read out to him that the Court of the Judicial Commissioner at Ajmere had declared that her marriage with Mr. Webster was, to use the word adopted by the petitioner when in the witness box, cancelled; on 20th April following, the parties to this petition went through a ceremony of marriage at the Richmond Town Methodist Episcopal Church, Bangalore Cantonment. According to the petition they are both Anglo-Indians and profess the Christian religion. The learned Counsel on behalf of the petitioner, to whom I am indebted for a very able argument, at the outset stated and correctly stated the position at law that a ceremony of marriage ordinarily constituting a binding marriage between the parties subsists unless and until it is set aside on one or other of the grounds which justify annulling or setting aside a marriage. That contention was made in regard to the ceremony of marriage celebrated between the respondent and Mr. Webster. But it applies equally in regard to the ceremony of marriage between the petitioner and the respondent in this petition. I am asked to decree that the marriage between the petitioner and the respondent is null and void and I can do so only when evidence is placed before me which proves the allegations which are made supporting the petition and which proves facts justifying the making of such a decree. The petitioner bringing this petition must shoulder the onus cast upon him to prove what he sets out to allege and if he fails to produce the evidence justifying the relief sought, it follows that the petition must be dismissed. The petitioner himself is the only witness who has been called. He told me that whilst he was aware of the earlier marriage ceremony between the respondent and Mr. Webster before he went through the marriage ceremony with her, she informed him that that earlier marriage had been cancelled or, in other words set aside. No evidence whatever was called before me to prove to my satisfaction of the existence of the marriage between the respondent and Mr. Webster and the only evidence at the moment of that marriage is the testimony given by the petitioner of what he had been informed by the respondent or that such a marriage having taken place, it was subsisting at

the time of the marriage ceremony between the petitioner and the respondent. On the contrary he adds further, what suggests that such marriage with Mr. Webster was not a valid marriage, that at the time it took place Mr. Webster's previous wife was still alive; no one has suggested here that the first marriage of Mr. Webster has ever been set aside. Mr. Thyagarajan has contended that the position in India is different to the position in England, regarding marriages. He concedes that this is the position in England; before a valid marriage can be celebrated both parties to such marriage must be either single or divorced or a widow or a widower and then only are they competent to enter into a valid marriage. If at the time of celebration of the marriage ceremony one or other of the parties had a spouse living, the earlier marriage not having been set aside, the later marriage is void *ab initio*, in other words, it is no marriage at all. But he contends that that position is not what exists in India and he bases his argument upon the wording of Ss. 18 and 19, Indian Divorce Act of 1869. These two sections run as follows :

18. Any husband or wife may present a petition to the District Court or to the High Court praying that his or her marriage may be declared null and void.

19. Such decree may be made on any of the following grounds : * * * * * *

(4) that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force.

Mr. Thyagarajan concedes that in England a party to a marriage of which the other party is incompetent to join in the celebration of a valid ceremony because of the existence of a previous husband or wife, is entitled without any recourse to any Court to marry any one else because that particular marriage is not in law a marriage at all. Frequently in England it is done. Sometimes a person, whom I will call an innocent party to a bigamous marriage, does go to the Court for a declaration that the bigamous marriage is null and void. That is for the purpose of precaution or record or evidence. But the bigamous marriage is non-existent and without any recourse to the Court it cannot be said that it exists unless and until a decree is passed declaring it to be null and void. The learned counsel for the petitioner says that he bases his contention of the difference in this country upon the wording particularly of S. 19 set out above, the wording being that 'the former husband or wife' of either party was living at the time of the marriage. The word 'marriage' he says, means the marriage between the parties to the bigamous marriage and use of the word 'marriage' indicates that it is a binding marriage until the contrary is declared by a competent Court. The section goes on to say "and the marriage with such former husband or wife was then in full force." Unless the marriage is a valid marriage it cannot be a marriage which is in full force. I have had pointed out to me S. 19 makes no difference between the grounds upon which application can be made to the Court to declare a marriage null and void. Of the four grounds therein mentioned, the first is impotency, a ground on which a marriage is not void *ab initio* but void at the instance of the injured party. The other grounds are grounds upon which in England the marriage is void *ab initio* and it is argued that having these four grounds grouped together indicates, that the intention of the Legislature was that they should all be treated in the same way, namely, that since the first, namely the ground of impotency is voidable and not void, it must follow that they are all in the same category. I have listened very attentively to his very able argument but I cannot accept that as the correct position. I have already said that the parties to this petition are Christians and no Christian can marry another person in the lifetime of an earlier spouse unless the previous marriage has been set aside. That is a personal law to the individual in England. I see no grounds to find it is different in India. If it were so, then a marriage celebrated in India between two British European Christians would be governed by different principles to a marriage between the same parties celebrated in England. Mr. Thyagarajan agrees that the Christian Marriage Act of 1872 provides machinery for marriages in this country between two Christians. S. 88 of that Act is as follows:

Nothing in this Act shall be deemed to validate any marriage if the personal law applicable to either of the parties forbids him or her to enter into it.

It being a personal law that a Christian cannot marry another person in the lifetime of a previous spouse in the absence of the earlier marriage being set aside, S. 88 to which I have referred expressly

provides that this position shall not be interfered with in regard to a marriage celebrated in India. It would be an invalid marriage and before it can be made into a valid one express statutory legislation must be required to indicate otherwise. I have said that the only witness called was the petitioner. There was put in before me the record of proceedings at the Judicial Commissioner's Court at Ajmere (Ex. C). It was first contended that this was put in to prove the facts set out in that record but now the learned counsel for the petitioner says he merely puts it in under the provisions of S. 43, Evidence Act, to show the existence of a fact in issue in this suit. What one finds from this record is that on 18th March 1935 the petition of Mr. Webster for a declaration that his marriage with the respondent should be declared null and void was dismissed. But upon a review of that decision, coupled with additional evidence which was not available at the earlier hearing, on 16th September 1935 the learned Judicial Commissioner there decreed subject to the confirmation of the High Court at Allahabad, that the marriage ceremony between Mr. Webster and the respondent was null and void because at that time Mr. Webster's previous wife was still alive. Mr. Tyagarajan says that Mr. Webster at the time he went through the ceremony of the earlier marriage with the respondent was not qualified by his status to create a valid marriage as ceremony of marriage was not set aside at the date when the petitioner and the respondent married on 20th April 1935 and therefore the petitioner is entitled to a decree here. He refers me to admissions in the written statement but in the Court of matrimonial causes and particularly in a matter of this sort the Court, to put it at the very lowest, is most loath to act upon any admissions even if they may be sufficient to grant relief to the petitioner.

But I cannot find that the admissions which, it is said, the respondent makes in the written statement are sufficient to give any relief to the petitioner. The petition itself contains facts and allegations which to my mind completely prevent him succeeding in this suit. In para. 4 the petitioner states that the respondent was married to Mr. Webster on 25th August 1932 that as Mr. Webster was a married man, had not heard of his wife for over seven years and presuming her to be dead went through a ceremony of marriage with the respondent, and that after the marriage with respondent the first Mrs. Webster the legal wife, appeared on the scene. In the petition itself there are clear admissions that the marriage between the respondent and Mr. Webster was not a valid marriage and never could be a valid marriage. The ceremony itself in the light of the position of Mr. Webster was merely a farce. Undoubtedly in England the respondent without any recourse to any proceeding in any Court would be at full liberty to marry any man and such marriage, provided the other party was competent, would be a binding marriage. I cannot see that there is any difference in India to the position in England. If it were so, very startling positions would arise. A bigamous marriage in England is a marriage which is not a valid marriage and S. 88, Christian Marriage Act, clearly to my mind contemplates and prevents a marriage which would be invalid in places elsewhere, including England, not becoming a valid marriage because it is celebrated in this country. S. 21, Indian Divorce Act, provides for the children of a bigamous marriage succeeding in the same manner as legitimate children. If such a marriage in India were a valid marriage until it were annulled there would be no need for such a provision; it becomes necessary when such marriage is void *ab initio* and confirms the view that the position in India is the same as in England in such cases. The onus is upon the petitioner to prove his case that the previous marriage between the respondent and Mr. Webster was in full force and effect and not set aside at the time he went through the marriage ceremony with her in Bangalore. Apart from any other reasons which I have mentioned, he has entirely failed to place before me evidence to justify his succeeding in this petition and the result is that it is dismissed with taxed costs.

C.R.K./K.B. *Petition dismissed.*

A. I. R. 1937 Madras 569

VENKATARAMANA RAO, J.

K. M. Venkatachala Chetty —

Appellant.

v.

V. D. Natesa Chetty — Respondent.

Stamp Register No. 14872 of 1936, Decided on 17th November 1936, against judgment of Wadsworth, J., D/- 27th March 1936.

(a) Letters Patent (Madras), Cl. 15—Judgment—It includes interlocutory or preliminary judgments also.

The word 'judgment' in Cl. 15, Letters Patent (Madras), would cover not only a final judgment but an interlocutory or preliminary judgment: *35 Mad 1 (F B), Foll.* [P 569 C 2]

(b) Madras High Court Original Side Fee Rules (1933), R. 35—Final judgment—Judgment is final when right of plaintiff is determined finally—Suit for dissolution of partnership — Judgment declaring relationship of partnership and referring matter to Official Referee for taking accounts—Judgment is final—On memorandum of appeal against such judgment court-fee must be paid under R. 35.

A final judgment means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff and against the defendant is finally determined, in favour of either of the plaintiff or of the defendant. If between those two parties the question of the plaintiff's alleged right as existing before he brought the action is finally determined, whether it is tried 'on the merits' or not, the order is a final judgment. [P 570 C 1]

Therefore a judgment declaring that a partnership subsisted between the plaintiff and the defendant in an action for dissolution of partnership and referring it to the Official Referee for the taking of the necessary accounts is a final judgment within the meaning of R. 35 of the Madras High Court Original Side Fee Rules, 1933, because the cardinal point in the case is decided and the matter is referred for the taking of accounts. Therefore upon a memorandum of appeal against such judgment court-fee must be paid under R. 35: *15 Bom 155*; *A I R 1933 P C 58* and *17 All 112 (P C), Rel. on.* [P 571 C 1]

(c) Court fee—Paying twice over—Hardship does not ordinarily arise—Appeal against final decree—Credit is given to court-fee paid on appeal against preliminary decree.

In cases arising under Court-fees Act, hardship of paying court-fees twice over does not occur ordinarily, because in an appeal against a final decree in a suit credit is given to the court-fee paid on the memorandum of appeal presented against the preliminary decree: *A I R 1932 Mad 453, Rel. on.* [P 571 C 1,2]

G. Ramakrishna Iyer — for Appellant.

Order.—The question involved in this reference relates to the amount of court-fee payable upon a memorandum of appeal presented against a judgment delivered on the Original Side of the High Court declaring that a partnership subsisted between the plaintiff and the defendant in an action for dissolution of partnership and referring it to the Official Referee for the taking of the necessary accounts. The provisions which regulate the payment of the court-fee are Rr. 35 and 36 of the High Court-fee Rules, 1933. They run thus:

35. Memorandum of appeal from a final judgment when the value of the subject matter of the appeal does not exceed Rs. 2500 . . . . Rs. 225.

36. Memorandum of appeal from any other judgment or order . . . Rs. 100.

The fee of Rs. 100 was paid by the appellant under R. 36 and he contends that it is sufficient. The argument of his learned counsel is, as the matter has been referred to the Official Referee for accounts, the suit cannot be said to be finally disposed of, and there was no final judgment within the meaning of R. 35, and he was not bound to pay a higher court-fee than what he has done. An appeal lies from the judgment of a Single Judge in a suit instituted on the Original Side under Cl. 15 of the Letters Patent. The word 'final' is not to be found in Cl. 15 but it occurs in Cl. 39 of the Letters Patent where an appeal is provided to His Majesty in Council against the final judgment, decree or order of the High Court of Judicature at Madras. It may be noticed that Cl. 40 of the Letters Patent provides a similar appeal against any preliminary or interlocutory judgment, decree or order of the High Court under certain conditions specified in the said clause. So far as our High Court is concerned, there has been a judicial interpretation of what a 'judgment' is within the meaning of Cl. 15 of the Letters Patent in the Full Bench decision in 35 Mad 1[1] and ever since the date of the said decision, so far as I know, it has been treated as an authority on the said matter and subsequent decisions have in this Court uniformly adopted the interpretation given therein. According to the said decision the word 'judgment' in Cl. 15 would cover not only a final judgment but an interlocutory or preliminary judgment. But neither Arnold White, C. J. nor Krishnaswamy Iyer, J. defined what a final judgment is. Krishnaswamy Iyer, J. adopts the definition given by Black in his book on Judgments, for explaining what an interlocutory judgment is.

1. Tuljaram Row v. Alagappa Chetti, (1912) 35 Mad 1=8 I C 340=21 M L J 1 (F B).

He seems to treat the terms 'interlocutory' and 'preliminary' as synonymous. It is unnecessary for me to consider whether this view is sound. I think it is enough to determine for the purpose of this reference what a final judgment means. If it is determined what a 'final judgment' means, every judgment which is not final will be either interlocutory or preliminary. The cases in English law on the question, what is a 'final judgment' are not easy to reconcile, but the Judicial Committee for the purpose of the Letters Patent seems to have adopted the definition of final judgment as given by Cotton, L. J. in (1884) 12 Q B D 342,[2] and by Lord Esher, M. R. in 25 Q B D 465[3]: *vide* 47 Bom 724[4] at p. 733. In 12 Q B D 342[2] Cotton, L. J. observes:

> I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, i. e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established.

In 20 Q B D 512,[5] Lord Esher, M. R., after citing with approval the opinion of Cotton, L. J. explains what a final judgment means, thus:

> A final judgment means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff and against the defendant, is finally determined, in favour of either of the plaintiff or of the defendant. I think that definition will be found to cover most cases, though perhaps not every one. .... In my opinion the question is not only, was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again. If between those two parties the question of the plaintiff's alleged right as existing before he brought the action was finally determined, whether it was tried 'on the merits' or not the order is a final judgment.

If this test is adopted there can be no question that the judgment in a suit for dissolution of partnership or in a suit for account which determines the liability of the parties finally in the sense that so long as that judgment stands it cannot be tried again, the judgment in the present case will be a final judgment within the meaning of R. 35 of the Fee Rules. This view is also borne out by the opinion expressed by the Judicial Committee in more cases than one on the language of S. 595, Civil P. C. of 1882. Under Cl. (c) of that section which now corresponds to S. 109 (c) of the present Code, an appeal was held to lie to His Majesty in Council from any final decree passed on an appeal by a High Court or any other Court of final appellate jurisdiction. In 15 Bom 155[6] a question arose thus: the decree directed the taking of accounts which the defendant contended ought not to be taken at all. This was passed by the Judge sitting on the Original Side of the High Court and it was confirmed in appeal by a Bench of two Judges. Against the decision in appeal, leave to appeal to His Majesty in Council was sought. The High Court declined leave on the ground that it was not a final decree within the meaning of S. 595, Cl. (c), Civil P. C. The Privy Council expressed the opinion that this view was wrong. Lord Hobhouse observed thus:

> The real question in issue was the liability, and that has been determined by this decree against the defendant, in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything. That is finally determined against him, and therefore in their Lordships' view the decree is a final one within the meaning of S. 595 of the Code.

It will be seen that this view is in accord with the view expressed by Lord Esher, referred to above, in 20 Q B D 512.[5] The interpretation put on the word 'final' was again re-affirmed by the Privy Council in 17 All 112.[7] What is meant by 'final' is further made clear by the following observations of their Lordships in the above judgment:

> The question is whether the decree of the High Court is final. It appears to their Lordships that it is final. The case is analogous to that of 15 Bom 155.[6]

There the defendant denied his liability to account to the plaintiff. The High Court affirmed his liability and directed an account. Of course the account might turn out in the defendant's favour. But their Lordships held that the order establishing liability was one which could never be questioned again in the suit and that it

2. *Ex parte* Chinery, *In re* Chinery, (1884) 12 Q B D 342=53 L J Ch 662=50 L T 342=32 W R 469=1 Morrell 32.
3. Onslow v. Commissioners of Inland Revenue, (1890) 25 Q B D 465=59 L J Q B 556=63 L T 513=38 W R 728.
4. Tata Iron & Steel Co., Ltd. v. Chief Revenue Authority of Bombay, A I R 1923 P C 148=74 I C 469=50 I A 212=47 Bom 724 (P C).
5. *In re* Riddel, *Ex parte* Strathmore (Earl), (1888) 20 Q B D 512=57 L J Q B 259=58 L T 838=36 W R 532=5 Morrell 59.
6. Rahimbhoy Habibhoy v. C. A. Turner, (1891) 15 Bom 155=18 I A 6 (P C).
7. Sayyed Muzhar Hossain v. Mt. Bodha Bibi, (1895) 17 All 112=22 I A 1 (P C).

was the cardinal point of the suit. As observed by the learned Judges in 22 Cal 928,[9] the decision of the Privy Council in 15 Bom 155[6] clearly indicates in their opinion that the final decree in S. 595 does not mean the last decree but the decree determining the rights finally. Even under the new Code, where the wording differs materially from that of the old Code, their Lordships of the Privy Council expressed the opinion that the decision in 15 Bom 155[6] will also govern cases arising under the new Code. Referring to these two cases (15 Bom 155[6] and 17 All 112[7]) the Privy Council observed thus in 11 Rang 58[9] at p. 63 :

> Two other cases before this Board were relied on by the learned Judges, viz., 15 Bom 155[6] and 17 All 112.[7] But both of these cases were decided with reference to the Civil P. C. of 1882, in which the wording of the relevant sections differed materially from that of the Code of 1908. Special leave to appeal was given in each of these cases on the ground that the suit had been fully tried in the lower Court and the 'cardinal point' decided, leaving, in the one case, only a reference for accounts and, in the other, only subordinate points for decision which should have been dealt with by the appellate Court. In the first case, 15 Bom 155[6] it is clear that an appeal to His Majesty in Council would have lain as of right under the provisions of the present Code.

This case clearly indicates that the principle enunciated in 15 Bom 155,[6] that where the cardinal point in the case is decided and the matter is referred for the taking of accounts, the judgment would be a final judgment or decree. Therefore it seems to me that a judgment which decides finally the liability to account so far as the Court deciding it is concerned, would be a final judgment within the meaning of R. 35 of the Fee Rules though there is a reference for the taking of accounts to the Official Referee. The appellant is therefore liable to pay court-fee under R. 35 of the Original Side Fee Rules. Mr. Ramakrishna Iyer submitted that if he were to appeal against the decree passed after the consideration of the report of the Official Referee he will have to pay another ad valorem fee within the meaning of R. 35 and it would work hardship. But that is a matter for amendment of the rules. In cases arising under the Court-fees Act it may be noticed that such hardship does not occur ordinarily, because as pointed out in 55 Mad 664[10] in an appeal against a final decree in a suit credit is given to the court-fee paid on the memorandum of appeal presented against the preliminary decree. The appellant is given 10 days' time from today to pay the additional court-fee.

C.R.K./B.D. *Order accordingly.*

8. Chundi Dutt v. Pudmanund Singh, (1895) 22 Cal 928.

9. Abdul Rahiman v. D.K. Cassim & Sons, A I R 1933 P C 58=142 I C 328=60 I A 76=11 Rang 58 (P C).

10. *In re* Suppu Thayammal, A I R 1932 Mad 453=138 I C 218=55 Mad 664=62 M L J 624.

A. I. R. 1937 Madras 571

CORNISH AND KING, JJ.

Bengal Insurance and Real Property Co. Ltd., Calcutta, and *another* — Appellants.

v.

Velayammal — Respondent.

Appeals Nos. 50 of 1935 and 239 of 1934 and Civil Misc. Petn. No. 342 of 1936, Decided on 14th December 1936, against decree of Sub-Judge, Coimbatore, in O. S. No. 134 of 1933.

(a) Contract—Insurance—Cause of action—Making of offer may be part of cause of action in suit upon contract resulting from such offer—Until proposal is received there is no complete offer—Insurance company having head office at *C*—Its agents having no authority to accept proposals—Proposal made through agent at *E*, place of assured's residence—Offer and acceptance both at *C* on the proposal form reaching head-office at *C*—For suit to recover policy money, cause of action wholly arises at *C*—Company's directing local agent at *E* to collect premium does not give rise to cause of action at *E*.

The making of an offer may be a part of the cause of action in a suit upon a contract which has resulted from that offer. Until however a proposal is received there is no complete offer: *A I R 1920 Mad 314* ; *A I R 1920 Mad 177* and *A I R 1933 Mad 764, Rel. on.* [P 573 C 1,2]

An Insurance Company had its head office at *C*. Its agents had no authority to accept proposals of insurance from the assured. All they had to do was to get the proposal form duly filled and to send it to the head office at *C* for disposal. Accordingly the assured filled the form at *E* and it was sent by the company's agent to the head-office. On the death of the assured his widow brought a suit at *E* for the recovery of the policy money :

Held : that there was no offer until the proposal reached the head office at *C*. The offer was made at *C* and accepted at *C* and so under the terms of the contract the policy money was payable at *C*. The cause of action therefore for the suit for the recovery of the policy money arose entirely at *C*, and the cause of action could not be said to have arisen at *E* from the circumstance that when the halfyearly premium became payable, the company instead of sending its demand to the assured, directed its local agent to collect the money from him. [P 573 C 2]

(b) Jurisdiction — Objection to—Appellate Court cannot interfere on ground of lower Court's want of jurisdiction unless defendant shows that he was prejudiced by trial in particular jurisdiction.

Before an appellate Court will interfere on the ground of the lower Court's want of jurisdiction the defendant must show that he has been prejudiced by the trial being held within the particular jurisdiction : *A I R 1919 Cal 1014, Rel. on.* [P 574 C 1]

(c) Married Women's Property Act (1874), S. 6—Declaration by assured stating that policy is intended for benefit of his wife—Declaration forming part of policy—Policy held should be deemed in trust for benefit of wife—Contingent character of such benefit does not prevent it from being benefit within Act.

If a declaration is part of the contract of insurance, it will be part of the policy ; for a contract of insurance if created by any binding means is a policy to all intents and purposes : *In re The Norwich Equitable Fire Assurance Society, 67 L T 241, Rel. on.* [P 574 C 1]

In a declaration which was a part of an insurance policy the assured stated that the policy was intended for the benefit of his wife :

Held : that the policy should be deemed to be in trust for the benefit of the wife under S. 6, Married Women's Property Act. The fact that such benefit to the wife was of a contingent character did not prevent it from being benefit within the Married Women's Property Act : *In re Fleetwood's Policy, (1926) 1 Ch D 48, Rel. on.* [P 574 C 2]

(d) Civil P. C. (1908), O. 8, R. 2—Defendant not pleading S. 6, Married Women's Property Act, as defence to maintainability of suit — Plaintiff's pleader arguing on such point — Defendant cannot have benefit of defence which he did not plead.

In a suit for the recovery of money under an insurance policy, the defendant did not plead in defence that S. 6, Married Women's Property Act, was a bar to the suit. The plaintiff's pleader accidently argued the question of applicability of the said section to the suit :

Held : that the defendant could not have the benefit of the defence which he did not plead : *In re Rabinson's Settlement, (1912) 1 Ch 717, Rel. on.* [P 574 C 2]

(e) Hindu Law—Joint family—Self acquisition—Money paid to member of joint family by manager for his personal use—Profit made by such member from such money not in detriment of joint property—Such profit is not family acquisition but is such member's separate self-acquired property.

A profit made by a member of a joint family from the enjoyment of joint property without detriment to it is his separate self-acquired property. When money is given to a member of a family by the manager from family funds to be spent by him for his own personal use, any profit made by such member from such money is not a family acquisition but it is the separate self-acquired property of such member : *19 Cal 253 (P C), Rel. on.* [P 575 C 2]

(f) Hindu Law—Joint family—Self acquisition—Member of joint family insuring his life—Money available to him from private and also from joint family funds—Presumption is that such member paid insurance premium from his own money—Policy money of such member cannot be claimed by joint family.

Where an assured who is a member of a joint family, is shown to have money available from private as well as joint family sources, the presumption is that the premium for a policy on his life was paid from his own money. The joint family cannot claim the policy money of such member as it does not belong to such family : *A I R 1914 Mad 595 (F B), Foll.* [P 575 C 2]

T. R. Venkatarama Sastri, M. Sriramamurthy, K. Bhashyam Iyengar and *V. C. Veeraraghavan* — for Appellants.

K. V. Ramachandra Iyer — for Respondent.

Cornish, J.—The appellant in A. S. No. 50 is the Bengal Insurance and Real Property Company having its head office in Calcutta. It was sued by the plaintiff, the widow of one Sengottiah Goundan, to recover the money due on a life assurance policy between her husband and the Company. The proposal for this policy was made through the Company's agent at Erode on 24th August 1927. The proposal was accepted by the Company on 8th September 1927. Thereupon a half year's premium became payable within five days from the date of the Company's notice of acceptance of the proposal. But this premium not having been paid, a fresh certificate of health, as required by the Company's notice (Ex. 23), had to be furnished by the assured to the Company. This he did on 22nd January 1928, and the declaration or certificate is Ex. 1. It stated that he was at the time in good health and that since his medical examination on 30th August 1927 he had not consulted any medical man or suffered from any illness. The policy was issued on 5th May 1928. In a little over three months, namely on 16th August 1928, the assured died of pernicious anaemia.

The plaintiff's claim to recover the money was resisted by the Company on two principal grounds : (1) The written statement alleged that the policy was made void by the fraudulent suppression of a material fact by the assured, viz. his disease, of which he must have been aware at the time when he made his declaration of good health on 22nd January 1928 ; and (2) that the trial Court at Coimbatore had no jurisdiction over the suit as no part of the cause of action had arisen within the limits of that Court's jurisdiction.

There is no evidence that the assured was ill when he made the declaration or that he was suffering then from the ailment which was so soon to be fatal to him. The doctor who examined him in August 1927 certified the assured as a first class life for insurance. This witness says that he had never seen a case of pernicious anaemia; but he has read about this ailment and he stated that he saw none of its symptoms in the assured when he examined him. The widow of the assured (P. W. 2) says that her husband was in good health until about 1½ months before his death. He was then advised to go to Bangalore for a change, and he died in Bangalore. The doctor who attended him there has not given evidence. He gave the certificate that assured was under his treatment for pernicious anaemia and that he died of this disease. This information is expanded in a later letter to the effect that the assured was under his treatment from 29th July till his death. But there is no evidence when this ailment seized the assured. Reference has been made to standard medical books, from which it appears that pernicious anaemia is an insidious complaint which may run its course rapidly within a period of 6 to 12 weeks. Upon this state of the facts it is impossible to hold that the defendant company has succeeded in showing that the assured knew that he had this disease or, indeed, that he had it in January 1928 when he signed the declaration of his good health, or even in April when he paid the premium. The learned advocate for the appellant briefly referred to the question whether the plaintiff's suit might not be barred by Art. 85, Lim. Act, the suit having been brought more than three years after the proof of the death of assured. But he very fairly conceded that it was difficult to maintain this position in the face of Ex. 12. This document is a clear admission by the company of the claim and is sufficient to save the bar of time. We are of opinion that the suit is not time-barred.

The main argument turned on the question of jurisdiction. The lower Court held that a part of the cause of action arose within its jurisdiction inasmuch as the offer of the assured was made at Erode. Undoubtedly the making of an offer may be part of the cause of action in a suit upon a contract which has resulted from that offer. But the material question is, where was the offer made, for until a proposal is received there is no complete offer: 10 M L W 445,[1] A I R 1920 Mad 177[2] at p. 180, 65 M L J 455.[3] The defendant company's agent at Erode was only authorized to canvass for proposals for insurance. This is apparent from the instructions to agents which are printed at the top of the proposal forms with which the agents were supplied. These instructions inform the agent that he should see that the proponent answers all questions in the form properly in order to avoid correspondence and consequent delay in finally disposing of the proposal. From this it is clear that the agent had no authority to accept the proposal. All he had to do was to see that the proposal form was correctly filled up and to send it to the head office in Calcutta for disposal there. Until the proposal reached the head office there was no offer. The offer was made in Calcutta; it was accepted in Calcutta; and under the terms of the contract, the policy money was payable in Calcutta. The cause of action arose entirely in Calcutta. We do not think that any particle of a cause of action in Erode can be extracted from the circumstance that when the half-yearly premium became payable, the company instead of sending its demand to the assured, directed its local agent to collect the money from him. It has been held that in a suit to recover money payable on an insurance policy the cause of action arises at the place where the assured died: 41 I C 392.[4] But this will not help the plaintiff; for the assured died in Bangalore, and Bangalore, including the Civil and Military Station is foreign territory: 12 Mad 39.[5] We think that no part of the cause of action arose within the Coimbatore Sub-Court's jurisdiction. But even so, S. 21, Civil P. C., provides that an appellate Court shall not allow an objection on the ground of want of jurisdiction of the Court of first instance, notwithstanding that the objection has been taken at the earliest opportunity, unless

1. Appu Thamban v. Foulkes, A I R 1920 Mad 314=54 I C 260=10 M L W 445.
2. Mylappa Chettiar v. Aga Mirza, A I R 1920 Mad 177=54 I C 550=37 M L J 712.
3. National Insurance Co., Ltd., Calcutta v. Seethammal, A I R 1933 Mad 764=145 I C 993=65 M L J 455.
4. Vishwendra Thirtha v. National Insurance Co., Ltd., A I R 1918 Mad 635=41 I C 392.
5. *In re* Hayes, (1889) 12 Mad 39=1 Weir 10.

there has been a consequent failure of justice. This means that before an appellate Court will interfere on the ground of the lower Court's want of jurisdiction the defendant must show that he has been prejudiced by the trial being held within the particular jurisdiction: 44 I C 694.[6] The appellant's learned advocate has not suggested that his client has been prejudiced or handicapped by the fact of the trial having taken place in Coimbatore instead of in Calcutta.

These conclusions would suffice to dispose of the appeal had not the plaintiff's pleader in the course of his argument in the trial Court, for the purpose of repelling the claim made by the second defendant to the policy money, raised the question of a trust created in favour of the plaintiff by operation of S. 6, Married Women's Property Act. The learned Subordinate Judge pursued this argument at some length in his judgment, though the topic was not the subject of an issue, and came to the decision that S. 6 had no application. S. 6 enacts that a policy of insurance effected by a married man on his own life and expressed on the face of it to be for the benefit of his wife, shall enure and be deemed to be a trust for the benefit of the wife. One looks in vain in Ex. 11, which is described as the policy, and the schedule attached to it, for an expression of the policy being intended for the benefit of the assured's wife. This is to be found in the declaration. If the declaration is part of the contract of insurance it will be part of the policy; for a contract of insurance if created by any binding means is a policy to all intents and purposes: 57 L T 241.[7] But Ex. 11 states that the declaration is part of the policy, so there is no doubt that this document is incorporated in and part of the policy. In the declaration it appears that in answer to question 12 "Name of the nominee or nominees who would receive the sum assured," the assured had stated: "Self or wife, Velayammal." This shows that the wife was intended to have a benefit from the policy. According to the terms of the policy the money was payable in the event of the assured surviving 11th April 1943 or at previous death. Obviously he could not receive payment if he died before that date, but his wife could. It is true that her right to the benefit depended upon the contingency of her surviving her husband if he died before the named date. But the circumstance that a benefit to the wife is of a contingent character does not prevent it from being a benefit within the Married Women's Property Act: (1926) 1 Ch D 48.[8] If there was trust, as in our judgment there was, for the benefit of the wife, in the event which happened, it would follow from S. 6 that the Official Trustee of Bengal would be the trustee, and he alone would be competent to sue for the enforcement of the trust: 57 Mad 536.[9] But, as already observed, the point about the application of S. 6, Married Women's Property Act arose somewhat adventitiously. The defendant company did not plead it as a defence to the maintainability of the suit by the plaintiff. It ought to have done so, if it had intended to rely upon it. O. 8, R. 2, Civil P. C., requires that the defendant shall raise by his pleading all matters which show that the suit is not maintainable. The rule follows O. 19, R. 15, English Supreme Court Rules. With reference to this latter rule it was observed by Buckley, L. J. in (1912) 1 Ch 717[10] at p. 728:

> The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over.

The defendant company could only have relied upon this defence to the maintainability of the suit by obtaining leave to amend its pleadings. Not having done that, the company cannot be allowed, by reason of the accident that the plaintiff's pleader argued the question of the applicability of S. 6, Married Women's Property Act, to have the benefit of a defence which it did not plead. The plaintiff's learned advocate has suggested that the Official Trustee should be made a party. It is not

6. Bengal Provident and Insurance Co. v. Kamini Kumar Chowdary, A I R 1919 Cal 1014=44 I C 694=22 C W N 517.
7. *In re* The Norwich Equitable Fire Assurance Society, (1888) 57 L T 241.
8. *In re* Fleetwood's Policy, (1926) 1 Ch D 48=95 L J Ch 195=135 L T 374=(1926) W C & Ins Rep 1.
9. Lakshmi Ammal v. Sun Life Assurance Co., Canada, A I R 1934 Mad 264=151 I C 112=57 Mad 536=66 M L J 667.
10. *In re* Rabinson's Settlement, (1912) 1 Ch 717=81 LJCh 393=106 LT 443=28 T L R 298.

necessary in this case, because all that the trustee would have to do would be to receive the money from the company and, after deducting his charges, pay it to the beneficiary.

We now turn to A. S. No. 239 the appeal of defendant 2. He is the younger and undivided brother of the assured, and claims that as the money for the one and only premium paid was furnished from the joint family funds, the policy money must be regarded as an acquisition for the joint family, and he, the surviving coparcener, is entitled to it. His learned advocate has argued that assured being the eldest brother was by right the manager, and that a manager cannot take money from the family funds for his own aggrandisement. What the position would have been had the assured been the managing member of this family, it is not necessary to decide. The cases cited, 35 Mad 162[11] and 38 Mad 556,[12] leave the question of a manager's power to insure his life, paying the premium from the family money, for the benefit of some members only of the joint family, in some uncertainty. But the evidence is that the assured was not the manager. His mother, who has given evidence as D. W. 1 has said that she had been managing the family property since her husband's death 17 years ago. It is not unlikely that the assured who was only 23 years of age when he died would have been content to leave his mother in the management. She says that she used to pay money to the assured for his personal expenses and that she paid him Rs. 175 (the amount required for the half-yearly premium) for insuring his life.

Her further story that she paid this money to him in the presence of the company's agent has been disbelieved by the learned Subordinate Judge, and indeed it is noteworthy that no question was put by the defence to the agent to confirm this assertion. She does not pretend that the assured told her that he wanted to insure his life to make some additional provision for the family. His statement in the declaration shows that he had no such intention. The question then is, whether money paid to a member of a joint family by the manager for his personal use, which he is free to spend as soon as he receives it, must, because he chooses to invest it for some purpose which is clearly not intended to be for the benefit of the family, be deemed to be a family acquisition. A profit made by the member of a joint family from the enjoyment of joint property without detriment to it is his separate self-acquired property: 19 I A 48.[13] When money is given to a member of a family by the manager from family funds to be spent by him for his own personal use, it seems to us that any profit made by him can hardly be said to be in detriment of the joint property.

But apart from these considerations there is his mother's own evidence that the assured was borrowing money from other persons and that after his death she defended four suits by creditors in respect of such loans. She successfully pleaded in those suits that the debts incurred by the assured were not for the purpose of the family. Now as it appears that the assured was obtaining money for his needs from other sources and as the evidence does not establish that the sum of Rs. 175 received from his mother was in fact utilised to pay the premia, we think that we are justified in applying the presumption, which Sankaran Nair, J. in 37 Mad 483,[14] said would arise where an assured is shown to have money available from private as well as from joint family sources, namely, that the premia for a policy on his life would be paid from the man's own money. We accordingly hold that the policy money did not belong to the joint family and that they have no claim to it. And as there is nothing in the declaration by the assured to show that he intended his wife to have only the limited estate of a Hindu widow in the policy money, she is entitled to it absolutely. The result is that the appeals are dismissed and the decree of the lower Court stands. Defendant 1, the company, will pay the plaintiff her costs in A. S. No. 50 and defendant 2 will pay her costs of the appeal in A. S. No. 239. The plaintiff's costs in the lower Court including

11. Oriental Government Security Life Assurance Co. Ltd. v. Ventedu Ammiraju, (1912) 35 Mad 162=10 I C 269=(1911) 1 M W N 276.
12. Srinivasa Iyengar v. Thiruvengadathaiyangar, AIR 1914 Mad 226=23 IC 264=38 Mad 556.
13. M. Lachmeswar Singh v. S. Manowar Hossein, (1892) 19 Cal 253=19 I A 48=6 Sar 133 (P C).
14. P. Balamba v. Krishnayya, A I R 1914 Mad 595=20 IC 934=37 Mad 483=25 MLJ 65(FB).

court-fee will be paid by defendant 1. Defendant 2 will pay his own costs in the lower Court. The plaintiff having sued as a pauper and succeeded in her suit, we direct her to pay the court-fee to Government. At the time when judgment was delivered the plaintiff had not obtained a succession certificate. She has since procured it, and she has filed a petition for leave to produce it. The petition is allowed.

C.R.K./W.D. *Appeals dismissed.*

A. I. R. 1937 Madras 576

VENKATARAMANA RAO, J.

S. P. Swami Naidu — Petitioner.

v.

Natesa Iyer and *another* —

Opposite Parties.

Civil Revn. Petn. No. 574 of 1936, Decided on 6th January 1937.

Civil P. C. (1908), O. 33, R. 9 (c)—Scope—O. 33, R. 9 (c) applies to agreement by which interest in subject matter of suit is transferred or created in favour of person not entitled to it—It does not apply to recognition of antecedent title in one of parties to suit by virtue of family settlement.

Order 33, R. 9 (c), Civil P. C., contemplates an agreement in and by which an interest is transferred or created in the subject matter of the suit in favour of a person who is not entitled to it, and would not cover a case where by virtue of a family settlement between the parties there is a recognition of an antecedent title in one of the parties to the suit. [P 576 C 2]

M. Krishna Bharathi—for Petitioners.

L. A. Gopalakrishna Iyer — for Opposite Parties.

Order.—This is a petition to revise the order of the Additional Subordinate Judge of Coimbatore declining to dispauper the plaintiff under O. 33, R. 9, Civil P. C. The plaintiff instituted the suit, out of which this petition arises, on a mortgage executed by defendants 1 to 4, in favour of his mother and deceased sister, the mother of defendant 6 in the suit. The case on which the plaintiff came to Court was, though the mortgage was executed in favour of both the plaintiff's mother and sister, they were really benamidars for the father of the plaintiff, and the plaintiff was the person solely entitled to the amount due under the mortgage, and therefore he prayed for a mortgage decree for the entire amount to be passed in his favour. The case of defendant 6 is that his mother is entitled to half the amount, that the allegations relating to benami are false and that he was entitled to half the mortgage amount in the right of his mother. Among the issues framed in the suit, are the following:

1. Was the mortgage deed in question taken by the plaintiff's father benami in the names of the plaintiff's mother and sister as alleged by the plaintiff ?

6. Is defendant 6 entitled to any portion of the mortgage amount ?

On 13th February 1936, the plaintiff and defendant 6 filed a joint memo into Court in and by which the plaintiff agreed that defendant 6 is entitled to one half of the amount. The result of the arrangement embodied in the said memo is that the plaintiff gives up his contention as to benami. Defendant 5 who is a subsequent purchaser of the suit property has filed an application to dispauper the plaintiff on the ground that the plaintiff has subsequent to the suit entered into an arrangement with reference to the subject matter of the suit in and by which defendant 6 has obtained an interest therein and therefore he is liable to be dispaupered. The lower Court has negatived the contention and dismissed the application and the question is, is the view of the lower Court sound ? I am inclined to think it is. O. 33, R. 9 (c) contemplates an agreement in and by which an interest is transferred or created in the subject matter of the suit in favour of a person who is not entitled to it, and would not cover a case such as this where by virtue of a family settlement between the parties there is a recognition of an antecedent title in one of the parties to the suit. The joint memo does no more than declare that the plaintiff's sister was from the inception entitled to half the entire mortgage amount and that defendant 6 as her heir would be entitled to it. O. 33, R. 9 (c) is not intended to affect cases of this description. Mr. Krishna Bharathi contends that as under the memo the plaintiff is now entitled to get a decree for half the amount the lower Court ought to have found out whether the plaintiff would not be in a position to pay the court-fee for half the amount and given a finding in regard thereto, but this was not made a ground for dispaupering the plaintiff. It is open to defendant 5 if he is so advised, to prefer a separate petition. I therefore do not propose to deal with the said matter in this revision petition. In the result, the civil revision petition is dismissed with costs.

C.R.K./W.D. *Petition dismissed.*

A. I. R. 1937 Madras 577

VARADACHARIAR AND KING, JJ.

A. Subramania Iyer—Petitioner.

v.

S. Meenakshisundaram Chettiar and *another*—Opposite Parties.

Civil Revn. Petn. No. 1097 of 1935, Decided on 5th February 1937, from order of Dist. Court, Tinnevelly, D/- 14th February 1935.

Insolvency—Proof of debts—Debt recoverable on date of insolvency petition but barred on date of adjudication order is provable.

A debt recoverable by the creditor on the date of the presentation of the insolvency petition but barred on the date of order of adjudication is provable debt as by the operation of provision in S. 28 (7), Provincial Insolvency Act, as to 'relation back' the criterion date is the date of the filing of the petition : *A I R 1928 Mad 608*; *A I R 1933 Lah 688* and *A I R 1936 Bom 130, Rel. on*; *A I R 1935 Mad 817, Ref.* [P 577 C 1]

T. Krishnaswami Ayyangar — for Petitioner.

A. Swaminatha Ayyar and *S. Tyagaraja Ayyar*—for Opposite Parties.

Varadachariar, J.—This civil revision petition (under S. 75, Provincial Insolvency Act) arises out of an application praying that the respondents' debts which were admitted by the Official Receiver may be expunged from the schedule. The matter has been dealt with in the Courts below on the assumption that the respondents' claim could have been enforced in a Court of law on the date of the presentation of the insolvency petition but that the remedy by suit had become barred by limitation before the date of the order of adjudication. The case has been argued before us on the same assumption.

Section 34 (2), Act 5 of 1920, provides that all debts to which the insolvent is subject when he is adjudged an insolvent (etc.), shall be debts provable under the Act. The Courts below have upheld the respondents' contention that in view of the provision in S. 28 (7) as to 'relation back' the 'criterion date was the date of the filing of the petition'; in support of the conclusion, they have relied on 51 Mad 594,[1] where it was held that a petition duly filed by a creditor might under S. 16 be allowed to be continued by another creditor whose claim might (if a suit were necessary) have become barred between the date of the presentation of the insolvency petition and the date of the substitution. The trial Court further relied on the use of the expression 'the commencement of the insolvency' in the course of the judgment in 47 Mad 120.[2] The latter case is clearly distinguishable ; but as regards the former case, it cannot be denied that the reasoning on which the decision has been based affords support to the respondents' contention, though it is perhaps possible to justify the decision on a different ground, viz., that the petition filed by a creditor must be regarded as a kind of representative proceeding and that the other creditors are in a sense parties thereto even from the outset.

There are two decisions directly in point, one of the Lahore High Court, under the Provincial Insolvency Act, 14 Lah 730,[3] and the other of the Bombay High Court under the Presidency Towns Insolvency Act, A I R 1936 Bom 130;[4] and they support the conclusion arrived at by the Courts below. In 35 M L J 296[5] and 50 Mad 300[6] there are observations to the effect that on the ground of principle if not also as a matter of construction the 'relation back' doctrine must be held to govern the interpretation of the expression 'order of adjudication' occurring in some of the later sections of the Act. In 58 Mad 1032,[7] both the learned Judges expressed the opinion that the restriction imposed by Cl. (2), S. 28 on the institution of suits by creditors must in view of S. 28 (7) be held to relate back to the date of the presentation of the petition; and if this were the correct view, it would only be logical to hold that even for purposes of S. 34 (2), the same is the material date: *cf.* (1904) A C 1[8] at p. 5.

Having heard the point fully argued we think it right to say that if the matter

1. Venkata Hanumantha Rao v. Gangaya, A I R 1928 Mad 608=110 I C 611=51 Mad 594=55 M L J 168.

2. Sivasubramania Pillai v. Theethiappa Pillai, A I R 1924 Mad 163=75 I C 572=47 Mad 120=45 M L J 166.
3. Nizam v. Babu Ram, A I R 1933 Lah 688=143 I C 175=14 Lah 730=34 P L R 464.
4. Byramji Bomanji v. Official Assignee, Bombay, A I R 1936 Bom 130=161 I C 736=60 Bom 444=38 Bom L R 71.
5. Sankarayana Iyer v. Alagiri Iyer, A I R 1919 Mad 473=49 I C 283=35 M L J 296.
6. Rangiah v. Appaji Rao, A I R 1927 Mad 163=99 I C 241=50 Mad 300=51 M L J 319.
7. Ramayya Garu v. Official Receiver, East Godavari, A I R 1935 Mad 817=158 I C 460=58 Mad 1032=69 M L J 241.
8. Harrison v. Kirk, (1904) A C 1=73 L J P C 35=89 L T 566.

were *res integra* we should have hesitated to come to the conclusion reached or suggested in the cases above referred to. The scheme of the English Bankruptcy Law since 1883 is to regard the date of the receiving order as the material date for questions like the present and to dissociate them from questions relating to the vesting of the title in the trustee (which only follows on adjudication) and from the doctrine as to 'relation back' whose purpose and effect were explained by the Master of the Rolls in (1893) 1 Q B 455[9] at p. 457. The observations in some of the earlier English decisions (which have been quoted in the later cases), must, it seems to us, be understood with due regard to the state of the law when those cases were decided. The Provincial Insolvency Act, however, has not wholly followed the scheme of the English Act, 1883; not only has it not introduced the intermediate stage of a 'receiving order', but it has departed from modern English practice in fixing the date of the presentation of the insolvency petition as the material date for most purposes. In the notes appended to the Bill of 1905, it was stated that this was considered to be "in accordance with the law in force in the Presidency Towns" (11 and 12 Vict. c. 21). Further, the Act provides for the relation back, not of the trustee's title or of the commencement of the insolvency but of the order of the Court. It is therefore not possible to say with confidence how far the Legislature in this country intended to dissociate or has in the result dissociated questions like the one now before us from the doctrine of 'relation back' in the sense in which it has been introduced by the Act. In a matter where certainty and uniformity of practice are more important than theoretical unassailability, we do not feel justified in dissenting from the view which has been expressed or assumed in the several cases above referred to in several provinces. Presumably creditors must for many years have acted on the view thus sanctioned and it seems reasonable to leave it to the Legislature to alter it if necessary. On this ground we dismiss this revision petition but without costs.

C.R.K./T.M. *Petition dismissed.*

9. *In re* Pollitt, (1893) 1 Q B 455=62 L J Q B 236=4 R 253=10 Morrell 35=68 L T 366=41 W R 276.

A. I. R. 1937 Madras 578

KING, J.

Pregada Balanagu — Petitioner.

v.

Krosuru Kotayya — Opposite Party.

Criminal Revn. Case No. 872 and Petn. No. 790 of 1936, Decided on 17th March 1937, from order of Sub-divisional Magistrate, Guntur, D/- 1st September 1936.

Criminal P. C. (1898), Ss. 197 and 45 — Village Munsif sending report under S. 45 is neither Magistrate nor public servant within S. 197 — No previous sanction for his prosecution is necessary.

In sending his report under S. 45, Criminal P. C., the Village Munsif is not acting in his capacity as Magistrate, being there called specifically a Village Headman, nor is he a public servant removable only by or with the sanction of a Local Government. No previous sanction of Local Government is necessary for prosecution of such Village Munsif : *A I R 1935 Mad 442, Rel. on.* [P 578 C 2]

V. Rajagopalachari and *C. Vasudevan* — for Petitioner.

S. Vepa and *J. Krishnamurthi* — for Opposite Party.

Public Prosecutor — for the Crown.

Order. — I do not think the Sub-divisional Magistrate was right in holding that the sanction of Government was necessary in this case under S. 197, Criminal P. C. In sending his report under S. 45, the Village Munsif is not acting in his capacity as Magistrate, being there called specifically a Village Headman, nor is he a public servant removable only by or with the sanction of a Local Government : *see* 58 Mad 787.[1] But the Sub-divisional Magistrate might well have dismissed the complaint under S. 203 after putting a few questions to the complainant. It is a complaint filed five months after the police investigation was over, and a mere glance at it is enough to show that the complainant has made no serious attempt at stating any facts which if proved in evidence would support a conviction. In these circumstances I see no reason to interfere and dismiss this petition.

C.R.K./W.D. *Petition dismissed.*

1. Pichai Pillai v. Balasundara Mudali, A I R 1935 Mad 442=1935 Cr C 619=157 I C 24=58 Mad 787=36 Cr L J 1241=68 M L J 608.

A. I. R. 1937 Madras 579

VENKATARAMANA RAO, J.

Yevanje Krishna Bhatta—Appellant.

v.

Khandige Iswara Bhatta and *others*—Respondents.

Second Appeal No. 872 of 1933, Decided on 27th January 1937, against decree of Sub-Judge, South Kanara, in A. S. No. 249 of 1932.

Accounts—Settled—Re-opening of—After settlement of accounts, accounts of one party found to have been cooked up—Accounts can be re-opened at instance of aggrieved party.

If after settling the accounts it turns out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of equity. [P 579 C 2]

Where after the settlement of accounts, the account of one party is found to have been cooked up, the accounts can be re-opened at the instance of the aggrieved party : *5 M I A 372 (P C), Rel. on.* [P 579 C 2]

K. Y. Adiga and *P. Sridhara Rao* — for Appellant.

B. Sitarama Rao and *K. Vittal Rao*— for Respondents.

Judgment.—This second appeal arises out of a suit by the plaintiff for a refund of a certain sum of money on the ground that in the settlement of account between the parties he has paid certain amounts in excess of what was legally due to the defendant. The plaintiff executed a usufructuary mortgage in favour of the defendant on 26th June 1915 and took a lease back from him on 3rd August 1915. Under the lease he had to pay rent according to the rate specified therein. On 3rd April 1928 the parties looked into the accounts for a period of ten years and arrived at a certain figure as being due and payable by the plaintiff to the defendant and on the basis of that calculation the plaintiff paid a sum of Rs. 1,657 on that date. The plaintiff's case is that it was not a final taking of accounts and that he subsequently found out that the figure was arrived at on a wrong calculation of interest, that a sum of Rs. 523 collected by the defendant as receiver in another suit was not given credit to and that there were many other errors which had crept into the accounts and which had not been noticed by him on the date on which the accounts between the parties were settled. It has now been concurrently found by both the lower Courts that the plaintiff's case that a sum of Rs. 523 was due to him is not correct and in regard to the question of wrong calculation of interest they found that it was not open to the plaintiff to agitate that question when he had acquiesced in the method of calculation. I think the view of the lower Courts in this behalf is correct.

The case for the plaintiff is that only the rent account was settled and on that basis so much amount as was found to be due on the date of settlement was not really due. But the defendant stated that it was not only the account in respect of rent that was settled but there were certain other items in regard to which the plaintiff owed moneys to him and they were also adjusted and formed part of the settlement. All the said amounts are referred to in Paras. 34 and 36 of the judgment of the learned Subordinate Judge. Both the Courts have now concurrently found that no such moneys were due to the defendant and that the accounts of the defendant on the strength of which this claim was advanced were all cooked up. It, therefore, follows that in the taking of accounts, according to the defendant's own admission, these amounts ought not to have been taken into account. In such circumstances it is open to the plaintiff to have the account re-opened and to claim a refund of the amounts which have been wrongly taken into consideration. The law relating to this matter has been laid down in 5 M I A 372[1] at p. 395, to the following effect :

> Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance ; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced and that all the information which is possessed on one side and the other, should be furnished in the settlement of those accounts ; and if it afterwards turns out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity.

Therefore, the defendant is bound to refund the said amounts. It is now agreed that the total amount to be so refunded will be Rs. 670-13-0. I, therefore, declare that the plaintiff is entitled to have a refund of the said sum of Rs. 670-13-0 with interest at 6 per cent.

1. McKellar v. Wallace, (1851-54) 5 M I A 372= 8 Moo P C 378=1 Equity Rep 309=1 Sar 453 (P C).

from the date of plaint. Mr. Sitarama Rao contends that the plaintiff will be liable for future rent which accrued from the date of Ex. A under the terms of the lease and there are still amounts due from him. Mr. Adiga says that payments have been made for which there are receipts. There is no evidence before me in regard to this matter and I am not in a position to give a definite finding with regard thereto. It is open to Mr. Sitarama Rao's client to show in execution what amount is due to him as and by way of rent from the plaintiff and pay only the balance. It is open to the executing Court to go into this question. With this modification the second appeal is dismissed but in the circumstances I make no order as to costs of this second appeal.

C.R.K./W.D. *Decree modified.*

A. I. R. 1937 Madras 580

BURN, J.

Chivikula Lakshminarayana—

Appellant.

v.

Singu Hanumayya and *others*—

Respondents.

Second Appeal No. 133 of 1933, Decided on 18th December 1936, against decree of Sub-Judge, Guntur, in A. S. No. 113 of 1931.

Civil P. C. (1908), S. 47 — Person purchasing mortgaged property pendente lite—Mortgagee-decree-holder aware of this —Question regarding delivery of mortgaged property between decree-holder and purchaser falls under S. 47—Separate suit against purchaser for possession is barred.

The question regarding the delivery of the mortgaged property between mortgagee-decree-holder and purchaser of the mortgaged property *pendente lite* is one under S. 47, Civil P. C., and therefore the mortgagee-decree-holder is barred from filing a suit against the purchaser of the mortgaged property *pendente lite* in possession especially when he was aware of the purchase even during the pendency of the suit: *A I R 1933 All 201, Rel. on; A I R 1928 Bom 65, Dissent.; 24 Cal 62, Ref.*

[P 580 C 2; P 581 C 2]

Ch. Raghava Rao for *V. Govindrajachari*—for Appellant.

A. Lakshmayya—for Respondents.

Judgment.—There is no dispute about the facts. The only question decided by the learned Subordinate Judge and the only question arising for decision in this appeal is one of limitation. It is clear that if the question arising between the plaintiffs and the contesting respondents falls under S. 47, Civil P. C., the decision of the learned Subordinate Judge is correct. As to this I do not think there is any room for doubt. The contesting defendants are persons who purchased the mortgaged property *pendente lite.* There are many decisions the result of which is that purchasers of the mortgaged property *pendente lite* are representatives of the judgment-debtor and there is no dispute with regard to this point. Mr. Raghava Rao's contention is that the question which arises now between the plaintiffs and the contesting defendants does not come within S. 47 because it did not arise in execution of the decree. S. 47 however provides that all questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree must be determined by the Court executing the decree and not by a separate suit. The only question which arises is with regard to the delivery of the mortgaged property. The plaintiffs applied in execution for delivery against defendants 1 to 7, the heirs of the original mortgagor. But it was well known to the plaintiffs in 1922 when the execution petition was filed, that defendants 1 to 7 were not in possession.

As early as 1917 the plaintiffs had filed an application I. A. No. 1263 of 1917 to implead the purchasers *pendente lite* in the suit on the ground that they had bought the property and were in possession of it. That application was rejected by the trial Court. Now since the question is with regard to the delivery of possession of the mortgaged property, it seems to me impossible to hold that it is not a question relating to the execution of the decree. Mr. Raghava Rao contends that his clients did all that was obligatory upon them when they took out execution proceedings against defendants 1 to 7. He points out that they had unsuccessfully attempted to get the purchasers impleaded as parties in the suit, that they got a decree only against defendants 1 to 7 and that they executed this decree against defendants 1 to 7 in so far as it could be executed. Having done that he says they were under no obligation to implead the purchasers. He does not dispute the cases cited on behalf of the respondents of which 24 Cal 62[1] is typical, in which it

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1. Ishan Chunder Sirkar v. Beni Madhub Sirkar, (1897) 24 Cal 62=1 C W N 36 (F B).

has been held that a purchaser *pendente lite* is competent to intervene in execution proceedings and to have his questions decided by the executing Court. In the present case he points out that the purchasers did not intervene in the execution proceedings. This, however, leaves out of account the fact that the decree-holders knew the purchasers to be in possession but gave them no notice of the execution proceedings. It is not easy to see how the purchasers could intervene in execution proceedings in the absence of notice to them. Mr. Raghava Rao relies mainly upon the case reported in 52 Bom 208[2] in which it was held that a purchaser *pendente lite* is not a representative of the judgment-debtor for all purposes. With due respect I am not prepared to follow the decision of the Bombay High Court in that case. It appears from the judgment in 52 Bom 208[2] at p. 212 that no authority was cited before the learned Judges for the proposition that transferees *pendente lite* are representatives within the meaning of S. 47 except 16 All 286[3] and 22 All 243.[4] It is needless to point out that there are many more cases which might have been cited. The case which comes nearest to the present case, so far as I am able to see, is the case in 55 All 235.[5] Like the present case, that was one in which during the pendency of the suit for foreclosure the mortgagor sold to a stranger the equity of redemption. After the sale, the plaintiff applied for a final decree and impleaded the purchaser but later on discharged him. As in the present case, in execution of his final decree the plaintiff got delivery of possession as against the mortgagor. But he failed in the mutation proceedings to get his own name entered in the place of that transferee. Thereupon he applied to execute the decree again for delivery of possession as against the transferee. It was held by the Court that he was entitled to apply for execution against the transferee who was actually in possession. At p. 239 the learned Judges dealt with an argument similar to the one put forward by Mr. Raghava Rao in the present case. Mr. Raghava Rao has contended that having taken out execution proceedings against the only defendants who were on the record, he has done all that was necessary for him to do. The learned Judges of the Allahabad High Court observe as follows :

> It is next argued that the appellant having taken out execution of his decree against Nurul Hasan and having obtained delivery of possession against him, the decree should be deemed to have been completely executed, and no further execution proceedings can take place.

They go on to say :

> We do not think this argument is sound. There can be no doubt that the decree-holder could have in the first instance, applied for execution not only against Nurul Hasan but also against his transferee *pendente lite*. Had he done so, there could be no argument against the maintainability of such application so far as Parmeshwari Din was concerned. The position cannot be materially different if an application was made in the first instance only against Nurul Hasan; and when the decree-holder subsequently discovered that the execution taken out against Nurul Hasan was infructuous, he applied for execution of his decree under O. 21, R. 11, Civil P. C., against the respondent, who should as much be considered to be the judgment-debtor as Nurul Hasan himself. We are clearly of opinion that the execution taken out against Nurul Hasan was not a complete execution of the decree.

The present case is stronger in one respect. It appears that in the Allahabad case the decree-holder only found subsequently that his execution proceedings had been ineffective and infructuous. In the present case the plaintiffs knew from the beginning that the execution proceedings must be infructuous and ineffective. They have known for five years at least that the purchasers were in possession and there was no meaning in their putting in an execution application for delivery of possession without giving notice to the persons whom they knew to be in possession. For these reasons I am of opinion that the learned Subordinate Judge was right in holding that this was a question under S. 47, Civil P. C., and the plaintiffs' suit was barred. The question of limitation arises because the plaintiffs' suit was brought more than 4 years or about 4 years after the delivery proceedings under Ex. L. The suit therefore, if treated as an application under S. 47, was clearly barred by limitation. It follows that this appeal must be dismissed with costs of the contesting respondents. (Leave to appeal is asked for and refused.)

C.R.K./S.C. *Appeal dismissed.*

2. Basappa Budappa v. Bhiman Gowda Shiddangowda, A I R 1928 Bom 65=108 I C 17=52 Bom 208=30 Bom L R 102.
3. Madho Das v. Ramji Patak, (1894) 16 All 286 =1894 A W N 84.
4. Sheo Narain v. Chunni Lal, (1900) 22 All 243=1900 A W N 51.
5. Ram Charan v. Parmeshwar, A I R 1933 All 201=144 IC 70=55 All 235=1933 A L J 113.

A. I. R. 1937 Madras 582

VENKATARAMANA RAO, J.

K. M. M. Palaniappa Chettiar — Petitioner.

v.

Ramaswami Servai and *others* — Opposite Parties.

Civil Revn. Petn. No. 1855 of 1933, Decided on 15th December 1936, from order of Sub-Judge, Devakottai, D/- 26th September 1933.

(a) Civil P. C. (1908), O. 21, Rr. 95 and 103— Object of rule—Order on petition under R. 95 —Institution of suit under R. 103 is not the only remedy against such order — Establishment of right to property to supersede order is only contemplated —If such right is established within one year, order must be held as superseded and it is not necessary to institute suit within one year.

The policy underlying R. 103, O. 21, Civil P. C., is to have a speedy settlement of the questions of title raised in execution sales. But the institution of a suit under O. 21, R. 103, Civil P. C., is not the only remedy for having the order on petition under R. 95 superseded. The establishment of a right to the property is what is contemplated as necessary to supersede the order and if the unsuccessful party is able to get his right declared or established within a year, the order must be held to have been superseded by the later adjudication. Otherwise, in spite of the adjudication in his favour, he must again file a suit to have his right to the property declared, which a competent Court has already declared. The use of the word "may" in R. 103 seems to suggest that what is contemplated is the establishment of a right and the remedy by a suit is indicated. But what makes the order conclusive is not the failure to institute a suit but the failure to have the right established : *4 Mad 302* ; *A I R 1924 Mad 602* and *11 All 47 (P C)*, *Ref.* [P 583 C 2 ; P 584 C 1]

(b) Execution— Former execution application dismissed for reason which subsequently turned out to be untenable—Later execution application is one for revival of former.

Where the former execution application was dismissed finally but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turned out to be untenable, the later execution application would be deemed to be one for a revival of the former one : *A I R 1933 Mad 418, Foll.* [P 584 C 2]

A. Swaminath Iyer — for Petitioner.

C. A. Mahomed Ibrahim — for Opposite Parties.

Order.—This is an application to revise an order refusing delivery of possession under O. 21, R. 95, Civil P. C. The petitioner filed O. S. No. 31 of 1929 on the file of the Subordinate Judge's Court of Devakottah on a mortgage executed by one Muthuswami Servai, father of respondents 1 and 2 herein. The property mortgaged was admittedly joint family property wherein the said Muthuswami Servai and his sons were interested. In execution of the said decree three items of mortgaged property mentioned in the decree therein were brought to sale and purchased by the petitioner himself on 29th June 1931. After the purchase, the petitioner filed an application, E. A. No. 118 of 1932 for delivery of possession of the said items and obtained delivery of items 2 and 3 but not of item 1. This was in consequence of an obstruction by respondents 1 and 2. The petitioner then filed an application on 4th March 1932, E. A. No. 203 of 1932, on the file of the Subordinate Judge of Devakottah, for removal of the obstruction.

It may be stated that before the petitioner purchased the said properties, respondent 2, Krishna Servai, had filed a suit for partition, O. S. No. 153 of 1929, on the file of the District Munsif's Court of Devakottah, against his father Muthuswami Servai and his brother including respondent 1 in this case. In the said suit Krishna Servai impeached the said mortgage on the ground that it was not binding on the family and therefore on respondents 1 and 2 herein. Respondent 1 supported Krishna Servai in the said litigation. To the said suit the petitioner was made a party. When E. A. No. 203 of 1932 was taken up for hearing, the said suit was pending. In answer to the said application, both respondents 1 and 2 filed a counter affidavit stating their objections to the request made by the petitioner for delivery of possession of the property. In paras. 5 and 6 of the counter affidavit they set out in detail the nature of their objections. They stated that the properties which were the subject matter of the mortgage suit, O. S. No. 31 of 1929, were the subject matter of suit between the parties in O. S. No. 153 of 1929, that the said suit was pending trial, that as the petitioner purchased the properties pending the said litigation, his purchase would be affected by the doctrine of *lis pendens* and he would not be entitled to any relief inconsistent with the claim of the respondents. They further alleged thus in para. 6 of the said affidavit :

> In view of the considerations set forth in para. 5, supra, this Court trying the same question and giving a decision thereon may result on a conflict of decisions by two Courts which ought not to be allowed.

They also alleged that in view of the said litigation the question of title should not be gone into. The learned Subordinate Judge who dealt with the said application did not go into the question whether in view of the fact that the mortgage was by the father, the head of the family, it was open to the defendants to resist the purchaser's claim for delivery of possession, but as the suit, O. S. No. 153 of 1929, was pending, he dismissed the application holding that the petitioner failed to prove that the resistance was caused by the respondents at the instance of the judgment-debtor. This order was passed on 9th July 1932. The said O. S. No. 153 of 1929 was disposed of by the learned District Munsif of Devakottah on 19th August 1932, and so far as the mortgage in favour of the petitioner was concerned, the learned Judge dismissed the suit. He held that Krishna Servai and Ramaswami Servai, respondents 2 and 1 herein, were bound by the mortgage and the auction-sale and it was no longer open to them to recover any portion of the said property. There was an appeal against the said decision and it was confirmed by the learned Subordinate Judge of Devakottah on 30th January 1933. It will thus be seen that within a year from 9th July 1932, the date on which E. A. No. 203 of 1932 was dismissed, there has been a final adjudication by a competent Court declaring and establishing the right of the petitioner to the suit property and as the learned Subordinate Judge observes in the order which is now sought to be revised

by virtue of the judgment on appeal it is common ground that the respondents could not claim to be owners of item 1 and the title must be taken to have passed to the present petitioner auction-purchaser.

After the decision of the appellate Court on 22nd August 1933, the petitioner filed the application out of which this revision petition arises, E. A. No. 977 of 1933, under O. 21, R. 95 for delivery of possession of item 1. Objection was taken that as the petitioner did not file a suit within one year as required by O. 21, R. 103, Civil P. C., the order on the said petition became conclusive and the petitioner is not therefore entitled to obtain any relief. This objection prevailed in the Court below. The question is whether the view taken by the lower Court is sound. O. 21, R. 103, Civil P. C., provides that :

Any party not being a judgment-debtor against whom an order is made under R. 98, R. 99 or R. 101 may institute a suit to establish the right which he claims to the present possession of the property ; but, subject to the result of such suit (if any), the order shall be conclusive.

Article 2, Lim. Act, provides one year within which the said suit should be brought. Once the year is allowed to elapse, the order operates as a conclusive adjudication of the right to the property based on the auction-purchase. The party against whom the adverse order is passed under R. 99 or R. 101, whether as plaintiff or as defendant, is precluded from asserting the said right : *vide* 4 Mad 302.[1] The fact that a suit was pending wherein the question of the title to the property was in issue, was held not to be enough. In 75 I C 814,[2] an order was passed under O. 21, R. 101 when a suit regarding the title to the property was in issue. In the written statement filed in the suit, the defendants against whom the adverse order was passed under O. 21, R. 101 did raise the question of title but during the pendency of the suit, the defendants failed to institute a suit as required by O. 21, R. 103. Thereupon an application was made to raise an additional issue as regards the conclusiveness of the order. An additional issue was accordingly raised and it was held that the suit not having been filed within a year from the date of the order, the order had become conclusive and the plaintiff was given a decree. The policy underlying R. 103, O. 21, is to have a speedy settlement of the questions of title raised in execution sales. But is the institution of a suit under O. 21, R. 103, Civil P. C., the only remedy for having the said order superseded ? If the establishment of a right to the property is what is contemplated as necessary to supersede the order and I think it is, then if the unsuccessful party is able to get his right declared or established within a year, in my opinion, the order must be held to have been superseded by the later adjudication. Otherwise, in spite of the adjudication in his favour, he must again file a suit to have his right to the property declared, which a competent Court has already declared. As observed by the Privy Council in 11 All

1. B. Krishna Rao v. Lakshmana, (1882) 4 Mad 302.
2. Uni Achan v. Kunhikrishna Nair, A I R 1924 Mad 602=75 I C 814.

47[3] it would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not.

It seems to me that such a vain litigation is not contemplated by the Legislature. The use of the word 'may' in R. 103 seems to suggest that what is contemplated is the establishment of a right and the remedy by a suit is indicated. But what makes the order conclusive is not the failure to institute a suit but the failure to have the right established. I am therefore of the opinion that it is not obligatory for the petitioner to institute a suit within a year from 9th July 1932, for establishing that the purchase by him in Court auction conferred a valid title to the property against the respondents. But the next question is, should the petitioner bring a suit for possession or can he file the present application under O. 21, R. 95, Civil P.C., for delivery of possession of the property ? It was found in the said O. S. No. 153 of 1929 that the mortgages on the footing of which the petitioner obtained a decree were executed for legal necessity and for the purposes binding on the family, that the father and the brother of respondents 1 and 2 fully represented the family in the said transaction and in the mortgage suit and that respondents 1 and 2 are bound by the decree therein : *vide* paras. 39 and 40 of the judgment of the District Munsif.

Therefore it must be taken that respondents 1 and 2 as members of the family were so also parties to the said mortgage suit, O. S. No. 31 of 1929, and the decree therein and 'not persons other than the judgment-debtor.' Prima facie therefore the petitioner will be entitled to apply for possession under O. 21, R. 95. The question again is, is the prior application made by him a bar ? It will be seen that in E. A. No. 203 of 1932, the learned Subordinate Judge in view of the then pending suit O. S. No. 153 of 1929 and on the invitation of the respondents refrained from going into the question whether respondents 1 and 2 are not bound by the decree. The order on that petition must be deemed to have been made subject to the result of the litigation in O. S. No. 153 of 1929 and on the assumption that the respondents were not bound by the decree. Such an assumption is now found to be untenable in view of the decision in O. S. No. 153 of 1929. Under such circumstances the present application can be treated as a revival or continuation of the original application E. A. No. 118 of 1932. The principle stated by Sundaram Chettiar, J. in 56 Mad 490[4] at 503, would apply to the case :

> Where the former execution application was dismissed finally but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turned out to be untenable, the later execution application would be deemed to be one for a revival of the former one.

Such obstacle, the petitioner had in getting delivery of possession, now having been removed by virtue of the adjudication of O. S. No. 153 of 1929, the present application is therefore competent and the petitioner is entitled to get delivery of possession from respondents 1 and 2. I therefore reverse the order of the lower Court and direct delivery of possession being given to the petitioner. In the circumstances, I make no order as to costs.

C.R.K./S.C. *Order reversed.*

3. Bassu Kuar v. Dhum Singh, (1889) 11 All 47=15 I A 211=5 Sar 260 (P C).

4. Tripura Sundaramma v. Abdul Khader, A I R 1933 Mad 418=143 I C 1=56 Mad 490=64 M L J 664 (F B).

A. I. R. 1937 Madras 584

HORWILL, J.

Thummalakunta Krishtappa — Appellant.

v.

Satrasala Adinarayanappa and *another* — Respondents.

Appeal No. 167 of 1934, Decided on 2nd February 1937, against appellate order of Dist. Court, Anantapur, D/- 10th August 1937.

Principal debtor and surety—Discharge—Agreement by decree-holder to give time to principal debtor discharges surety — Exception is only when right to proceed against surety is specifically reserved.

The general rule is that an agreement by the decree-holder to give time to the judgment-debtor discharges the surety of the judgment-debtor. But there is one exception to this general rule and that is when the decree-holder gives concession to the judgment-debtor, but his right to proceed against the surety is specifically reserved : *Rouse* v. *Bradford Banking Co.*, *(1894) 2 Ch 32, Ref.*

[P 585 C 1]

P. Somasundaram — for Appellant.

V. S. Narasimhachar — for Respondents.

Judgment.—During the trial of the suit the respondent furnished security for the decree amount in case the plaintiff was successful. The decree was passed and so the respondent became liable for the decree amount. In execution by the decree-holder against the principal debtor the judgment-debtor appeared by a pleader and agreed to deposit Rs. 250 by 1st August 1933 and another Rs. 250 on the first of each month. This offer was accepted by the other side and so the District Judge passed an order:

> Mr. H. Narayana Rao agrees to deposit Rs. 250 by 1st August 1933 and to pay Rs. 250 on the first of each month. Mr. R. Krishna Sastri agrees. Ordered accordingly. No execution unless appellant defaults. No costs.

The question is whether by giving time under this order the sureties are discharged. The District Munsif of Anantapur held that they were not; but the District Judge of Anantapur, disagreeing with him held that they were. Mr. Somasundaram does not deny that in general an agreement by the decree-holder to give time to the judgment-debtor discharges the surety. As was laid down in (1894) 2 Ch 32,[1] referred to in 56 Mad 625[2]:

> The surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt or himself pay off the debt; and when he has paid it off he is at once entitled to sue the principal debtor and if the creditor has bound himself to give time to the principal debtor the surety cannot do either the one or the other of these things until the time so given has elapsed.

But there is one exception to this general rule and that is when the decree-holder gives a concession to the judgment-debtor, but his right to proceed against the surety is specifically reserved. It cannot be denied that the order of the learned District Judge as it stands does make it impossible to execute the decree even against the sureties: for the last sentence but one of the order runs "no execution unless appellant defaults". It is argued that this should be read with para. 5 of the affidavit; but I do not think that in the affidavit the judgment-debtor expressly states that the right of the decree-holder to proceed against the sureties is strictly reserved. The paragraph runs:

> When the respondents applied for attachment of houses before judgment in the lower Court, I gave two very solvent sureties for payment of the amount in case of decree, and so there is no fear of the respondent losing anything if the execution is stayed.

It was not intended by this statement to reserve the right of the decree-holder against the sureties. It was merely a statement made to assure the decree-holder that even if the judgment-debtor failed to act up to his undertaking to pay regularly by instalments there would still remain sureties against whom the decree-holder could proceed in case of default. The right to proceed against the sureties not having been reserved the general rule applies that the giving of time to the principal debtor absolves the sureties. That is what the lower appellate Court has found. The appeal is accordingly dismissed with costs. No leave.

C.R.K./S.C. *Appeal dismissed.*

1. Rouse v. Bradford Banking Co., (1894) 2 Ch 32=63 L J Ch 337=7 R 127=70 L T 427.
2. Annadana Jadayya v. Konammal, A I R 1933 Mad 309=141 I C 852=56 Mad 625=64 M L J 386.

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* A. I. R. 1937 Madras 585

MOCKETT, J.

Bommi Reddi Muni Reddi — Judgment-debtor — Appellant.

v.

Perur Subbiah — Decree-holder — Respondent.

Appeal No. 145 of 1934, Decided on 5th February 1937, against appellate order of Dist. Court, Proddatur, D/- 11-4-1933.

*** Registration Act (1908), S. 75 (4)—Scope—Order awarding costs made by Registrar under S. 75 (4)—Such costs can be recovered as costs awarded in suit under Civil P. C.—Registrar can send such order to civil Court for execution.**

Although a Registrar is not a civil Court yet any costs ordered by him under S. 75 (4), Registration Act, can be recovered as if he were a civil Court and as if those costs had been awarded in a suit under the Code of Civil Procedure. S. 75 (4) therefore empowers the Registrar to send his order for costs for execution to civil Court exactly as if they had been awarded in a suit and the method of recovery is to be in accordance with O. 21, Civil P. C.: *30 Mad 326* and *A I R 1928 Mad 475, Ref.* [P 586 C 1]

T. K. Srinivasathathachariar — for Appellant.

S. Kothandarama Nainar for *Ch. Raghava Rao* — for Respondent.

Judgment.—The only question here is whether, under S. 75, sub-s. (4), Registration Act, an order of the Registrar made under that section can be executed by a District Munsif. The District Registrar of Cuddapah held an enquiry under S. 74 and made an award of Rs. 329-14-0 as costs against the respondent, which

he sent to the District Munsif's Court of Proddatur for execution. The District Munsiff held that he had no power to execute it, and that order was reversed on appeal by the learned District Judge of Cuddapah against whose order this appeal has been filed. S. 75, sub-s. (4) is as follows :

> The Registrar may, for the purpose of any enquiry under S. 74, summon and enforce the attendance of witnesses and compel them to give evidence, as if he were a civil Court, and he may also direct by whom the whole or any part of the costs of any such enquiry shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure, 1908.

Now that sub-section presumes that the Registrar is not a civil Court. This High Court in two decisions, 30 Mad 326,[1] and 51 Mad 245,[2] has already held that his proceedings are not open to revision under S. 115, Civil P. C. But I consider the meaning of the latter part of the sub-section to be that, although he is not a civil Court, yet any costs ordered by him can be recovered as if he were a civil Court and as if those costs had been awarded in a suit under the Code of Civil Procedure. Otherwise a Registrar's order as to costs is futile as I can find no other machinery for their recovery outside S. 75, Registration Act. G. O. No. 1597 dated 8th July 1879 has been quoted to me, which purports to empower a Registrar to imprison persons for non-payment of costs decreed by him; but that does not decide this matter. In any case the same Government Order states as an axiom what is now a matter for decision, namely, that an order for costs can be executed through a civil Court in the ordinary way. I prefer to place my decision on what I consider to be clear words of sub-s. (4) which, in the view I take, expressly empowers a Registrar to send his order for costs for execution exactly as if they had been awarded in a suit, and the method of their recovery is to be in accordance with the Code of Civil Procedure, that is to say, under the provisions of O. 21, etc. It is surprising that this matter has never come up for formal decision before. The appeal will be dismissed with costs.

C.R.K./K.B. *Appeal dismissed.*

1. Manavala Goundan v. Kumarappa Reddy, (1907) 30 Mad 326=17 M L J 313.
2. Naganna Nayudu v. Pattabhiramayya, A I R 1928 Mad 475=109 I C 180=51 Mad 245=54 M L J 595.

A. I. R. 1937 Madras 586

BEASLEY, C. J.

Rama Vadhyar — Plaintiff — Petitioner.

v.

Manian Vadhyar and *others* — Defendants — Opposite Parties.

Civil Revn. Petn. No. 1652 of 1935, Decided on 15th February 1937, from decree of Sub-Judge, South Palghat, in S. C. S. No. 564 of 1934.

Limitation Act (1908 as amended by Act 1 of 1927), S. 21 (3) (b)—Only part payment or acknowledgment of debt by managing member of joint family for time being saves limitation against other members—Part payment made by managing member of joint family consisting of brothers, after partition—Such part payment does not save limitation as against other members unless authority to make such payment is given by others.

Under Cl. (b), sub-s. 3 of S. 21, Limitation Act, only part payment or acknowledgment of debt made by the managing member of a joint family for the time being can save the bar of limitation as against the other members of the family. But where a part payment is made by one member who is the managing member, not being a father, of a joint Hindu family of brothers after a bona fide partition has been effected between the brothers, the members of the family, such part payment will not save the bar of limitation as against the other divided members because after partition there is no undivided family and therefore no managing member of it, and unless there is authority to acknowledge the debt or make a part payment, the other members of the family will not be bound by the acknowledgment or part payment of one member alone: *A I R 1933 Mad 708*; *A I R 1928 Mad 657 (F B)*; *A I R 1920 Mad 353 Expl.* and *Dist.*; *Case law referred.* [P 588 C 2]

C. K. Viswanatha Iyer — for Petitioner.

M. Ranganatha Sastri — for Opposite Parties.

Order.—The petition relates to a suit upon a promissory note executed by defendant 1 who is the elder brother of defendants 2 and 3. The promissory note is dated 16th July 1928 and the suit was filed on 22nd October 1934. To save limitation two part payments were relied on: one on 10th September 1930 and the other on 25th December 1931. Both these payments were endorsed on the promissory note as part payments towards interest and the endorsements were in the handwriting of and signed by defendant 1. Both part payments were made after a partition between the brothers. It was alleged that the suit debt was one binding on defendants 2 and 3 and the suit was brought by the assignee of the promissory

note. I am considering this question on the assumption that defendant 1 executed the promissory note as family manager on behalf of the family for a purpose binding on the family, although the lower Court has not considered this question, having decided as a preliminary issue that the part payments by defendant 1 after the date of the partition did not save limitation as against the other two defendants. The question of the binding nature of the debt and whether the promissory note was executed by defendant 1 as family manager on behalf of the family is one which need only be considered if I disagree with the lower Court's conclusion on the question of limitation. Dealing with the case on the assumption already stated, the question is whether defendant 1's part payments after partition save the bar of limitation as against the other defendants. This question has been very fully and very ably argued by learned counsel on both sides, the respondents' case being argued by Mr. Ranganatha Sastri as *amicus curiae*, and I am much indebted to him for his great assistance.

Mr. C. K. Viswanatha Iyer for the petitioner, amongst other cases, relied upon 56 Mad 833,[1] a judgment of mine when sitting with Bardswell, J. In that case before partition, a Hindu father executed a promissory note and after partition made payments towards principal or interest. The question was whether these payments saved the suit from the bar of limitation, his sons having been made parties to the suit. The point there was very similar to the one here except that the part payment was made by the father and not as in the present case by the elder brother or the managing member. It was held that although the part payment was after partition, the father still had authority from his sons to keep alive during the period of limitation the debt incurred by him before partition and that such a case must be distinguished from a case where the father after partition takes a renewal of a debt as it is another matter altogether to wipe out the original debt and substitute therefor another debt. Reference was made in that judgment to the Full Bench case of 51 Mad 361,[2] where it was held that a simple money creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a bona fide partition between the father and the sons, and the observations of Anantakrishna Ayyar, J. at p. 410 of the report are relied upon in my judgment; and that decision and mine are cited in support of the petitioner's argument and it is contended that no distinction can be drawn between a Hindu father and a managing member and that part payments or acknowledgments by either after partition have the same result, namely of preventing the bar of limitation as regards his other family members. In 56 Mad 833[1] I was considering the authority of a Hindu father to make acknowledgments or part payments on behalf of himself and his sons and not that of a managing member; and in the Full Bench case the debt was the father's debt, that is to say, incurred by the father and no question of limitation there arose. The question there was merely:

> Whether a simple money creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a bona fide partition has taken place between the father and the sons,

and it seems to me that the decision was based upon the pious obligation of the sons to pay the debts incurred by their father not for an illegal or immoral purpose. Jackson, J. on p. 376 refers to the rulings in 24 Mad 555;[3] 38 Mad 1120[4] and 47 Mad 621,[5] and is of the opinion that they do establish a distinct trend of opinion that the son is under a pious obligation notwithstanding partition to discharge the not immoral debts of his father incurred before partition. The decision in that case really is that where before partition the Hindu father has incurred a debt which by reason of the pious obligations his sons are under a liability to pay, the creditor's rights are not defeated by a bona fide partition and that the liability of the sons still continues after partition, but I may add, subject to the law of limitation; and it was not necessary in that case to proceed beyond the point already indicated although Ananthakrishna Ayyar, J.

1. Muniswami v. Kutti Moopan, A I R 1933 Mad 708=145 IC 404=56 Mad 833=65 MLJ 311.
2. Subramania v. Sabapathi, AIR 1928 Mad 657 =110 IC 141=51 Mad 361=54 MLJ 726 (FB).
3. Ramachandra Padayachi v. Kondayya Chetti, (1901) 24 Mad 555.
4. Kameswaramma v. Venkatasubba Rao, A I R 1914 Mad 323=24 I C 474=38 Mad 1120=27 M L J 112.
5. Jagannatha Rao v. Visvesam, A I R 1924 Mad 682=80 I C 228=47 Mad 621=46 M L J 590.

has discussed the question of acknowledgments made by a Hindu father after partition as distinguished from a renewal after partition of a pre-partition promissory note; and that is the distinction which is made in *Muniswami* v. *Kutti*.[1] But some support is certainly given to the petitioner's contention that there is no distinction between the acts of the Hindu father and the managing member in this connection by the observations of Anathakrishna Ayyar, J. on p. 416; but in my view that learned Judge was not then considering post-partition acknowledgments of the pre-partition debts incurred by the Hindu father or by the managing member; and I do not take the Full Bench case as any authority at all in support of the petitioner's contention here; 19 Mad 74[6] and 52 Mad 246,[7] were cited by Mr. C. K. Viswanatha Iyer in order to show that the powers of the managing member of a Hindu family are the same as those of the Hindu father, but these cases again do not discuss their respective authorities to keep pre-partition debts alive after partition as against the members of the family or relate at all to questions of limitation.

10 M L W 466[8] does, however, relate to acknowledgments by the manager of a joint Hindu family as extending the period of limitation against other members of the family. There the others members of the family were also parties to the original contract and, for that reason, it was held that in the absence of special circumstances, acknowledgments by the manager of the Hindu family could not extend the period of limitation as against the other members of the family. This case draws a distinction between the effect of such acknowledgment where the other members of the family are also the original contracting parties and where they are not. But this case also is not exactly in point because, as I understand the facts of it, the decision related to an acknowledgment made whilst the family was still undivided and not after it has become divided and that is of course an important distinction because after partition the person who makes the part payment or acknowledgment must be some one who has direct or implied authority to do so from the divided members. If it is proved that he has done so as their agent or with their authority, then that will be sufficient. The original debt here was incurred by the managing member. If he had acknowledged the debt before partition, then clearly such acknowledgment would be binding on the other members of the family and during the period of limitation they would be equally bound to pay such a debt even after partition; but in my opinion it is quite different where, but for an acknowledgment after partition, the debt would be barred by limitation. Cl. (b), sub-s. (3) to S. 21, Limitation Act, makes the position clear; sub-s. (3) is an amendment inserted by Act 1 of 1927 and Cl. (b) reads as follows:

> Where a liability has been incurred by, or on behalf, of a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorized agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family.

After a partition there is no undivided family and therefore no managing member of it; and unless there is authority to acknowledge the debt or make a part payment the other members of the family will not be bound by the acknowledgment or part payment of one member alone. This question was considered by Curgenven, J. in C. R. P. No. 623 of 1933. There, there was a partition between the defendant and his brother and the suit which was upon a promissory note would have been barred against the defendant himself but for a part payment made after a partition. Curgenven, J. held that this payment being made after partition was not made by the manager for the time being as required by S. 21 (3) (b), Limitation Act, and did not therefore save limitation against the defendant's brother. I am satisfied that this is the plain meaning of the section and that Curgenven, J. took the correct view. The suit as against defendants 2 and 3 here was barred by limitation and the lower Court's decree dismissing the suit against them with costs was correct. This C. R. P. is therefore dismissed.

C.R.K./K.B. *Application dismissed.*

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6. Rangayya Chetti v. Thanikachalla Mudali, (1896) 19 Mad 74.
7. Official Receiver, Anantapur v. Ramachandrappa, A I R 1929 Mad 166=114 I C 345=52 Mad 246=55 M L J 721.
8. Duraiswami Ayyar v. Krishnier, A I R 1920 Mad 352=54 I C 318=10 M L W 466.

A. I. R. 1937 Madras 589

VENKATARAMANA RAO, J.

Gogineni Ankayya — Petitioner.

v.

Official Receiver, Masulipatam and *others* — Opposite Parties.

Civil Revn. Petn. No. 906 of 1934, Decided on 22nd January 1937, from decree of Dist. Court, Masulipatam, in C. M. A. No. 8 of 1933.

(a) Provincial Insolvency Act (1920), S. 20 —Powers of interim Receiver—Interim Receiver ordered to exercise all powers of owner under O. 40, R. 1 (d), Civil P. C., and also expressly empowered to act under O. 21, R. 89—Appointment of receiver divests insolvent of all control over property—Receiver becomes statutory agent of insolvent—Receiver is competent to file application to set aside sale under O. 21. R. 89, Civil P. C.

Whatever the receiver rightly does, with regard to the property he does it simply as the agent of the owner of the property or the person interested in the property. [P 590 C 1]

Where on the sale of the judgment-debtor's property in execution of a decree, the other creditors apply to adjudge him an insolvent and an interim receiver of the insolvent's property is appointed under S. 20, Provincial Insolvency Act, and is ordered to exercise all the powers of an owner under O. 40, R. 1 (d), Civil P. C., and is also expressly empowered to act under O. 21, R. 89, Civil P. C., to set aside the sale of immoveable property belonging to the insolvent, the appointment of the interim receiver divests the insolvent of all control over the property and operates as an injunction restraining him from interfering with the possession of the property or taking any action in regard thereto. The receiver becomes the statutory agent to do all the acts which the insolvent was entitled to do if he were not so disabled. The making of an application under O. 21, R. 89 to set aside sale is an act which the judgment-debtor insolvent would have been competent to do but for the appointment of the interim receiver. The interim receiver is therefore competent to file an application to set aside sale under O. 21, R. 89 : *A I R 1926 Mad 357* and *6 Beng L R 486, Rel. on.* [P 589 C 2; P 590 C 1; P 591 C 1]

(b) Civil P. C. (1908), O. 40, R. 1 (d)—Interpretation—Word 'and' before Cl. (d), O. 40, R. 1 means 'also' or 'in addition to'—Powers conferred under Cl. (d) are in addition to powers conferred under Cls. (a) (b) and (c)—Operation of O. 40, R. 1 (d) is not therefore restricted to property of which receiver is in possession.

The word 'and' before Cl. (d), O. 40, R. 1, Civil P. C., means 'also' or 'in addition to', i. e., the powers conferred under Cl. (d) are in addition to all or any of the powers under O. 40, R. 1 (a), (b) or (c). The operation of O. 40, R. 1 (d) is not restricted to the property of which the receiver is already in possession because under O. 40, R. 1 (d) power can be conferred upon receiver to realize the property or to reduce the property into possession : *A I R 1926 Mad 432, Dissent.* [P 590 C 2]

(c) Provincial Insolvency Act (1920), S. 20 — Interpretation — Word 'thereupon' does not mean that receiver cannot act in relation to property until he takes possession of it.

The word 'thereupon' in S. 20, Provincial Insolvency Act, does not mean that the receiver is not clothed with the necessary powers to act in relation to the property until he takes possession. On the other hand it indicates that on a direction being given by the Court empowering him to take immediate possession he gets clothed with all the powers that are necessary to enable him to get such possession and one of the powers contemplated under O. 40, R. 1 (d), Civil P. C., is realization of the property which would also include reduction of the property into his possession. [P 590 C 2; P 591 C 1]

V. Govindarajachari — for Petitioner.

P. Somasundaram, S. Narayana Rao and *M. Balachandrudu* — for Opposite Parties.

Order. — Two questions have been argued in this revision petition: (1) whether an interim receiver appointed under S. 20, Provincial Insolvency Act, is entitled to set aside a sale of immoveable property in execution of a decree under O. 21. R. 89, Civil P. C., and (2) whether a person entitled to the distribution of the sale proceeds realized in execution of a decree in virtue of his being the holder of a decree is entitled to notice under O. 21, R. 92, Civil P. C. Respondent 2 in this case obtained a decree for money against one Hanumantha Rao, and in execution thereof, the immoveable properties of the said Hanumantha Rao were brought to sale on 3rd October 1932 and purchased by respondents 3 and 4. Subsequent to the sale, at the instance of some creditors, an application was made to the Insolvency Court to adjudge Hanumantha Rao as insolvent and an application was also made in the said insolvency application for the appointment of an interim receiver of the property of the insolvent. Respondent 1 was appointed interim receiver and by the power of appointment he was ordered to exercise all the powers of an owner under O. 40, R. 1 (d), Civil P. C., and he was also expressly empowered to act under O. 21, R. 89, Civil P. C., to set aside the sale of the said immoveable property after raising the necessary funds. Therefore his appointment as interim receiver divested the said Hanumantha Rao of all control over the property and operated as an injunction restraining him from interfering with the possession of the same or taking any action in regard

thereto. He thus became disabled from acting and the interim receiver as it were became his statutory agent to do all acts which he was entitled to do if he were not so disabled. The making of an application under O. 21, R. 89 was an act which the judgment-debtor Hanumantha Rao would have been competent to do but for the appointment of the interim receiver. The application therefore presented by respondent 1 under the said section must be deemed to have been made by the owner for the time being within the meaning of the said rule as the act of respondent 1 must be deemed to have been done for and on behalf of and as representing the said Hanumantha Rao. It is no doubt true that the title to the property still remained in the judgment-debtor but he had been deprived of all control, in regard thereto and another had been appointed to act for him in his stead. It is sometimes said that the receiver is an officer of Court and not an agent of the party. But this statement is not strictly accurate because for certain purposes he does act as the agent of the real owner. As observed by Phear, J. in 6 Beng L R 486[1] at p. 488 :

> Whatever the receiver rightly does, with regard to the property he does it simply as the agent of the owner of the property or the person interested in the property.

In this case the only owner is the said Hanumantho Rao and therefore the interim receiver in presenting the petition under O. 21, R. 89, must be deemed to have acted as his agent. The view I am taking is also supported by the decision of Jackson, J. in 50 M L J 239[2] where the learned Judge was inclined to the view that if an interim receiver appointed under S. 20, Provincial Insolvency Act, is expressly empowered by Court to take action under O. 21, R. 89, Civil P. C., he would be an owner for the time being within the meaning of the said rule. It is contended by Mr. Govindarajachari relying on certain observations in 50 M L J 665[3] that unless the receiver takes possession of the property or the property is committed to his possession, the receiver cannot take action under O. 21, R. 89, Civil P. C. He relied on both O. 11, R. 1, Civil P. C., and S. 20, Provincial Insolvency Act. The argument of Mr. Govindarajachari is that O. 40, R. 1 (d) comes into operation only when the property has been committed to the possession of the receiver under O. 40, R. 1, Cl. (c). I am unable to agree with this contention. The word 'and' before Cl. (d) means 'also' or 'in addition to'; i. e., the powers conferred under Cl. (d) are in addition to all or any of the powers conferred under O. 40, R. 1 (a), (b) or (c). Again in Cl. (d) it will be seen that power can be conferred upon the receiver to realize the property, i. e., to reduce the property into possession. It is obvious that this cannot relate to property of which the receiver has been put into possession. In support of the argument based on S. 20, Mr. Govindarajachari relied on the following observations in 50 M L J 665[3] :

> An interim receiver has under S. 20 only the powers of a receiver appointed under the Civil Procedure Code, and he is not clothed even with those powers till he takes possession of the debtor's properties. This is clear from the section itself.

It seems to me that this is a very narrow interpretation of the section. What the section says is the Court may direct him to take immediate possession of the properties or of any part thereof. It does not necessarily follow from the language that it was intended to deal only with possession of property which the receiver is capable of taking possession from the insolvent direct. It may be, the property is in the physical possession of the insolvent or it may be in the possession of his tenant and in both cases it may be possible for the receiver to take immediate possession, in one case the actual physical possession and in the other case constructive possession by making the tenant attorn to him or directing the insolvent to do all that is necessary for the tenant to attorn to him. But in cases where the property is in the possession of a third party the receiver must be deemed to have been directed to do all that is necessary to take immediate possession. The word 'thereupon' in S. 20 does not mean that he is not clothed with the necessary power to act in relation to the property until he takes possession. On the other hand, it seems to indicate that on a direction being given by the Court empowering him to take immediate possession he gets

1. Wilkinson v. Gangadhar Sircar, (1871) 6 Beng L R 486.
2. Ramachandra Aiyar v. Sankara Iyer, A I R 1926 Mad 357=93 I C 271=50 M L J 239.
3. Subramania Iyer v. Official Receiver, Tanjore, A I R 1926 Mad 432=93 I C 877=50 M L J 665.

clothed with all the powers that are necessary to enable him to get such possession and one of the powers contemplated under O. 40, R. 1 (d) is realization of the property which would also include reduction of the property into his possession. I am therefore of the opinion that the interim receiver in this case was competent to file an application under O. 21, R. 89 to set aside the sale of the property in question. In view of this it is unnecessary to deal with the second point argued by Mr. Govindarajachari, though I must admit there is a good deal of force in the argument advanced by him that the language of O. 21, R. 92, Civil P. C., is wide enough to include a person who is entitled to rateable distribution of the sale proceeds. In the result, the Civil Revision Petition fails and is dismissed with cost of respondent 3.

C.R.K./K.B. *Revision dismissed.*

A. I. R. 1937 Madras 591

VENKATARAMANA RAO, J.

N. Muthuswami Pillai and *others*— Petitioners.

v.

N. S. Manickavasagam Pillai and *others* — Opposite Parties.

Civil Revn. Petn. No. 9 of 1936, Decided on 4th January 1937, against order of Sub-Judge, Ramnad, D/- 9th December 1935.

Court-fees Act (1870), S. 7, Cl. (v)—Representative suit by certain members of caste for administration of caste property—Prayer for ejectment of defendants in exclusive possession of property refusing its administration for common benefit — Recovery of possession of property from defendants being necessary before property can be administered, suit is in substance one for recovery of possession — Court-fees are payable under S. 7, Cl. (v) of the Act.

A suit for removing a trustee in possession and for appointing the plaintiff in his stead and placing him in possession of the trust property must be treated, for purposes of Court-fees, in the absence of a special provision of law, as a suit falling under S. 7, Court-fees Act. It is immaterial for purposes of Court-fees whether the plaintiff has or has not beneficial interest in the property. [P 593 C 1]

A representative suit under O. 1, R. 8, Civil P. C. was brought by certain members of a caste for the administration of certain property wherein all the members of the caste were interested. The plaintiffs prayed for ejectment of persons who were in exclusive possession thereof and who refused to have the same administered for the common benefit of the caste :

Held : that the recovery of possession was absolutely necessary from persons who were setting up a title in derogation of the rights of the members of the caste before the property could be administered for the common purposes of the caste. The suit was therefore in substance one for recovery of possession and was governed by Cl. (v), S. 7, Court-fees Act for the purposes of Court-fee : *8 Mad 516* and *A I R 1925 Mad 804*, *Rel. on* ; *Case law discussed.* [P 593 C 2]

K. V. Krishnaswami Iyer and *A. S. Ramchandran* — for Petitioners.

Govt. Pleader and *K. Swaminatha Iyer* — for Opposite Parties.

Order. — This civil revision petition raises a question of court-fee. The suit was originally instituted under S. 92, Civil P. C., with the sanction of the Advocate-General for the removal of the defendants from the possession of the suit property, for the appointment of a trustee to manage it, for vesting the said property in the said trustee, for framing a scheme for its management and for other incidental reliefs. A fixed fee of Rs. 50 was paid under Art. 17 (iii), Sch. 2, Madras Court-fees Amending Act. The main allegations in the plaint were that the plaintiffs are members of a caste known as Siruvaikudi Vellalars, that the suit property was acquired and constructed out of caste funds subscribed from time to time by members of the caste for the general purposes of the caste, that the object of the acquisition was to use the property as a rest house 'for such of the members of the community as might visit Thiruvannamalai for rendering worship, whether at festival times or during ordinary periods,' that the said property was also used for the purpose of affording accommodation to and convenience of the members of the community when assembling for caste meetings which were being held periodically, that the property was thus a specific endowment of a religious and charitable character in which the entire community is interested, that the defendants were in exclusive possession of the said property and were denying the rights of the members of the community to use it in the manner they were entitled to do.

The learned Subordinate Judge passed a decree removing the defendants from possession of the property and calling for a draft scheme, as in his opinion "a scheme for the better management of the trust" was necessary. On appeal Varadachariar and Burn, JJ. set aside the decree holding that the suit was not maintainable under

S. 92, Civil P. C., but they however gave leave to amend the plaint as one under O. 1, R. 8, Civil P. C. leaving the question open whether in the circumstances of the case the said rule would be applicable. The condition of the amendment was that the said plaintiffs should pay such additional court-fee as may be payable on the plaint in consequence of the amendment. The learned Subordinate Judge has now directed an additional court-fee of Rupees 1,312-7-0 to be paid. It is against this said order the above revision petition has been preferred.

It is contended by Mr. K. V. Krishnaswami Iyer for the petitioner that the reliefs claimed in the plaint are incapable of valuation as the plaintiffs are not seeking any personal benefit for themselves and that the nature of the claim as originally laid is not in any way altered by the amendment. Before examining the soundness of that contention, it is necessary to look into the substance of the plaintiff's claim. So far as the nature of the property is concerned in respect whereof the reliefs are sought, the said judgment of the Bench is binding on the parties and it is not open to me to go behind it. It is thus observed therein :

> It may be conceded that the interest of each of such member of the community in caste property is not identical with ordinary co-ownership in property held in common. But it will not necessarily follow from this alone, that the property can be regarded as held in 'trust' and much less that it is property held in 'trust' for a 'charitable purpose.'

The suit therefore cannot be viewed as one for the administration of a trust. It is in substance one for the administration of property of a caste wherein all the members of the caste are interested after ejectment of persons who are in exclusive possession thereof and refuse to have the same administered for the common benefit. As Varadachariar, J. pointed out in the said judgment, it may not be strictly accurate to describe the interest of a member of a caste in the property as one of co-ownership. A caste is not a corporation or a partnership and it is difficult to describe it under any legal conception. A caste is a well defined body of persons associated together for certain purposes and governed by usages of its own and where membership is regulated by birth property can be owned by such a body and all the members have a beneficial interest therein, in that every member is entitled to use and enjoy it in accordance with the rules and regulations prescribed by it and it cannot be dealt with or alienated without the consent of the members of the community expressed or declared in accordance with caste usage. This legal relationship of a member of a caste with reference to its property has to be kept in mind in considering the cases cited at the bar with reference to suits under S. 92, Civil P. C. In most of the said cases a view has been taken that suits under S. 92, Civil P. C., are incapable of valuation and can be valued under Sch. 2, Art. 17 (vi), Courts-fees Act, and the fact that reliefs are prayed directing a trustee who is sought to be removed to hand over possession of the trust property or to refund moneys misappropriated by him does not matter. The reason assigned is that the plaintiffs do not claim beneficial interest for themselves (*vide* 19 All 60[1] and 21 All 200)[2] and it is thus expressed in 12 C L J 211[3] :

> The juridical person who is in possession of the only property which can have any value is the idol, and if the shebait, who is alleged to have neglected his duty and to have embezzled the idol's property, is sought to be remoevd and another manager put in his place, it cannot be said that this is a suit involving the value of any portion of the idol's property.

This is the view taken by Krishnan, J. in 48 M L J 514.[4] But I must point out a different view was expressed in two early cases of this Court. In 11 Mad 148,[5] the suit was for the removal of a manager under the Religious Endowments Act of 1863, and for recovery of damages misappropriated by him. Dealing with the question of court-fee, the learned Judges observed thus :

> The contention that the plaint needs only a stamp of Rs. 10, even when damages are claimed, cannot be supported, inasmuch as the compensation claimed would then form part of the subject matter of the suit, capable of being estimated at a money value within the meaning of the Court-fees Act.

In 8 Mad 516[6] where with reference to a family charity a suit was filed for the removal of the then manager and for

1. Thakuri v. Brahma Narain, (1896) 19 All 60=1896 A W N 187.
2. Girdhari Lal v. Ram Lal, (1899) 21 All 200=1899 A W N 32.
3. Ramrup Das v. Surjaram Das, (1910) 12 C L J 211=7 I C 92=14 C W N 932.
4. Sudalaimuthu Pillai v. Peria Sundaram Pillai, A I R 1925 Mad 722=87 I C 25=48 M L J 514.
5. Srinivasa v. Venkata, (1888) 11 Mad 148.
6. Sonachala v. Manicka, (1885) 8 Mad 516.

appointment of the plaintiff in his stead and for other appropriate reliefs, Muthuswami Ayyar, J. remarked at p. 518 :

> A suit therefore for removing a trustee in possession and for appointing the plaintiff in his stead and placing him in possession of the trust property must be treated, for purposes of Court-fees in the absence of a special provision of law, as a suit falling under S. 7, Court-fees Act.

It seems to me that this is a correct principle to be followed. Madhavan Nair, J. cited the observation of Muthuswami Iyer, J. with approval in 48 M L J 571[7] and decided the case before him accordingly. He pointed out in that case that the question of the plaintiff having beneficial interest in the property has nothing to do with the question of court-fee. I expressed the same view in 42 M L W 765,[8] and I see no reason to change it : (*cf. also* 54 All 869,[9] where King, J. also seems to take the same view.) If one examines the cases which have taken the view that a suit under S. 92, Civil P. C., need not be valued as one for possession it will be seen that the learned Judges do not treat the suit as one for possession. In 19 All 60[1] at p. 62 the following observations occur :

> The plaintiffs nowhere seek possession of the property. Although they ask that they may be appointed superintendents they might never be appointed to that office. The Judge might see fit to appoint some other person as trustee or superintendent, and no occasion might arise for the plaintiffs taking possession of the property. It might also not be necessary to eject the defendant. If the declaration sought for be made, the defendants might themselves cease to interfere with the property.

The learned Judges in that case do not say that if it is necessary to eject the defendant, the suit need not be valued as one for possession. Burkitt, J. in 28 All 112[10] at p. 121 seems to think that no relief for possession can be awarded to plaintiffs in such a suit and a separate suit for possession may be necessary, if the trustee removed, declined to deliver possession. In most cases the property is in the possession of tenants and vesting was considered enough: *vide* 36 Mad 364.[11] But if it is necessary to recover possession from the defendants-trustees, as Muthuswami Ayyar, J. observed, the claim would directly come within Cl. (v) S. 7, Court-fees Act. The question of hardship noticed by Krishnan, J. in 48 M L J 514[4] and in the Allahabad cases is hardly a matter for consideration if the language of the statute is plain. It is a matter for legislation and now the Madras Amending Act by enacting Sch. II, Art. 17 (iii) has obviated the hardship; and a fixed court-fee of Rs. 50 would be enough in a suit under S. 92, Civil P. C. even if a trustee is asked to refund money : 47 M L J 656.[12] But if the suit does not fall under S. 92, Civil P. C., in the absence of a provision of law, Cl. (v), S. 7, Court-fees Act must govern a case where the suit is in substance one for the recovery of possession. In the present case, the material allegation in the plaint leaves no room for doubt that recovery of possession is a substantial relief. I give herein below the necessary allegations :

> 10. The aforesaid minority—which has managed to possess itself of the keys of the premises and other communal properties and funds have been evincing a desire to hold exclusive possession of the undermentioned premises in the sole interest of the individuals composing the faction. 11. The defendants are setting up exclusive right to the possession and management of the undermentioned property; and in the exercise of such right, claim to interfere with the rights of the members of the general body of the community to use the premises for which they are intended. There was in consequence a police enquiry on the matter of the possession of the undermentioned premises. 12. Acting on the strength of the one-sided report of the police, the Subdivisional Magistrate has passed proceedings on 18th October 1929 prohibiting the members of the general body of the community from using the premises in the manner they are entitled to do. 13. The interests of the body of the community peremptorily demand that the suit properties should be placed on a proper footing of administration and it is essential that a scheme should be settled by the Court for ensuring that the premises are put to their proper use. 14. Although the defendants have no manner of right to the possession of the premises, yet as they are actually in possession, they are liable to be removed from possession, and it is essential that they should be so removed.

It will thus be seen that the recovery of possession is absolutely necessary from persons who are setting up a title in derogation of the rights of the members of the caste before the property can be administered for the common purposes of the caste, whether by Courts or the caste and

7. *In re* Muhammad Gouse, A I R 1925 Mad 804=88 I C 209=48 M L J 571.
8. Somasundaram Chetty v. Chidambaram Chetty, (1935) 42 M L W 765=159 I C 636.
9. Parsottamanandgiri v. Mayanandgiri, A I R 1932 All 893=142 I C 251=54 All 869 = 1932 A L J 777.
10. Ghazaffar Hussain Khan v. Yawar Hussain, (1905) 28 All 112=2 A L J 591=1905 A W N 201.
11. Ramadass v. Hanumantha Rao, (1913) 36 Mad 364=12 I C 449=21 M L J 952.
12. Ramanuja Naidu v. Alagappa Chettiar, A I R 1924 Mad 882=85 I C 801=47 M L J 656.

I do not express my opinion by whom it should be. And recovery of possession is sought on behalf of all the members of the caste who are virtually plaintiffs in the case and who, as I have already pointed out, do possess an interest in the property and claim to get a benefit therein by having it preserved for their common use. Thus even on the theory of beneficial interest enunciated in the cases relied on, the present suit will come within the purview of Cl. (v), S. 7, Court-fees Act. The decision of the lower Court in directing the plaintiff to value the suit as one for possession under Cl. (v) is correct. In regard to the valuation of the other reliefs in the plaint, the assessment by the lower Court has not been impeached to be incorrect if the main contention of the petitioners were to fail. The plaintiffs are however entitled to get credit for the sum of Rs. 50 already paid by them at the time when they instituted the suit. The plaintiffs will have three months' time from this date to pay the court-fee. Subject to this modification the Civil Revision Petition fails and is dismissed with costs.

C.R.K./K.B. *Revision dismissed.*

A. I. R. 1937 Madras 594

CORNISH AND VARADACHARIAR, JJ.

M. Shanmuga Mudaliar and *another*— Appellants.

v.

P. K. A. C. T. Veerappa Chettiar and *others* — Respondents.

Appeal No. 236 of 1934, Decided on 20th October 1936, against decree of Dist. Court, Vellore, D/- 19th March 1934.

Madras Hindu Religious Endowments Act (2 of 1927), Ss. 51 (4) and 75 — Person being trustee when High Court framed scheme in 1920 — Clause in scheme providing that trustees should continue in office for life till removed for good cause — Right secured to trustee under scheme held was not taken away by S. 51 (4).

A certain person was one of the trustees in office at the time that the High Court framed the scheme in 1920. Cl. 3 of the scheme as then framed provided that the then trustees should continue in office for life until removed by the committee for good cause :

Held: that reading Ss. 51 and 75, Madras Hindu Religious Endowments Act, together, the right secured to the person as trustee by the original scheme was not taken away by S. 51, Cl. 4.

[P 595 C 1, 2]

B. C. Seshachalam — for Appellants.

K. Subramanian and *K. Subba Rao* — for Respondents.

Varadachariar, J.—This appeal arises out of a suit brought for some modification in the scheme framed by this Court in 1920 in respect of the management of Sri Arunachalaswaraswamy Devasthanam at Tiruvannamalai. The only question raised by the appellants relates to one of the points dealt with by the learned Judge in para. 12 of his judgment. The persons who are said to have raised that question before the learned Judge do not appear before us. We have examined the pleadings in the lower Court and they do not give any indication that the point dealt with in that paragraph was intended to be raised. It is however represented that towards the end of the argument before the learned District Judge suggestions of the kind referred to in para. 12 were made by certain persons. While as regards two of these suggestions the learned Judge contented himself with leaving the matter to the discretion of the Board, he went further as regards the third suggestion, namely that no member of the Reddiar community should be appointed a trustee of the temple. Some of the observations made by the learned Judge on the point last referred to are open to criticism, especially the way in which the learned Judge disposes of the fact that endowments for the suit temple have been made by the members of the Reddiar community.

The documents tendered in evidence in this appeal and which have been admitted by us so far as they are public documents also show that on more than one occasion in the past, the members of that community have been appointed trustees of the suit temple by the authorities who then had the appointing power. In these circumstances we think it best to say that the observations made by the learned Judge in para. 12 of his judgment as regards the Reddiar community had better be treated as not made. As the Court interpreting below has not incorporated any specific disqualification about that community in the scheme as finally settled by him, we do not think it necessary to say more than this, that in respect of applicants from that community, the Board will exercise the same discretion as it is expected to exercise in respect of

applications from the members of the other communities for a seat on the trust Board and deal with each application on its own merits in the light of the usage and the past history of the temple. To this extent the appeal is allowed ; but in this view there need not be any order as to the costs of the appeal.

A memorandum of objections has been preferred by the Endowments Board and three points were raised by the learned counsel appearing for the Board. The main objection related to Cl. 4 of the scheme so far as it recognizes defendant 1 as a life trustee unless removed for good cause. It has been argued that if this is the creation of a life trusteeship in his favour for the first time, it is not in the interests of the institution to create such a life tenure, but that, if on the other hand, it is to be regarded as a recognition of a pre-existing life tenure, it is opposed to the provisions of S. 51, Religious Endowments Act, because Cl. 4 of that section enacts that all the non-hereditary trustees lawfully holding office on the date of the commencement of that Act shall be entitled to hold office only for one year from that date. We do not understand the learned Judge as intending to create a life tenure in defendant 1 by his scheme. He seems to proceed on the footing that defendant 1 was already entitled to the office for life. Mr. Subba Rao, the learned counsel appearing for the Endowments Board, has questioned the correctness of that view.

Admittedly the present defendant 1 was one of the trustees in office at the time that the High Court framed the scheme in 1920. Cl. 3 of the scheme as then framed provided that the then trustees should continue in office until removed by the committee for good cause. Mr. Subba Rao is of course right in suggesting that that clause by itself would not create a life interestship in defendant 1. But it would appear that the trustees then in office had been appointed under the pre-existing law presumably for their lives. It is significant in this connexion that in the memorandum of cross-objections filed before the High Court at the time the former scheme was framed, a point was specifically raised that the tenure of the then trustee should not be for life but only for five years. Reading Cl. 3 of the former scheme in the light of that objection and of the fact that the then trustees had been appointed under the previous law, we think that the natural interpretation of Cl. 3 of the original scheme is that the then trustees were entitled to be in office for life subject to removal for good cause. Mr. Subba Rao next contended that, even on this assumption, defendant 1's tenure of office must be deemed to have come to an end under Cl. 4, S. 51. But this argument does not give full effect to the provision in S. 75 of the Act that schemes framed in suits under S. 92. Civil P. C., prior to the coming into force of Act 2 of 1927 shall, notwithstanding any provisions of this Act which may be inconsistent with the provisions of such scheme, be deemed to be a scheme settled under this Act. Reading Ss. 51 and 75 together, we think that the right secured to defendant 1 by Cl. 3 of the original scheme cannot be held to have been taken away by S. 51, Cl. 4.

Two other objections were raised before us, one relating to Cl. 11 and the other to Cl. 15 of the scheme as now framed by the learned Judge. Cl. 11 provides that the auditor's fee shall be fixed by the Board and paid by the Board. Mr. Subba Rao invited our attention to the provision in the Act that in the case of non-excepted temples the auditor's fee should be paid by the committee and not by the Board. It is explained on the other side that the provision was put in, in this form by the lower Court because at the time the scheme was there framed, the local committee was not functioning. We recognize that the continuance of this provision may be somewhat anomalous in view of the provisions of S. 48. But as the committee is not before us we do not feel justified in making a modification which will have the effect of throwing the burden of the auditor's fee on the committee. We expect that there will be no difficulty in the Board and the committee coming to the proper understanding in respect of the matter. If no such arrangement is found feasible, a friendly suit for necessary modification may be necessary.

As regards the provisions in Cl. 15 about the appointment of a manager, Mr. Subba Rao desires that the power of appointment should be vested in the Board and not in the trustees. We do not think that this will conduce to smooth administration. The interests of the institution seem to us sufficiently protected by the provision in Cl. 16 giving the Board power to

remove the managar for proper reasons. The memorandum of objections must therefore be dismissed with costs of defendant 1.

C.R.K./S.C. *Appeal partly allowed.*

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* A. I. R. 1937 Madras 596

VENKATASUBBA RAO, J.

Abdul Aziz Sahib — Appellant.

v.

M. Abdul Sammad Sahib and *another* — Respondents.

Second Appeal No. 745 of 1935, Decided on 18th March 1937, against decree of Sub-Judge, Vellore, in A. S. No. 84 of 1935.

*** Specific Relief Act (1877), S. 16—Divisibility of contract—S. 16 must be considered in conjunction with Ss. 14, 15 and 17 — Defendant agreeing to sell to plaintiff certain plot in which he has 1/3 share, remaining share belonging to his children—Plaintiff paying part of consideration as advance—Contract becoming incapable of performance due to unwillingness of sons to effect sale—Suit by plaintiff for specific performance—Specific performance with regard to one-third plot, held could not be granted as contract was not divisible into two parts.**

Section 16, Specific Relief Act, does not stand isolated and for understanding its full significance, it must be read in conjunction with certain other sections, namely Ss. 14, 15 and 17 which along with it form a group. [P 596 C 2]

Defendant agreed to sell to plaintiff a certain plot of land in which he had only one-third share and the remaining two-third share belonged to his children. Out of the agreed consideration a certain sum was paid as advance by the plaintiff to the defendant. Subsequently the contract became incapable of performance as the two sons were unwilling to fulfil it. The plaintiff therefore brought a suit for specific performance of the contract :

Held : that as the contract was not divisible into two parts, one relating to a third of the plot and the other relating to the remaining two-thirds, the Court could not substitute a new bargain and force a new contract on the parties by decreeing the plaintiff's claim with respect to one-third share of the defendant, on payment of the price in proportion to that share. The specific performance of the contract with respect to the defendant's share could not therefore be granted under S. 16, Specific Relief Act : *A I R 1925 P C 45*, *Rel. on.* [P 597 C 1]

V. N. Shama Rao — for Appellant.

K. Rajah Iyer — for Respondents.

Judgment.—This second appeal raises a question relating to the construction of S. 16, Specific Relief Act, which runs thus :

When a part of contract which taken by itself can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

The facts may be briefly stated. Defendant 1, a Station Master, agreed to sell to the plaintiff, a plot of land measuring about 1 acre 14 cents. That plot had originally belonged to his wife, and upon her death, it devolved upon himself and his children his share being one-third and the share of the children being two-thirds. Out of the agreed consideration of Rs. 825 the plaintiff paid Rs. 250 as advance to defendant 1. The latter, with what motive it is unnecessary to enquire, repudiated the contract and it now transpires that two of his sons who have become majors are unwilling to fulfil it. It may now be taken that as regards two-thirds of the property (the children's share) defendant 1 cannot be compelled to specifically perform the contract. I may mention that what he did was this : he first gave a writing agreeing to sell the property to defendant 2; subsequently he executed in his favour a sale deed in respect of the entire land. The lower appellate Court disagreeing with the District Munsif held that in the circumstances the contract was capable of being specifically performed in respect of defendant 1's one-third share. On that basis it passed a decree directing him to convey his one-third share on the plaintiff paying a third of the agreed price. The lower Court's judgment is wrong, as it fails to take note of the language of the section. Can it be said that the present contract is divisible into two parts, one relating to a third and the other relating to the remaining two-thirds? In other words, in the language of the section, can we import a contract affecting a third, standing on a separate and independent footing from another supposed contract relating to the remainder of the land? S. 16 does not stand isolated and for understanding its full significance it must be read in conjunction with certain other sections which along with it form a group. As the Judicial Committee point out in 52 I A 90[1] :

Sections 14 to 17, inclusive of the Specific Relief Act, 1877, are both positive and negative in their form. Taken together they constitute a complete Code within the terms of which relief of the character in question must be brought, if it is to be granted at all.

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1. Graham v. Krishna Chunder Dey, A I R 1925 P C 45=86 I C 232=52 Cal 335=52 I A 90 (P C).

The effect of the lower Court's judgment is to allow an abatement of price in respect of defendant 1's failure to carry out the contract in its entirety. Let us see what is necessarily implied in this view. Had defendant 1 come to Court instead of the plaintiff, he would have been likewise granted specific performance, that is to say, it would have been open to him, although he was the party in default, to compel the plaintiff, a person not to blame, to buy a third of the land—the result being that the Court would be substituting a new bargain and forcing upon the parties a new contract, a thing which the Privy Council has shown ought not to be done. I do not propose to consider the matter further as the law has been in the case cited above clearly expounded by the Privy Council and the principles applicable have been fully explained. In the view I have taken, it is unnecessary to deal with the finding recorded by the lower Courts in regard to defendant 2; nor is it necessary for me to express any opinion as regards the title he has obtained.

The question then remains, to what relief is the plaintiff entitled? That defendant 1 has been guilty of gross dishonesty, there can be no doubt. If the agreement relied on by defendant 2 was in fact executed on the date it bears, defendant 1's act in agreeing to sell the same property subsequently to the plaintiff and receiving from him Rs. 250 as advance would be clearly fraudulent. If on the other hand that agreement was executed subsequent to his having agreed with the plaintiff, but was improperly ante-dated, defendant 1 would in that event be guilty of a serious offence. Whichever version is true, he has committed a fraud and I must therefore pass a decree in favour of the plaintiff directing defendant 1 to return to him the advance amount of Rs. 250 with interest thereon at 12 per cent. per annum from 7th September 1933 to the date of payment. The decree of the lower Court granting specific performance in respect of the one-third share is set aside. Defendant 1 shall pay the plaintiff costs in both the Courts below. I make no order as to costs here. (Leave to appeal is refused.)

C.R.K./K.B. *Order accordingly.*

A. I. R. 1937 Madras 597

HORWILL, J.

M. P. S. Syed Muhammad Salihu Rowther — Petitioner.

v.

Syed Sultan Moideen Sahib and *another* — Opposite Parties.

Civil Revn. Petn. No. 693 of 1935, Decided on 19th February 1937, from order of Dist. Court, Tinnevelly, D/- 31st January 1935.

Religious Endowments Act (1863), S. 10—Vacancy in committee—Remaining members are select body authorized to fill up vacancy—Opinion of majority among them is sufficient.

The reference in S. 10, Religious Endowments Act, to the remaining members emphasizes the fact that the remaining members are not the committee; and so it is not the corporate body of the committee that fills up this vacancy but the surviving members. Nevertheless, the remaining members are a select body given statutory powers under the section to fill up the existing vacancy, so that the nature of this body is very similar to that of a corporation with one sole object and power. Therefore the ordinary rule that the opinion of a majority suffices would prevail. It may be true that the power of the members is derived from the District Judge in the sense that they obtain the power to fill the vacancy in the event of the District Judge declining to do so; but their power is an alternative power and once the District Judge fails to exercise his power to fill the vacancy, the other provision of S. 10 operates, under which the remaining members of the committee are empowered to fill the vacancy. They are not certain specified persons but such members of the committee as are still alive. [P 598 C 1,2; P 599 C 1]

B. Pocker and *K. T. M. Ahmed Ibrahim* — for Petitioner.

S. Ramachandra Iyer — for Opposite Parties.

Order.—A vacancy occurred in the Tinnevelly District Mosque committee. Under S. 10, Religious Endowments Act of 1863, all persons interested can elect a member to fill the vacancy. If that is not done within three months, the civil Court, on the application of any person, may appoint a person to fill the vacancy. In the present case the District Judge of Tinnevelly was moved to fill this vacancy; but he declined to do so, and ordered that the vacancy be forthwith filled up by the remaining members of the committee. Applications for the vacant post put in before the District Judge were forwarded to the committee for consideration and notices were affixed to the principal mosques in the District and in the office of the Committee. Before the meeting, notices

went to all the four members of the committee but one refused to attend. He wrote a letter to the Court stating that he was quite sure that the remaining three members intended to appoint the petitioner and that he had no intention of attending the meeting as he did not agree with them. The remaining three members appointed the petitioner. A number of disappointed candidates thereupon moved the District Judge to declare that the vacancy had not been filled by the committee and to appoint a suitable person himself. The District Judge came to the conclusion that a plain reading of S. 10 showed that the vacancy can be filled up only by the unanimous assent of the members. He further concluded from the evidence of one of the members of the committee (P. W. 3), who took part in the selection, that the claims of all the applicants had not been properly considered. He therefore held that the petitioner had not been appointed by the committee and proceeded under S. 10 to fill the vacancy himself by appointing the respondent.

The main point for consideration in this petition is whether it was necessary for all the four remaining members of the committee to be unanimous in their selection. I need not refer to the very many cases cited by Mr. Pocker for the petitioner, because they relate to acts of a corporate body such as the committee itself was; and it is not even necessary to consider whether the committee could have functioned after one of its members was dead, although it may be said in passing that 34 Mad 1,[1] is an authority for the position that when a member of the committee dies the remaining members do not constitute a committee and cannot act as such. The very wording of S. 10 shows that it has reference only to the remaining members of the committee and not to the committee. A corporation is more than the sum of its members and has certain powers as a body not possessed by the members of the corporation. The reference in S. 10 to the remaining members emphasizes the fact that the remaining members are not the committee; and so it is not the corporate body of the committee that fills up this vacancy but the surviving members. Nevertheless, it seems to me that these four remaining members were a select body given statutory powers under the section to fill up the existing vacancy; so that the nature of this body is very similar to that of a corporation with one sole object and power. In Halsbury, Vol. 8, p. 53 (2nd edn.), S. 90, are set out the powers of a select body; and it is seen that in important respects a select body resembles a corporation, in that acts can be performed, for example, not merely by the members acting unanimously, but by a majority of those present if more than the majority of the members are present.

It is argued that a select body can derive its powers only from the corporation itself; but I do not think that the term 'select body' need be limited to a committee of a corporation, I do not see why a select body should not be given special statutory powers such as have been given to the remaining members of the committee under S. 10, Religious Endowments Act. In 40 Mad 941,[2] it was held in a case somewhat similar to the present that the electoral body was a select body which had the well recognized powers to do acts approved by a majority present, if more than a majority of the members were present at the meeting. There, a committee of five persons and three Mutavallis formed an electoral body; and if a Mutavalli died, the remaining Mutavallis and the five members of the committee could elect a Mutavalli to fill the vacancy. It was held there that all that was necessary was that a majority of this electoral body should be present and that a majority of those present should be in favour of the candidate elected. That case is sought to be distinguished on the ground that an election was spoken of and that an election implies that there should be some difference of opinion among the members of the electoral body. However that may be, it was the finding of the Bench which tried that case that the body was a select body as ordinarily understood at common law. This decision is an important one, as it is the only case quoted on either side that has any real bearing on the question under discussion. The duty of filling up this vacancy was clearly conferred upon these four members as a body; and it would therefore seem that the ordinary rule that

1. Senthalva v. Manjanna Shetty, (1911) 34 Mad 1=7 I C 754=20 M L J 814.

2. Hasan Raza Sahib v. Hasan Ali Sahib, A I R 1918 Mad 1131=38 I C 528=40 Mad 941=33 M L J 348.

the opinion of a majority suffices, would prevail. Mr. Ramachandra Iyer has sought to assimilate the position of these four members of the committee to that of trustees who have been delegated authority by the founder of a trust, the equivalent of the founder of the trust being the District Judge who, it is said, has delegated this authority to four specific persons. I do not think that this argument flows happily from the wording of the section. It may be true that the power of the members is derived from the District Judge in the sense that they obtained the power to fill the vacancy in the event of the District Judge declining to do so; but their power is an alternative power and once the District Judge fails to exercise his power to fill the vacancy, the other provision of S. 10 operates, under which the remaining members of the committee are empowered to fill the vacancy. They are not four specified persons but such members of the committee as are still alive.

The other ground on which the learned District Judge has declared that no election has been held is that from the evidence of one of the members of the committee (P. W. 3), it would appear that the proceedings of the members were of a rather summary nature. According to P. W. 3, the president and the other members of the committee wished the petitioner to be appointed and asked him if he agreed. After he had seen the words of the resolution thus written down, he suggested that the other applicants might be interviewed. The other two members replied that the petitioner was a suitable man and that there was no need to see the others. Even if this account be true, I do not think that it was necessary for the committee to carefully read over the applications of all the candidates. They knew what men were available and what were their qualifications; and it was quite natural that they should have thought as soon as the vacancy came into existence that one person was more fitted to fill the vacancy than another. Even if it be true that they were actuated by the knowledge that the petitioner was amenable to their influence, their election would not be void, especially as it cannot be said that the petitioner is unsuitable for the office. It seems better that the members should select some person with whom they can work rather than one more intelligent and capable with whom they could not get on in committee. The District Judge would perhaps have been well advised to have considered the volume of protest from all the candidates for the office and not to have referred the matter to the surviving members of the committee; but having done so he cannot express dissatisfaction with their choice and attempt to over-ride their decision and avoid it.

It is with some reluctance that I interfere with the order of the learned District Judge on this point, arrived at by him after a careful consideration of the law, which is singularly lacking in authority, and of the conduct of the remaining members of the committee; but I feel that he has proceeded on wrong principles and has expected from the members of the committee a judicial impartiality such as is not to be expected from a committee of this nature. The petition is therefore allowed, the order of the District Judge set aside, and the selection by the committee of the petitioner restored. No order as to costs.

C.R.K./S.C. *Petition allowed.*

A. I. R. 1937 Madras 599

VARADACHARIAR AND KING, JJ.

Katta Gundayya and *others* — Appellants.

v.

Katta Siddappa and *others* — Respondents.

Appeals Nos. 267 and 548 of 1934, Decided on 27th January 1937, against order of Dist. Court, Anantapur, D/- 14th August 1934.

(a) Hindu Law—Partition— When all property of joint family is divided presumption is that further conduct of family business is in nature of partnership — But where some property only is divided excluding family trade, mere fact that partial partition amounts to division of status does not make members partners in respect of that business —Suit for partition of such business with prayer for accounts is governed by Art. 120, Lim. Act, and not by Art. 106.

Where all the property belonging to a joint Hindu family has formed the subject of partition, it is reasonable to presume that any further conduct of business by some or all of the members of the original joint family must be the result of a contract between them; and such contract will in law be regarded as one in the nature of a partnership. But where it is clear that only some properties of the family are divided and other properties belonging to the family including

the family trade are not brought into the division at all, the mere fact that even such partial division will in law amount to a division of status between the parties will not justify the view that the mutual relationship of the members to and in respect of the family business which theretofore rested upon status or birth must thereafter be treated as one resting on contract, so as to involve the notion of a partnership. S. 5, Partnership Act, clearly recognizes this antithesis. The suit for partition and for accounts of such undivided family business is governed by Art. 120, Lim. Act, and not by Art. 106. [P 601 C 1 ; P 602 C 1]

(b) Partnership—Dissolution of —Mere discontinuance of business does not amount to dissolution.

The mere fact that after a particular date no further business was done will not amount to a dissolution of the partnership : *A I R 1921 Cal 538* ; *A I R 1927 P C 70* ; *A I R 1930 Lah 378* and *A I R 1933 Mad 353, Ref.* [P 602 C 1]

K. Krishnaswami Iyengar and *T. S. Narasinga Rao* — for Appellants.

B. Sitarama Rao and *R. Srinivasa Rao* — for Respondents.

Varadachariar, J. — (*Appeal No. 267 of 1934*).—This appeal arises out of a suit for partition. Plaintiff 1 and defendant 1 are brothers. The other plaintiffs and the other defendants are their sons and grandsons. Till 1915, the two branches constituted an undivided Hindu family which was possessed of extensive properties, moveable and immovable. They had also a family business. In 1915 partition between the two branches began and the parties have gone on dividing portions of the properties, from time to time, sometimes by arrangement between themselves and sometimes through arbitrators. Some moveables, some immovables and various outstandings remained undivided even at the date of the plaint in this suit which was filed in 1931. After the division began in 1915, the family trade continued to be carried on till 1922, though it appears that from 1920 the defendants began to do business on their own account as well. After 1922 it is admitted that no further business was carried on in common. On the other hand, the plaintiffs' branch also began to do business on its own account from 1922. Between 1922 and the date of the institution of this suit, the outstandings due to the family were being collected by plaintiff 1 or defendant 1 according to convenience ; such collections have sometimes been divided between them as and when they were made but on other occasions the parties seemed to have retained in their own hands the amounts respectively collected by them. This suit was accordingly instituted by the plaintiff's branch, for a partition of the immoveable properties still remaining undivided, for a division of the outstandings remaining uncollected and for the appointment of a Commissioner to take accounts of the collections respectively made by the two branches with a view to direct one party or the other to pay the other's share of excess collected by such party. The plaint refers to the properties still remaining undivided as "co-parcenary" property. This is not an accurate description ; and the arguments both in the Court below and before us have proceeded on the footing that in 1915 the parties must be regarded as having become divided in status ; but according to the plaintiff's case, there can be no doubt that the suit properties are properties belonging in common to a family which had become divided in status.

As regards the immovable properties of which partition was claimed, there was little or no dispute. As regards items 31 to 83 of the plaint schedule, the defendants contended that the properties themselves must be held to belong exclusively to the defendants' branch, the plaintiffs being at best only entitled to a share of the amount due under the decree in O. S. No. 57 of 1919 in execution of which these properties were purchased by defendant 1. In answer to prayer for the division of outstandings and for the appointment of a Commissioner to take an account of the collections made by each party, the defendants raised a plea of limitation contending that after 1915 plaintiff 1 and defendant 1 must be deemed to have carried on the business only as partners, that the partnership was dissolved in 1922 and that any claim for the taking of the accounts thereof must therefore be deemed to be governed by Art. 106, Lim. Act. A further defence to the claim for the taking of accounts was raised with reference to the order passed in E. P. No. 26 of 1927 in O. S. No. 27 of 1925 on the file of the Sub-Court. A prayer made by the present defendant as decree-holders in that suit for the taking of accounts had been disallowed by the executing Court. Hence it was said that the matter must be taken to have been concluded by that order. These three pleas were overruled by the lower Court and a preliminary decree for partition and for the taking of the neces-

sary account was passed; hence this appeal by the defendant.

It may be convenient to deal at the outset with the question of limitation, because in one view that plea will also bear upon the plaintiffs' claim in respect of the debt which formed the subject matter of O. S. No. 57 of 1918 which led to the purchase of items 31 to 83. Relying upon the observations of the Judicial Committee in 4 Lah 350[1] and 67 M L J 167,[2] Mr. Krishnaswami Iyengar, on behalf of the appellants contended that the Court below was not right in holding that the relationship between the parties was only that of tenants-in-common and that the proper view was that so far as the family business was concerned their relationship after 1915 was that of partners. As pointed out by the learned District Judge the facts of the cases before the Privy Council were different from the facts of the present case. Where all the property belonging to a joint Hindu family has formed the subject of partition, it is reasonable to presume that any further conduct of business by some or all of the members of the original joint family must be the result of a contract between them ; and such contract will in law be regarded as one in the nature of a partnership. But where, as in the present case, it is clear that only some properties of the family were divided and other properties belonging to the family including the family trade were not brought into the division at all, the mere fact that even such partial division will in law amount to a division of status between the parties will not justify the view that the mutual relationship of the members to and in respect of the family business which theretofore rested upon status or birth must thereafter be treated as one resting on contract, so as to involve the notion of a partnership. S. 5, Partnership Act, clearly recognizes this antithesis. The present suit is in form and in substance one for a division of property which admittedly had not heretofore been divided between the parties and a prayer for the taking of the account of the assets including the outstandings due to that business is as reasonably incidental to a suit for partition as to a suit for dissolution of partnership. We would be importing an unnecessary fiction in the present case if we should hold that in 1915 the parties intended to substitute a contractual relationship between themselves in respect of the family business in place of the old relationship founded on status. That, that status became one of tenancy-in-common in place of the old co-parcenary status does not attract the further result that the status must be held to have so far changed as to give rise to a relationship by contract. There is in this case the further fact that even in 1915, there were major sons of plaintiff 1 and major sons of defendant 1 who equally with defendant and plaintiff 1 were interested in the assets of the trade as well as in the other properties belonging to the family. It is not suggested that these sons were partners in any sense known to the law; if so, their relation in respect of the trade and its assets must be only that of co-owners. There is no justification for implying that they authorized plaintiff 1 and defendant 1 to enter into a partnership on their behalf as well.

The subsequent conduct of the parties, as noticed in the judgment of the learned District Judge is also more consistent with the hypothesis that they regarded themselves as co-owners who went on dividing from stage to stage various items of properties moveable and immovable as and when they found convenient to divide them. With reference to the trade assets, it appears that they divided various outstandings as and when they were collected. Similarly, with reference to the trade liabilities, they renewed their debts to strangers by executing separate documents for their respective shares as and when occasion arose. What is spoken of in the evidence as the taking over by the new business of the assets and liabilities of the old seems only to refer to the way the accounts were made up. In this state of the evidence we do not see any reason for implying a contractual relationship between some of the members of the family in respect of what was admittedly a portion of the family assets. It is not contended that a business cannot be carried on by certain members as co-owners (not being partners). Such a conception is well known in respect of family businesses carried on by Dayabhaga families. The division of status in 1915 only put an end to the right of survivorship between the

1. Mt. Jatti v. Banwarilal, A I R 1923 P C 136 =74 I C 462=4 Lah 350=50 I A 192 (P C).
2. Babu v. Official Assignee of Madras, A I R 1934 P C 138=150 I C 1=57 Mad 931=61 I A 257=67 M L J 167 (P C).

two branches and involved no other legal consequence. Mr. Krishnaswami Iyengar contended that the admitted fact of the family business having been carried on since 1915 in the joint names of plaintiff 1 and defendant 1 was a clear indication that the parties meant it to be different from the old business which was carried on in the sole name of defendant 1. The change of name is sufficiently accounted for by the division in status; because, from that date defendant 1 ceased to be legally entitled to be in sole charge of the business as he was during the joint stage and the change of name was effected with a view to make it clear that both the brothers were in joint management. It will be begging the question to import a legal distinction merely by using the words 'do' and 'new' as if they were two different concerns. We are accordingly of opinion that the lower Court rightly applied Art. 120, Limitation Act, to the case and rejected the defendants' contention that Art. 106 should be held to be applicable.

We may add that even if it should be assumed that in 1915 the relationship of partners came into existence between plaintiff 1 and defendant 1, the present suit would not be barred unless the defendants also make out that there has been a dissolution of the partnership more than three years prior to the institution of the suit. The onus of making out such a dissolution is on the defendants; and it is well established that the mere fact that after a particular date no further business was done will not amount to a dissolution of the partnership: *see* 25 C W N 847;[3] 53 M L J 245;[4] A I R 1930 Lah 378[5] and 37 M L W 288.[6] There has been in this case no death or bankruptcy or any other event which of itself works a dissolution as a matter of law. All that is contended for on behalf of the defendants is that the conduct of the parties subsequent to 1922 must be held to give rise to an inference of dissolution by common consent. We have already stated that the mere discontinuance of the business does not lead to this inference. It is said that the starting of separate businesses by the parties is a factor to be considered; but its significance cannot be very much in this case, because as already stated, the defendants' branch began a separate business even in 1920 and it is nobody's suggestion that the joint business was dissolved then. It was next said that certain dispute between the parties was referred to arbitration in 1924 and it was contended that as that reference comprised some of the items relating to the trade, such a reference could have been made only on the footing that the partnership had been dissolved. We do not think the evidence justifies this conclusion. Some of the items referred to the arbitrators related to claims *inter se* between the joint business and the separate business carried on by the defendants' branch. Other items of the reference related to particular outstandings which had been collected by one party or the other or were claimed by one party or the other. There is nothing to show that all matters relating to the business ever formed the subject either of reference to arbitration or of any arrangement between the parties. It therefore seems to us that even if Art. 106 should be held to be applicable to this case, the suit would not be barred, because it has not been shown that there was a dissolution more than three years prior to the date of the suit.

With reference to the plaintiffs' claim to items 31 to 83 of the plaint schedule, the material facts are not in dispute. The debt in respect of which O. S. No. 57 of 1918 was instituted was undoubtedly a debt due to the family. The suit was instituted in defendant 1's sole name, because the accounts of the period, when the debt became due, stood in defendant 1's name as he was at that time the sole manager of the undivided family. The evidence of P. W. 1 shows that the expenses relating to that suit have been debited to the joint account and it also appears from his evidence as well as from the entries in the accounts that when some accounts were realized from the judgment-debtor, after the passing of that decree, the amounts so realized were shared equally by the plaintiffs' branch and by the defendants' branch. There can thus be no doubt that the debt was a common debt and that in instituting the suit and even after obtaining the decree,

3. Haramohan Poddar v. Sudarson Poddar, A I R 1921 Cal 538=66 I C 811=25 C W N 847.
4. Sathappa Chetti v. Subramanyan Chetty, A I R 1927 P C 70=101 I C 17=53 M L J 245 (P C).
5. Din Mahomed v. Kanshi Ram, A I R 1930 Lah 378=120 I C 613.
6. Srinivasalu v. Ramakrishna Naidu, A I R 1933 Mad 353=144 I C 573=37 M L W 288.

defendant 1 regarded himself as entitled to that amount for himself and for the plaintiffs' branch. He must be, therefore, held to have throughout acted in a representative capacity and a purchase made in satisfaction of a claim of that kind must in law be regarded as a purchase made by him in his representative character, at any rate in the absence of clear evidence either that he repudiated that character or that the plaintiffs' branch repudiated the benefit of the bargain : *see* S. 90, Trusts Act, 26 C W N 406,[7] 37 All 545,[8] 52 All 954[9] and A I R 1933 All 854.[10]

It was suggested that Ex. V, a notice given by plaintiff 1 to defendant 1 in 1929, had the effect of limiting the plaintiffs' claim to the money and deprived them of any right to contend that defendant 1 thereafter acted in representative capacity. We find nothing in Ex. V to support this contention. It merely asserts that the amount due under the decree in O. S. No. 57 of 1918 was a common debt and that if defendant 1 should realize the same he must pay the writer his share thereof. No reference could have been made at that time to any purchase of property in satisfaction of the said debt and much less could there have been repudiation by the plaintiff of his interest in such property, because the purchase came to be made only 17 months after the date of Ex. V. It is not suggested that defendant 1 gave any reply to Ex. V. There is accordingly no basis for the argument that defendant 1 put forward any exclusive claim to the amount or repudiated his representative character in respect of the decree amount. The plaintiffs' branch will of course be bound to repay the defendants' branch all expenses properly incurred by the latter in connexion with the acquisition of these properties to the extent of the half share of the plaintiffs' branch. But as against that liability the plaintiffs will also be entitled to an account of the income derived by the defendants' branch from these properties. The parties are not able to say whether such expenses and income have been brought into the joint account or not. If they have not been so brought, the Commissioner will also take accounts in respect of the same and incorporate its result in his report.

In answer to the argument founded upon the order in E. P. No. 26 of 1927, it is sufficient to say that there is nothing in the terms of that order to preclude the present claim of the plaintiffs for an account. All that they then contended and all that the Court then held was that there was nothing in the decree then under execution to warrant the taking of accounts in execution. As we have already stated in another connexion, that decree was passed merely on an award made by arbitrators in respect of certain specific items and as all the accounts necessary for that purpose had been looked into by the arbitrators themselves, the learned Judge who dealt with that application held that there was no further account-taking to be done in the execution department. The present suit does not relate to the items covered by that decree. This plea of bar by that order was not seriously pressed before us.

The appeal therefore fails and is dismissed with costs. A memorandum of objections has been filed on behalf of the plaintiffs in respect of certain items in the accounts totalling Rs. 2,310. It appears from the Commissioner's report that evidence was adduced before him in respect of the various items of family assets collected by plaintiff 1 on the one side and by defendant 1 on the other, and he embodied his findings in respect of such collections in the report which he made to the Court. In that connexion, he was of opinion that along with other collections admitted by the defendants' branch to have been made by them a further sum of Rs. 2,310 had been collected by the defendants' branch. When the case came on before the Court, the Court was not prepared at that stage to deal with the evidence relating to the collections so far as such collection was not admitted by the parties concerned. The result was that in the preliminary decree, the lower Court empowered the commissioner to examine the account and take evidence, if necessary, with a view to decide what amounts have been collected by one party or the other beyond the amount admitted by them to have been so collected. In this view, it is quite natural that the learned District Judge, expressed no opinion of his own on the question whether the defendants'

7. Bandu Ram v. Chintaman Singh, A I R 1922 P C 215=66 I C 402=26 C W N 406 (P C).
8. Ganga Sahai v. Kesri, A I R 1915 P C 81=30 I C 265=37 All 545=42 I A 177 (P C).
9. Dwarka Prasad v. Mahadeo Prasad, A I R 1930 All 631=128 I C 446=52 All 954=1930 A L J 950.
10. Lal Singh v. Mt. Chotey Beti, A I R 1933 All 854=148 I C 502=1934 A L J 107.

branch had in fact collected this additional sum of Rs. 2,310. We are informed that when the matter went before the commissioner again, he was inclined to take the view that this sum of Rs. 2,310 must be deemed to have been dissallowed by the Court itself and that it was no longer open to him to deal with the item making up this aggregate. We do not think that this is a correct view. It is obvious that the lower Court has not so far dealt with the question of disputed collections. It therefore seems to us sufficient to say that it will be for the Commissioner to enquire into and decide the question of the truth or otherwise of the plaintiffs' story that this amount has also been collected by the defendants' branch. We do not think any further order is necessary on the merits.

C. M. A. No. 548 of 1934.—This arises out of an order made in the course of the proceedings in execution of the decree passed in O. S. 27 of 1925. The award on which that decree was passed as well as the decree declared that the elder branch was entitled to certain amounts as against the younger branch but the lower Court has construed the direction relating thereto as only entitling the elder branch to credit in respect of those sums in taking the account of the family assets and liabilities and not entitling the decree-holders to claim cash payment of the same from the younger branch. The lower Court has also pointed out that the elder branch has been given credit in respect of these items in the account directed to be taken in the main partition suit between the two branches. As we have confirmed the decree of the lower Court in the main partition suit, no further orders are necessary in this C. M. A. which is accordingly dismissed with costs.

C.R.K./S.C. *Appeals dismissed.*

A. I. R. 1937 Madras 604

VENKATARAMANA RAO, J.

Kuppu Govinda Chettiar — Petitioner.

v.

Uttukottai Co-operative Society — Opposite Party.

Civil Revn. Petns. Nos. 692 and 693 of 1936, Decided on 29th January 1937, from orders of Dist. Court, Chingleput, in O. S. Nos. 1 and 12 of 1935 respectively.

Court-fees Act (1870), S. 7 (iv-A) and Sch. 2, Art. 17-A (iii) (Madras Amendment of 1922) — Applicability—Order of liquidator under S. 42 (2) (b), Co-operative Societies Act—Suit for declaration that such order is null and void—Court fee paid according to Art. 17-A (iii)—Order of liquidator cannot be decree for money within meaning of S. 7 (iv-A) not having been passed by Court in suit—Court-fee is properly paid under Art. 17-A (iii).

A subject cannot be taxed unless he comes within the letter of the law and in case of reasonable doubt, a construction most beneficial to the subject is to be adopted. The term 'decree' under S. 7 (iv-A), Madras Court-fees Amending Act, connotes a final order of a Court, whether civil or revenue, in a suit, and an order passed by an officer or a body which is not a Court but is invested with judicial powers in pursuance of which a liability is fixed on a person to pay a sum of money, will not come within its purview. [P 605 C 1]

Where a liquidator passes an order under S. 42 (2) (b), Co-operative Societies Act, and the plaintiff files a suit for a declaration that such order is null and void against him and pays court-fee under Art. 17-A (iii), Madras Court-fees Amending Act, such order not being a decree for money within meaning of S. 7 (iv-A), not having been passed by any Court in suit, S. 7 (iv-A) of the Act does not apply to it and the court-fee is properly paid under Art. 17-A (iii): *A I R 1922 P C 374, Referred.* [P 605 C 1]

V. Ramaswamy Iyer and *N. G. Krishna Iyengar* — for Petitioner.

K. S. Champakesa Iyengar — for Opposite Party.

Order.—The question raised in this revision petition relates to the amount of the court-fee leviable on a plaint which prays for a declaration that an order of a liquidator of a co-operative society determining the amount of contribution payable by the plaintiff under S. 42 (2) (b), Co-operative Societies Act, is null and void. The case of the plaintiff is that he ceased to be a member in or about June 1930, that more than two years after he ceased to be a member an order for contribution was made against him on 25th November 1933, directing him to pay a large sum, namely Rs. 8,000 and that the liquidator had no jurisdiction to pass such an order and he therefore prayed for a decree that such an order is 'illegal, void and of no effect and unenforceable against the plaintiff.' He paid a court-fee of Rs. 100 under Art. 17-A (iii) of Sch. 2, Madras Court-fees Amending Act. The learned District Judge held that the plaintiff should have valued the claim under S. 7 (iv-A), of the said Amending Act. This order of the learned District Judge is canvassed as being unsound by Mr. V. Ramaswami Iyer for the plaintiff. The question is, is the order of the liquidator a decree for money within the meaning of

the said S. 7 (iv-A)? The term 'decree' therein connotes a final order of a Court, whether civil or revenue, in a suit, and an order passed by an officer or a body which is not a Court but is invested with judicial powers in pursuance of which a liability is fixed on a person to pay a sum of money, will not come within its purview. The Co-operative Societies Act itself draws a distinction between an order and a decree. S. 42 (5) of the Act says that orders made under the said section, when made by a liquidator, shall be enforced by any civil Court in the same manner as a decree of such Court. In construing an analogous provision, S. 15, Arbitration Act, which provides that an award shall be enforceable as if it were a decree of Court, Viscount Cave observed thus :

Section 15 does not enact that an award when filed is to be deemed a decree of the Court but only that it is to be enforceable as if it were a decree : 50 Cal 1[1] at p. 9

and refused to apply the bar of S. 47, Civil P. C., to a suit to have an award declared null and void. Thus, applying the said principle, from the Co-operative Societies Act itself it is abundantly clear that the order of liquidator under S. 42 (2) (b) cannot be a decree for money within the meaning of S. 7 (iv-A), not having been passed by any Court in a suit. A subject cannot be taxed unless he comes within the letter of the law and in case of reasonable doubt, a construction most beneficial to the subject is to be adopted. I am therefore of the opinion that S. 7 (iv-A) would not apply to the case and that the court-fee paid is proper. I accordingly set aside the order of the learned District Judge and allow the revision petition.

C. R. P. No. 693 of 1936.—Following my judgment in C. R. P. No. 692 of 1936, I set aside the order of the learned District Judge and allow the revision petition.

C.R.K./W.D. *Revision allowed.*

1. E. D. Sassoon & Co. v. Ramdutt Ramkissen Das, A I R 1922 P C 374=70 I C 777=50 Cal 1=49 I A 366 (P C).

A. I. R. 1937 Madras 605

CORNISH, J.

Paddisetti Rangayya Setti—Petitioner.

v.

Guduru Venkata Subba Reddi and *others* — Opposite Parties.

Civil Revn. Petn. No. 1436 of 1934, Decided on 5th February 1937.

(a) Civil P. C. (1908), S. 2 (3) and O. 21, R. 2 — "Decree-holder" does not include transferee from him.

The definition of "decree-holder" as given in S. 2 (3), Civil P. C., does not include a transferee of such decree-holder and the term "decree-holder" in O. 21, R. 2, Civil P. C., has the same meaning : *33 Mad 62*; *14 I C 702* and *17 I C 617, Expl.* [P 606 C 1]

(b) Civil P. C. (1908), O. 21, R. 16—Assignee of decree—No steps by assignee under O. 21, R. 16, for some time — Decree-holder and judgment-debtor composing matter in meanwhile—Decree cannot be executed by transferee—In such case his remedy is by way of suit against transferor.

Until the transferee has taken steps under O. 21, R. 16, Civil P. C., for sanction to execute the decree, the executing Court cannot recognize any other person than the decree-holder on record. [P 606 C 1]

Where therefore subsequent to the assignment of the decree by the decree-holder, a composition of the decree takes place between the transferor and the judgment-debtor, before any steps are taken by the transferee under O. 21, R. 16, Civil P. C., and on seeking to execute the decree, the transferee finds that adjustment has taken place already, he cannot execute the decree. In such a case the remedy of the transferee is by way of suit against the transferor : *A I R 1935 Mad 383, Rel. on.* [P 606 C 1]

B. V. Ramanarasu — for Petitioner.

Ch. Raghava Rao —

for Opposite Parties.

Order.—The petitioner in this Civil Revision Petition is the judgment-debtor in a suit, S. C. No. 563 of 1933. The decree-holder in that suit was judgment-debtor of the present petitioner in another suit, S. C. No. 1112 of 1923. The decree-holder in the first of these suits transferred his decree to the present respondent on 5th July 1933. But on 17th August 1933 the petitioner and the decree-holder, apparently without the knowledge or consent of the transferee, made an adjustment of the decrees which they had obtained against one another. This adjustment was duly certified to the Court. An agreement was drawn up between the petitioner and the transferor which recited that the decree in S. C. No. 563 of 1933 had been transferred, and that as this transfer had not been recognized, the transferor "should file full satisfaction memo for the present". When, one year later, the transferee applied under O. 21, R. 16 for execution of the decree in S. C. No. 563 of 1933, he was met with the objection of the judgment-debtor that the decree had been adjusted. The question is whether in the circumstances the objection can prevail. I think it must. The lower Court

in coming to an opposite conclusion has proceeded on the authority in 33 Mad 62,[1] where it was held that transfer of a decree is effective to pass the property in the decree without any formal recognition of it by the Court.

But that case, as well as the two other cases cited by the learned counsel for the respondent, 14 I C 702[2] and 17 I C 617,[3] which are in his favour, belong to a period when the definition of "decree-holder" in the Code included the transferee of the decree. The present definition of "decree-holder" is more limited. It means the person in whose favour a decree has been passed. This is the meaning which the word must bear in O. 21, R. 2, providing for the recording of satisfaction or adjustment of decree between the decree-holder and the judgment-debtor. Until the transferee has taken steps under O. 21, R. 16, for sanction to execute the decree, the executing Court cannot recognize any other person than the decree-holder on record: 68 M L J 392.[4] This may involve the position that a judgment-debtor cannot safely settle his debt with the transferee prior to the transferee's application under R. 16, or that the transferee on applying to execute his decree may find, as in the present instance, that the debtor and the decree-holder have since the transfer composed the matter. But these are the risks attendant upon taking an assignment of a decree. No doubt a transferee who finds that the decree cannot be executed because the decree has already been satisfied or adjusted has his remedy by way of suit against his transferor. But this is a matter with which the executing Court has no concern. In the result, therefore, I must allow the revision petition with costs throughout.

C.R.K./V.B.B. *Revision allowed.*

1. Sadagopachariar v. Raghunathachariar, (1909) 33 Mad 62=3 I C 938.
2. Balakrishna Pillai v. Muni Reddi, (1912) 14 I C 702.
3. Dharani Mudali v. Meenamba Bai, (1912) 17 I C 617.
4. Jayanarayana v. Polayya, A I R 1935 Mad 383=159 I C 589=68 M L J 392.

A. I. R. 1937 Madras 606

VENKATARAMANA RAO, J.

Tsappati Kotilingam — Petitioner.

v.

Tsappati Satyanarayanamurti and *others* — Opposite Parties.

Civil Revn. Petn. No. 917 of 1936, Decided on 10th December 1936, from order of Sub-Judge, Cocanada, D/- 14th August 1936.

Court-fees Act (1870), S. 7 (iv) (b)—Plaint stating that after separation of one brother remaining two brothers, viz., father of plaintiff and father of defendant, continued to be joint—Waste of property by defendant—Plaintiff suing for partition—Plaintiff need not allege joint possession—On allegation in plaint, court-fee paid under S. 7 (iv) (b) is proper.

In a case the allegation in the plaint was that there was a joint family consisting of three brothers, that one brother having expressed his desire to separate from the family, he was given some property in lieu of his share and that the remaining two brothers, one being the father of the defendant and the other the father of the plaintiff, continued as members of the joint family without division in status between them. As the defendant was wasting the property the plaintiff sued for partition and paid court-fee under S. 7 (iv) (b), Court-fees Act. The Subordinate Judge was of opinion that as the plaintiff did not allege joint possession or enjoyment, the court-fee ought to have been paid under S. 7 (v) and not under S. 7 (iv) (b). On revision:

Held: that as the plaintiff alleged that he was a co-parcener, it was enough because the possession of one co-parcener must be deemed to be possession of all and, therefore, it was not necessary for the plaintiff to allege joint possession. Hence the claim of the plaintiff must be taken as one to enforce the right to share in the suit property on the ground that it was joint family property. On the allegation in the plaint, therefore, the court-fee paid under S. 7 (iv) (b) was proper.

[P 607 C 1, 2]

D. Narsa Raju — for Petitioner.

Govt. Pleader and *B. Satyanarayana*— for Opposite Parties.

Order. — This revision petition raises the question of court-fee. The plaintiff sues for a partition of what he calls the joint family property in which he and the defendants are interested. His case is that his father, the father of defendant 1, Mallayya and Nukayya formed members of a joint Hindu family, that Nukayya having expressed a desire to separate from the family, he was given some property in lieu of his share, and that the remaining two brothers, Mallayya and the father of the plaintiff, continued as members of the joint family without any division in status between them; Mallayya died and

thereafter he and the defendants continued as members of an undivided family and he has been living with his maternal uncle and allowed defendant 1 to be in possession and management of the properties; as defendant 1 was wasting away the property, he called upon him to account but defendant 1 declined to render, and hence the necessity for this suit. The learned Subordinate Judge was of opinion that as the plaintiff did not allege joint possession or enjoyment, the court-fee must be paid under S. 7, Cl. (v), Court-fees Act, and not under S. 7, Cl. (iv) (b) of the Act. It seems to me that this view is unsound. S. 7, Cl. (iv) (b) provides for a suit to enforce the right to share in any property on the ground that it is joint family property. Krishnaswami Aiyar, J. interpreted this clause in 21 M L J 21[1] at p. 26 thus :

> There is a joint family at the date of the suit. The plaintiff's right to have the property divided is on the ground that the property belongs to the joint family on that date. There is no further cause of action necessary to sue. The fact that it is joint family property is sufficient to entitle a co-parcener without more to claim his share by partition.

If the plaintiff alleges that he is a co-parcener, it is enough because the possession of one co-parcener must be deemed to be possession on behalf of all. 21 M L W 207[2] also takes this view. In that case, Wallace, J. was of the opinion that a plaint by a Hindu co-parcener for joint family properties should be valued under S. 7, Cl. (iv) (b), Court-fees Act, where there is no allegation in the plaint that he has been ousted from possession of the joint family properties because the possession of a co-parcener must be deemed to be possession of all. But at the same time he observed that if in the course of the trial it were established that he was not in possession, he will have to pay court-fee under S. 7, Cl. (v). In this case the allegation in the plaint is that there was a joint family consisting of three brothers, Nukayya, Mallaya and Tatayya, the father of the plaintiff, but Nukayya separated from the family. The effect of that separation may be to effect a separation between the members *inter se*. Before the plaintiff can succeed in the suit, he will have to lay the foundation that the original family continued undivided in spite of the separation of Nukayya before the Court can grant relief on the footing that he is a member of an undivided Hindu family. But he has alleged in the plaint that the family continued undivided and the court-fee will have to be calculated on the allegations in the plaint. I must, therefore, take it that his claim is to enforce the right to share in the suit property on the ground that it is joint family property. I think that before the plaintiff can be called upon to pay a court-fee on any basis other than under S. 7, Cl. (iv) (b), it has to be established in this case whether the separation of Nukayya did not effect a severance of the entire joint family as well and the remaining brothers continued undivided. If this is found against, then the plaintiff should be called upon to pay a valuation on the findings of the Court, because it may be he may be entitled to value the plaint under Art. 17, Cl. (vi), Court-fees Act. That would depend on the nature of the findings the lower Court will arrive at. But for the present on the allegations in the plaint it must be taken that the plaint has been properly valued. I, therefore, reverse the order of the lower Court and remand the case for disposal in the light of the observations contained in this judgment. I make no order as to costs.

C.R.K./S.C. *Case remanded.*

1. Rangiah Chetty v. Subramania Chetty, (1911) 21 M L J 21=8 I C 512 (F B).
2. Ramakrishna Aiyar v. Muthuswami Iyer, A I R 1925 Mad 468=86 I C 627=21 M L W 207.

A. I. R. 1937 Madras 607

VARADACHARIAR AND PANDRANG ROW, JJ.

M. Raghavulu Naidu and *others* — Appellants.

v.

Kamsalya Bai and *onother* — Respondents.

Appeals Nos. 171 of 1934 and 62 of 1935, Decided on 11th February 1937, against decrees of Sub-Judge, Chingleput, D/- 23rd March 1934.

(a) Hindu Law—Co-widows — Widow succeeding to co-widow takes only limited interest.

A co-widow who succeeds as heir to the property of a co-widow takes only a limited interest: *25 All 476* and *A I R 1926 Mad 84, Rel. on.* [P 608 C 2]

(b) Hindu Law — Reversioner — Proof of title—Person claiming as reversioner—Strict proof of such person's being nearest heir is necessary only in case of doubt.

Where a person claims to be the nearest reversioner, it is only if on the evidence there is room for doubt as to such person being the nearest heir, that the principle comes in, that the Court must insist on strict proof that he is the nearest heir. Such person is not expected to prove an absolute negative, in the sense of excluding the possibility of the existence of some unknown person who if he had existed might be a nearer heir.

[P 608 C 2]

N. Gopala Menon and *V. M. Ramaswamy Mudaliar* — for Appellants.

A. V. Viswanatha Sastri and *C. Santhamurthi Naidu* — for Respondents.

Varadachariar, J. — (*Appeal No. 171 of 1934*). This appeal arises out of a suit for possession. The plaintiff claimed to be entitled to the suit properties as the widow of one Maniram Misser and according to the plaintiff's case he (Maniram Misser) was the reversionary heir to the estate of the last male owner of the suit properties named Guruprasad. The plaintiff's husband admittedly survived the widows of the last male owner; and if he was the nearest heir to Guruprasad on the date of the widow's death, it is not disputed that the plaintiff will be entitled to the property, subject to the other defences raised in the suit. It was contended by the defendants that the plaintiff's husband was not the reversioner. This contention was based upon two grounds : one that Guruprasad had left a will whereby his properties had been bequeathed absolutely to his two widows Rama Bai and Sona Bai ; the other ground was that the plaintiff had not proved that her husband was the nearest heir and that there were no nearer heirs in existence.

As to the first question, it has been held by this Court in a former stage of this litigation in A. S. No. 132 of 1928 that even on the footing that the widows took an absolute estate under the will of their husband, the half share of the widow who died first, namely Rama Bai, must be only deemed to have been inherited by the other as a co-widow and that notwithstanding the frame of the plaint, the plaintiff was entitled to such relief as she could claim in respect of Rama Bai's half share. It was apparently then assumed that in respect of Rama Bai's half-share, Sona Bai as heir would take only a limited interest ; but the point was not definitely decided. Accordingly the appellant's learned counsel in the course of his argument before us raised the contention that even in respect of Rama Bai's half-share, Sona Bai must be deemed to have taken an absolute interest, that she was therefore competent to alienate it at her pleasure and that there was no reversionary interest which plaintiff could claim as heir to her husband. It is sufficient to say that this contention is not tenable, in view of the decision of the Judicial Committee in 25 All 476,[1] (*see also* 49 Mad 116[2] at p. 152 where it was taken as settled that a co-widow who succeeded as heir to the Stridhanam property of a co-widow would take only a limited interest).

As to the proof that the plaintiff's husband was the nearest reversionary heir to the estate of Guruprasad, it was contended on behalf of the appellants that the evidence on the plaintiff's side was inadequate and did not establish that there were no nearer heirs in existence. As the learned Subordinate Judge points out, the evidence on the point is all one way and no suggestion has been made even in the course of cross-examination of the plaintiff's witnesse that there was any particular person in existence of whom it could possibly be said that he might be a nearer heir. Mr. Viswanatha Sastri contends that the rule that a person claiming as a reversioner should prove not merely that he is an heir but that he is the nearest heir involves that the plaintiff must exclude the possibility of there being nearer heirs in existence. We do not think that this is a fair interpretation of the rule. It is only if on the evidence there is room for doubt as to the plaintiff being the nearest heir, the principle comes in, that the Court must insist on strict proof that he is the nearest heir. The plaintiff is not expected to prove an absolute negative, in the sense of excluding the possibility of the existence of some unknown person who if he had existed might be a nearer heir. We therefore agree with the lower Court that the plaintiff has established her husband's title as reversionary heir to the estate of Guruprasad.

The next point argued on behalf of the appellant related to the binding character of the alienation in favour of the appellants by Sona Bai under the sale deed, Ex. 2, dated 5th May 1908. The sale purports to be for a sum of Rs. 9,000 out

1. Sheo Partab Bahadur Singh v. Allahabad Bank, (1903) 25 All 476=30 I A 29 (P C).
2. Ayiswarya Nandaji Saheb v. Sivaji Raja Saheb, A I R 1926 Mad 84=92 I C 928=49 Mad 116=49 M L J 568.

of which a sum of Rs. 150 was said to be due to Government in respect of a loan apparently taken under the Agriculturists' Loans Act and the whole of the balance is said to have been received in cash by Sona Bai. The document itself makes no reference to the purpose for which the money was received; nor does even the written statement filed in this suit give any particulars as to the existence of debts or the discharge thereof. There is merely a vague reference in the statement to decree debts and other debts. As pointed out by the lower Court, no evidence has been given as to the existence of any decrees or discharge thereof as a result of the suit sale. Some vague evidence has been attempted to be adduced through the few witnesses examined on the defendants' sides. We agree with the lower Court that, that evidence is unreliable.

A point was made before us that the lower Court improperly rejected a registration copy tendered on behalf of the defendants to prove the existence of a mortgage deed executed by the two widows in favour of the Mylapore Fund so as to support an argument that that debt is likely to have been discharged from out of the proceeds of Ex. 2. Even if that document should be admitted in evidence, it seems to us, that it would not go far to help the defendants' case unless they had gone further and shown that the debt was discharged out of the proceeds of the suit sale. The evidence in the case undoubtedly shows that Sona Bai had made several alienations and the debt to the Mylapore Fund would in all probability have been discharged from some other source. There is no point in merely stating that Sona Bai and Rama Bai had at sometime executed the mortgage bond in favour of the Mylapore Fund. The mere production of the copy seems to us therefore to be of no significance because it contains no endorsements whatever and the suggestion that it was discharged out of the proceeds of this sale merely rests upon oral evidence. On the other hand if the defendants seriously intended to prove that the proceeds of the suit sale had been utilized for the discharge of the debt due to the Mylapore Fund, there should have been no difficulty in getting at the books of the fund to prove the discharge of the debt at or about the time of the suit transaction so as at least to raise a presumption that the moneys received under the suit sale might have been so utilized. We must therefore confirm the finding of the lower Court that in respect of Rama Bai's half share which Sona Bai must be deemed to have inherited only for a limited interest, the sale under Ex. 2 has not been shown to be binding on the reversioner.

Mr. Viswanatha Sastri finally raised a point that as Sona Bai was undoubtedly entitled to a half share in absolute right from out of the whole estate of her husband, the appellants should at least be given the equitable right to insist that the whole of the suit property might be allotted to Sona Bai's half share leaving the plaintiff to treat the other half of the estate as representing Rama Bai's share. Notwithstanding the several opportunities which the defendants have had to raise this contention, no such contention seems to have been raised either at the time when a new issue was framed by this Court when it remanded the former appeal nor even when other issues were framed in the lower Court after remand. The respondents' learned counsel points out that even in the grounds of appeal in the present appeal no such point has been taken. Apart from this objection, there is also the difficulty in the appellants' way that we have no materials on which it may be possible to found an argument in support of such equity in favour of the appellants. It does not appear that the plaintiff or her husband got into possession of any property on the footing that it was Rama Bai's property, out of which the plaintiff can be asked to give effect to the alleged equity in the defendants' favour. The only other items of properties belonging to Guruprasad's estate of which any information is derivable from the records are items which the plaintiff sued for on the footing that they belonged to Guruprasad's estate and her husband was entitled thereto as reversioner to Guruprasad's estate.

We also find that Sona Bai had alienated by sale or by will considerable portions of her husband's property if not the whole. We are thus not in a position to find anything which will justify the claim that the suit property may fairly be allotted to Sona Bai's share leaving the plaintiff in possession of an equal part as representing Rama Bai's share. The result is that the appeal fails and must be dismissed with costs.

Appeal No. 62 of 1935.

This is an appeal against the final decree in the suit in which A. S. No. 171 of 1934 is the appeal from the preliminary decree. In pursuance of the direction in the preliminary decree, the suit properties were divided by a Commissioner and on lots being cast in Court, certain specific items were allotted to the plaintiff's share. At the time that these proceedings took place in the lower Court, the appellants did not care to appear. We see no ground on which we can now be asked to disturb the allotment as made in the final decree. The learned counsel for the appellants reiterated in this appeal the claim for equitable adjustment as between the shares of the two widows so as to leave his clients in possession of the whole of the suit property. This contention has been dealt with in the judgment in A. S. No. 171 of 1934 and has been disallowed. This appeal therefore must also be dismissed with costs.

C.R.K./W.D. *Appeals dismissed.*

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* A. I. R. 1937 Madras 610

FULL BENCH

VENKATASUBBA RAO, CORNISH AND VENKATARAMANA RAO, JJ.

Vadlamanati Venkatanarayana Rao — Appellant.

v.

Gottumukkule Venkata Somaraju — Respondent.

Appeal No. 433 af 1936, Decided on 3rd March 1937, against order of Sub-Judge, Narasapur, D/- 2nd July 1936.

*** (a) Hindu Law — Debts — Father—Son's liability—Suit against father in respect of family liability — Decree against father in such capacity is binding on joint undivided son even if not party to suit—On death of father decree can be executed against joint family property in hands of son—Son cannot plead in execution partition before such decree—Same rule applies in case of suit against manager in representative capacity and other undivided members are not parties to it.**

Where a father is sued as a representative of a joint Hindu family in respect of a joint family liability, the other members of the family must be held to be substantially parties to the suit through him. The fact that they are not parties *eo nomine* will not render them any the less parties to the suit. A decree obtained against him in such suit will be binding on the joint undivided son and entire joint family property can be taken in execution of such decree even if the son is not a party to the suit. The decree in such case, even if it does not show on its face that it was passed against the co-parcenary, would yet be binding upon the whole family inasmuch as he can effectively represent the entire family in such suit. The decree can be executed against the joint family property in the hands of the son on the death of the father. The son cannot plead in execution that a partition has taken place between him and his father before such decree.

[P 617 C 1, 2 ; P 618 C 1]

The same rule applies when the manager is sued in a representative capacity in respect of joint family liability and the other undivided members are not made parties to the suit : *15 Cal 70 (P C)* ; *A I R 1914 P C 136* ; *A I R 1927 P C 56* ; *A I R 1935 Lah 1* and *33 All 272 (P C)*, *Rel. on.* [P 618 C 1]

(b) Civil P. C. (1908), S. 53—Scope—Father as manager in personal capacity incurring liability enforceable against property in hands of son—S. 53 applies—S. 53 applies even if there is decree against father in respect of pre-partition debt binding on property allotted to son in partition—Word 'debt' includes pre-partition debt which includes liability for mesne profits though determined in a suit after partition : (Per *Cornish, J.*)

Per *Cornish, J.*—Apart from S. 53, Civil P. C., a Hindu son could not be made liable in execution as his father's legal representative in respect of property which was not property in which the father had any right or title at the time of his death. The language of S. 53 is sufficiently wide enough to include a liability incurred by the father which is enforceable against the property in the hands of his son, whether the liability was incurred by the father in his capacity of manager or personally. In both cases it is the Hindu law which attaches to the property this liability.

[P 615 C 1, 2]

Section 53 covers a case where there is a decree against the father in respect of a pre-partition debt binding on the share of property allotted to the son in the partition. [P 615 C 2]

The word 'debt' as used in the text is wide enough to include a pre-partition debt which will include a liability for mesne profits incurred by the father before partition, although the actual liability is not determined in a suit until after the partition. [P 616 C 1]

N. Sivaramakrishna Iyer — for Appellant.

P. Satyanarayana Rao and *S. Venugopal Rao* — for Respondent.

Venkatasubba Rao, J. — This appeal has been brought against an order made by the lower Court, refusing execution against the respondent. The decree that was sought to be executed was one passed in O. S. No. 7 of 1922 inter alia against the respondent's father, who was defendant 5 in the suit. Into the chequered history of that suit, it is unnecessary to enter ; it is sufficient to state for the present purpose, that the suit itself was

commenced in 1919 (it was originally numbered as 96 of 1919), that a decree for possession was passed against defendant 5 in May 1933, that in execution of that decree the plaintiff obtained possession of the lands in October of the same year and that by a further judgment delivered on 3rd April 1935 mesne profits were awarded against defendant 5, who subsequently died in the following June. (To avoid confusion, it may be stated that the formal decree drawn up in respect of mesne profits bears a later date, namely 22nd July 1935, but that is a circumstance which is immaterial.) The plaintiff-appellant applied for execution in February 1936, praying first, that the respondent (i. e., defendant 5's undivided son) might be brought on the record as his legal representative and secondly, that the decree for mesne profits might be executed against the co-parcenary property in his hands. The respondent contested the plaintiff's right, relying upon a partition said to have been entered into on 1st February 1931 between his father and himself. The facts alleged by him are these: Under the partition the lands in dispute along with certain other items of co-parcenary property were allotted to the father who two days later settled these properties upon his wife (the respondent's mother) by a deed of gift dated 3rd February 1931. He contended that in those circumstances the decree passed against his father could not be executed against the joint family property which fell to his share. This contention the lower Court upheld, finding as a fact that the partition set up was a genuine transaction. The plaintiff, who has filed this appeal, impeaches the correctness of the learned Subordinate Judge's order.

It may be convenient to set out here a few more facts connected with O. S. No. 7 of 1922. Along with defendant 5, his two adult sons were impleaded as defendants 6 and 7, but the respondent himself was not joined, he being then an infant. Those two sons put forward an oral partition alleged to have been entered into between themselves and their father in 1912. They asserted that they were not in possession of any of the items claimed, as the entire lands in dispute had been allotted to their father. Their contention was accepted and they were exonerated. So far as the plaintiff's claim to mesne profits was concerned, as the decree awarded profits only from 1916 onwards, defendants 6 and 7 were held not liable, apparently on the ground that the mesne profits decreed were in respect of a period subsequent to the partition: *see* the order embodying the finding at p. 172, and the judgment of Ramesam, J. at p. 153 of the Privy Council Pleadings Book. Pausing here for a moment the fact that emerges from this brief narrative is that defendant 5 was sued as representing the family in respect of his joint family property. In fact the addition of defendants 6 and 7 makes no difference as the claim against defendant 5 was in essence one made against him as representing his branch of the family. The view that prevailed in the suit was, that defendants 6 and 7 possessed no interest in the joint family property and should therefore be regarded as having been unnecessarily impleaded. The following passage bearing on this point from the order embodying the finding may in this connection be quoted:

> Coming now to defendants 5 to 7, they form one group. Defendant 5 is the father and defendants 6 and 7 are his sons by his first wife. Defendant 5 has another son by his second wife and they two are living together as members of a joint family. The contention of these defendants is that the lands in suit, so far as as they are admitted to have been in possession of defendant 5, are in his sole possession and that defendants 6 and 7 were not in possession of them in any of the years under enquiry. Division between the father and the sons in the year 1912 has been set up. Though the partition deed has not been produced, evidence of subsequent acts of the parties dealing separately with their respective shares has been adduced ..... The oral evidence on the defendant's side supports the contention of these defendants.

Although several questions have been argued, I conceive that the real point to decide is, did defendant 5 represent in the action his son the respondent, who was then a minor, although he was not described as a party on the record? For deciding this question a reference to the pleadings becomes necessary. Defendant 5, in the written statement filed by him, describes the lands in question as those in possession of his family and refers to the position of defendants 6 and 7 in the following terms:

> All these items of property fell to the share of defendant 5 in the partition of the property of the family of defendants 5, 6 and 7. Defendants 6 and 7 have no concern in this suit: para. 7.

The present suit, O. S. No. 7 of 1922, is itself the sequel of an earlier suit, O. S. No. 65 of 1908, the facts of which also show that defendant 5 was sued as repre-

senting his family. That was a mortgage suit filed by the plaintiff and certain others who had a subsisting mortgage right inter alia over the lands in question in the possession of defendant 5. The family of defendant 5 had acquired these properties under a purchase effected by his father, which shows that they were ancestral properties in the hands of defendants 5, 6 and 7. The purchase by defendant 5's father, it may be mentioned, was subject to the mortgage sued on in the earlier action. In due course a mortgage decree was passed against the mortgagor and various other persons including defendants 5 to 7, and the properties were in execution of the decree brought to sale and purchased by the mortgagees themselves. It was to recover possession of the lands so purchased that the present suit, O. S. No. 7 of 1922, was filed. Among the persons who contested the suit, was defendant 5 who pleaded that it was barred by S. 47, Civil P. C., but eventually, as already observed, a decree was passed in favour of the plaintiff.

I have narrated these facts at some length, with a view to show that defendant 5 was sued as representing his family and that it was in that capacity that he defended the action. The respondent describes himself as being 26 years old in an affidavit filed by him on 2nd January 1937, that is to say, during the greater part of the time the suit (O. S. No. 7 of 1922) was going on, he was a minor. He became a major about 1929 but still continued to be represented by his father in the suit. Granting that in the absence of the partition of 1931 he would be bound by the decree passed against his father and that it could be executed against the co-parcenary property in his possession (a point which I shall presently consider) the question arises, does the fact of the partition make any difference? I think the theory of representation must imply that the respondent, though not *eo nomine* on the record, should be treated as though he himself were a party to the suit. If this be so, it follows in my opinion that unless he has done something which has had the effect of removing him from the record, he must be treated as continuing to be a party till the date of the decree. At any rate, on the facts of this case it is impossible to come to a different conclusion. The lower Court's decree was passed in 1925 and it was, while an appeal from that decree was pending in this Court, that the partition now put forward of 1931 was entered into. Is it to be imagined that the respondent could at his will abruptly put an end to the representation which had gone on for about 12 years, producing by his act the strange legal result of his not being bound by the decree to be passed shortly thereafter? I think the answer to this question must be in negative.

The decision of this case must in my opinion really turn on the question whether a managing member can effectively represent the entire joint family in a suit by or against him, and secondly, on the still more important question, whether the decree should show on its face that the claim was made by or against the manager in his representative character. On neither point it seems to me much doubt can be entertained in view of certain Privy Council decisions. In 14 I A 187[1] the facts were these: The plaintiff being a mortgagee and purchaser at an execution sale of the mortgaged property, sued the defendants for a declaration that his purchase included their share of the mortgaged property and was not limited to the shares of the mortgagors who, as the managing members of the joint family to which the defendants belonged, had purported to mortgage the interests of the entire family. This case established two principles: first that the managing member could effectively represent the entire family and that a decree passed against him would be binding upon all the members, and secondly that it is not necessary that it should be stated in the pleadings in express terms that he is sued or is being sued as such manager; the suit will be deemed to have been brought by or against him in his representative character if the circumstances of the case show that he is the manager of the family and the property involved is the family property. In the plaint in that suit, the mortgagee claimed not only to recover against the mortgagors the amount of the mortgage debt and interest, but asked that he might have execution and be satisfied out of the mortgaged property. Similarly, in his application for execution, he asked, not that he might be allowed merely to seize the right, title and interest of the mortgagors, but that he might be permitted to

1. Dowlat Ram v. Mehar Chand, (1887) 15 Cal 70=14 I A 187=1 P R 1888=5 Sar 84 (P C).

seize and sell the entire property that had been mortgaged. That the decree (which by the way was not produced before their Lordships) did not contain the words that the mortgagors were sued in their representative character is perfectly obvious.

From the provisions of the mortgage deed their Lordships came to the conclusion that what was intended to be mortgaged was the whole of the mortgaged property and not the mortgagor's share alone. Relying upon the facts adverted to above, they held that the circumstances of the case showed that the suit was brought against the managers in their representative character. There is yet another principle, though not material to the present purpose, which this case establishes. The suit, as already stated, was brought by the mortgagee-purchaser and their Lordships observed that the defendants had the opportunity of having the questions tried in that suit, first, whether in fact there was a debt due, and secondly, whether the mortgage was a valid mortgage which bound the ancestral property (pp. 192 and 197). Without raising those questions, the defendants rested their defence on the ground that they had not been made parties to the suit and consequently their share in the property had not been sold and could not be sold under the execution : p. 195. The result was that the decree was held to be binding upon them, although they had not been made parties to the action. This theory of representation was pushed further in 41 I A 216.[2] There was a mortgage suit in which a foreclosure decree was passed against the managing members of a joint Hindu family. They did not avail themselves of their right to redeem, so that the order absolute was pronounced against them. The other members of the family then brought a suit claiming that they were entitled to redeem the mortgaged properties. Their claim was negatived. The importance of this decision lies in the fact that the mortgagee never had notice of the fact that the properties had been acquired by the mortgagors on behalf of their joint family (p. 219). That shows that neither were the mortgagors described in the plaint as the managers of the family nor was the decree passed against them in their representative character. But from the circumstances of the case it appeared that the joint family was effectively represented. It may be worth noting what those circumstances are :

> They (the mortgagors) were at the time of acquiring the properties and also at all material times in the foreclosure suits the managers of the joint family and they acted as such both in acquiring the properties and in abstaining from redeeming them.

In coming to the conclusion that the mortgagors effectively represented the entire family, their Lordships refer to the findings of the Courts in India (p. 220). In the passage quoted above, I regard the statement that the mortgagors acted as managers even in abstaining from redeeming the properties as most significant. This case shows beyond a shadow of doubt that a decree which does not on its face show that it was passed against co-parcenary, would yet be binding upon the whole family. 54 I A 122[3] gives effect to the same principle. That case referred to certain lands and it was there held that a previous decree which negatived the right of the managing member would on the ground of res judicata be binding upon the junior members of the co-parcenary. Their Lordships observe that in such cases the Court looks to Expln. 6, S. 11, Civil P. C., 1908, to see

> whether or not the leading member of the family has been acting either on behalf of the minors in their interests or, if they are majors, with the assent of the majors.

Then on the facts they came to the conclusion that the plaintiff in the previous suit was acting on behalf of himself and his minor children. It may be mentioned that there was the finding of the Subordinate Judge in the case that the managing member had conducted the previous suit with due care, which amounts to saying, in the words of Expln. 6, referred to above, that the parties litigated in respect of the right claimed, bona fide, in the former action. The three decisions of the Privy Council to which I have referred, relate to immoveable property, but the principle of representation applies alike to other transactions as well. In 38 I A 45,[4] the suit was brought in respect of a loan and the question that was raised was one of limitation. The action was originally brought by the managing members of the

2. Sheo Shankar Ram v. Jaddo Kunwar, A I R 1914 P C 136=24 I C 504=41 I A 216=36 All 383 (P C).

3. Lingan Gowda v. Basan Gowda, A I R 1927 P C 56=101 I C 44=54 I A 122=51 Bom 450 (P C).

4. Kishen Prasad v. Nar Narain Singh, (1911) 33 All 272=9 I C 739=38 I A 45 (P C).

family and it was held that the joinder of the other members as co-plaintiffs after the expiry of the statutory period did not prevent the suit as originally constituted from being in time. It became necessary to determine whether the members newly added were necessary parties and their Lordships held they were not. In the course of their judgment they refer to two decisions of the Madras High Court. The first case, 3 Mad 234,[5] turned on co-ownership of land. Turner, C. J. held that all the owners in such a case must be joined and they could not invest the managers with the right to sue in a representative capacity. Their Lordships say that this proposition, thus broadly stated as to co-ownership, cannot be applied to the managing members of an undivided Hindu family. Then referring to 18 Mad 33,[6] their Lordships observe that the proposition there laid down to the effect that a manager cannot sue without joining all those interested with him, if literally construed, goes too far. The decision of the Judicial Committee cited above render obsolete, 8 Mad 208,[7] and 10 Mad 316.[8] I have refrained from quoting in support of my view the Indian decisions on the point, but to one decision I may refer, where the question has been exhaustively considered by Tek Chand, J. : A I R 1935 Lah 1.[9]

Lastly the question remains, does the fact that subsequent to the suit there was a partition, make any difference? The reason for holding that the members not joined should be held liable is, that they are substantially parties to the suit through the manager, in other words, they are sufficiently represented, though not *eo nomine* parties on the record. It follows from this, that the decree can be executed not only against the parties whose names appear but also against those who must be deemed to be constructive parties. In this view it is immaterial whether the family continues to remain joint or became divided. As Mayne observes :

> All the members of the family, and therefore all their property, divided or undivided, will be liable for debts which have been contracted on behalf of the family by one who was authorized to contract them. (Mayne's Hindu Law, 9th Edn., S. 333.)

In this case the partition was, as already stated, entered into prior to the decree (though long after the commencement of the suit) but that circumstance, as I have held above, makes no difference. I have dealt with the case on the footing that defendant 5 was sued as representing the joint family of which he was the manager; but in addition to being the managing member, he happens to be the father of the respondent. Both the counsel therefore argued the case mainly on the assumption that the decree passed against the father was in respect of his personal debt, which the respondent as his son, was under a pious obligation to discharge. There is a legal duty cast upon the son as upon any other junior co-parcener, to discharge a liability incurred by the father, in his capacity of manager, for the family purposes and it is therefore unnecessary on the facts here to invoke the doctrine of pious obligation. However, as stated above, it was argued that a decree passed against the father alone, though prior to the partition and necessarily therefore in respect of a pre-partition debt, cannot be executed subsequent to the partition, against the co-parcenary property, in the hands of the son. As to the soundness of this position, although it is supported by some authority, I entertain considerable doubt and wish to reserve my opinion upon it for the present. It is then contended — that is the next step in the argument — that this position necessarily leads to the result that S. 53, Civil P. C., is inapplicable where before the father's death the son had become divided. With this view again I am not prepared to agree at present, but on this point also I wish to make no final pronouncement. In the result, the appeal is allowed with costs both here and in the Court below.

Cornish, J.—If the debt be regarded as a joint family debt, I agree with my learned brother's judgment. But I think that the same conclusion can be supported upon the view that the decree debt was personal to defendant 5. The appellant who had an unsatisfied decree against defendant 5 has sought to execute that decree after the judgment-debtor's death against the present respondent as his legal representative. He was, therefore, bound to have recourse

5. Pisharody v. Narayanan Somayajipad, (1881) 3 Mad 234.
6. Alagappa Chetty v. Vellian Chetti, (1895) 18 Mad 33=4 M L J 283.
7. Viraragavamma v. Samudrala, (1882) 8 Mad 208.
8. Guruvappa v. Thimma, (1887) 10 Mad 316.
9. Jai Kishen v. Ram Chand, A I R 1935 Lah 1 =157 I C 739.

to S. 50 of the Code for that purpose. That is the effect of the Full Bench ruling in 59 Mad 461.[10] The liability of the legal representative in respect of such unsatisfied decree is by S. 50 limited to the extent of the property of the deceased judgment-debtor which has come into his hands and has not been duly disposed of by him. That is the sole measure of a legal representative's liability for the debts of the deceased. The share of ancestral property which a son takes in a partition with his father ceases to be property in which the father has any right or proprietorship. Such share becomes the separate property of the son as against his father. But it has been decided by the Full Bench in 51 Mad 361[11] that the liability of the son under Hindu law for a debt incurred by his father continues notwithstanding a later partition between them. The creditor can enforce that liability against the son. The share, however, which a son has taken in a partition with the father is certainly not property of the father which after his death forms part of the father's estate in the hands of the son. But then comes the special provision of S. 53, which says that, for the purpose of S. 50, property in the hands of a son, which is liable under Hindu law for the payment of a debt of the deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come to the hands of the son as his legal representative. A fiction is introduced. As Cave, J. observed in 60 L J Q B 379[12]:

> When you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing nevertheless, for the purposes of the Act, it is to be deemed to be that thing.

Apart from S. 53, a Hindu son could not be made liable in execution as his father's legal representative in respect of property which was not property in which the father had any right or title at the time of his death. The language of the section seems to me sufficiently wide to include a liability incurred by the father which is enforceable against property in the hands of his son, whether the liability was incurred by the father in his capacity of manager or personally. In both cases it is the Hindu law which attaches to the property this liability.

In 14 Pat 732,[13] the view taken by one of the learned Judges, Agarwala, J. is that S. 53 is intended only to deal with the case of a joint Hindu family and to have no application to a separated Hindu family. As matter of history it is known that the section was introduced to set at rest a question upon which there had been a divergence of opinion in the Courts concerning the right of a decree-holder to execute the decree after his judgment-debtor's death against ancestral property which had passed by survivorship to the judgment-debtor's son. The state of the law previous to an amendment may be considered in the interpretation of the amending enactment, and it is permissible to use this knowledge for the purpose of ascertaining the remedy or alteration which the Legislature intended. But it is not a rule of construction that the language of an amending or new provision is to be limited to the particular matter intended to be altered if, in the ordinary and natural sense of the words employed, the enactment is capable of a wider application.

I think that S. 53 covers a case, such as the present, where there is a decree against the father, in respect of a pre-partition debt binding on the share of property allotted to the son in the partition. In such circumstances, for the purpose of S. 50, the son is to be deemed to be the legal representative of his deceased father in respect of the share taken in the partition by the son. This is no hardship to the son. It is merely a matter of procedure how the creditor shall enforce his right of making him liable for the father's debt. It has been held that in the execution proceedings, though the fact of the debt is not open to dispute, the character of the debt and its bearing upon the son's obligation to pay are matters which can be challenged as questions arising in the execution. Further, under S. 47 (3) the son can raise the question whether he is a legal representative for the purpose of S. 50. And if the debt is shown to be of such a character that the son is relieved of his obligation, the condition required by S. 53 to

10. Kanchamali Pathar v. Shahaji Rajah Sahib, A I R 1936 Mad 205=162 I C 156=59 Mad 461=70 M L J 162 (F B).
11. Subramania Iyer v. Sabapathy Iyer, A I R 1928 Mad 657=110 I C 141=51 Mad 361=54 M L J 726 (F B).
12. Queen v. Norfolk County Council, (1892) 60 L J Q B 379=65 L T 222=56 J P 7.
13. Atul Krishna Roy v. Lala Nandanji, A I R 1935 Pat 275=157 I C 53=14 Pat 732=16 P L T 393 (F B).

his being fixed with the liability of a legal representative will be wanting.

On the question whether the debt in the present case was a debt incurred by the father prior to the partition, I am content to accept what my brother Venkatasubba Rao, J. has stated in 21 M L W 606,[14] that the word in the texts which is translated 'debt' has a wider significance than a present obligation to pay a liquidated sum of money, which is the ordinary meaning of the word. It would include a liability for mesne profits incurred by the father before partition, although the actual liability was not determined in a suit until after the partition. It will be a pre-partition debt in the sense in which the word 'debt' is used in the texts. For these reasons I think the civil miscellaneous appeal should succeed.

Venkataramana Rao, J.—I agree that this appeal should be allowed. The facts are fully stated in the judgment of my learned brother Venkatasubba Rao, J. and it is unnecessary to re-state them. I shall content myself with stating a few facts which are necessary for the disposal of the point on which I seek to rest my decision. At all material times in this litigation defendant 5 and his son, the respondent in this appeal, were members of an undivided Hindu family. The property to which the present claim relates was purchased by defendant 5 for and on behalf of the joint family which at that time consisted of defendant 5 and defendants 6 and 7, his then undivided sons by the first wife. It was on the date of the acquisition subject to a mortgage. Subsequent to the purchase the mortgagee brought a suit to enforce the mortgage impleading defendant 5 as a purchaser of the equity of redemption. Defendant 5 represented his family in that litigation. There was a decree for sale and in execution of the decree the mortgagee purchased the property and the present suit has been instituted based on that purchase to recover possession of the property and for mesne profits in respect thereof. The plaintiffs impleaded not only defendant 5 but also his sons defendants 6 and 7. On the plea raised by defendants 6 and 7 that they ceased to have any interest in the suit properties by virtue of a partition effected in the family in and by which the suit properties fell to the share of defendant 5, they were exonerated from the suit. At the said partition defendant 5 obtained the said properties for himself and his son, the present respondent, who continued to be members of an undivided Hindu family. On 21st December 1925, the suit was dismissed and there was an appeal against the said decree to the High Court. The High Court pronounced judgment on 3rd May 1933, decreeing possession to the plaintiffs and directing the ascertainment of mesne profits, and a decree for mesne profits was ultimately passed on 3rd April 1935. Two months later defendant 5 died and in February 1936 the present application was filed to recover the amount by sale of the properties in the hands of the present respondent. It was resisted by him on the ground that during the pendency of the appeal there was a partition between him and his father in and by which the suit properties fell to the share of the father and by reason of the said partition the properties in his hands could not be rendered liable in execution on the basis of a decree obtained against his father alone. The lower Court gave effect to his contention.

It is contended in appeal that by virtue of S. 53, Civil P.C. the present respondent can be rendered liable in execution of a decree against the father in spite of the partition. It seems to me unnecessary to go into this question on the facts of this particular case. A father in a joint Hindu family, apart from certain rights which he gets by virtue of his position as a father in Hindu law, is also the head and manager of the joint family. As pointed out by their Lordships of the Privy Council in *Suraj Bunsikoer's case* in 5 Cal 148[15] at p. 165, the father is in all cases naturally and in the case of infant sons necessarily the manager of the joint family estate. By virtue of such position as manager, the father has got the power to represent the family in all transactions relating to the family. He can sue and be sued as representative of his family. That a manager can represent the family in litigation has never been doubted and has been laid down as pointed out in 35 Mad 681,[16] from the earliest times by the Privy Council. Where the suit relates to a joint family property and the person

14. Ramasubramania v. Sivakami Ammal, A I R 1925 Mad 841=90 I C 165=21 M L W 606.

15. Suraj Bunsikoer v. Sheo Prasad, (1880) 5 Cal 148=6 I A 88=4 C L R 226=4 Sar 1 (P C).

16. Kuttayan v. Mammanna Rowthan, (1912) 35 Mad 681=18 I C 195.

sued is either the father or the eldest member the accredited head of the family, it must be presumed that he was sued as representing his family and he need not be described as such in the pleadings, nor should the decree be specifically passed against him as such. In 6 I A 233=5 C L R 477[17] one Mosahab was sued as the heir of his grandfather Nath Dass for recovery of about Rs. 39,000 on account of the rents of a certain Mouzah Ramnugger and it is stated that Nath Dass had taken a lease of that from 1847-1854, and a decree was passed to be recoverable from the property left by the deceased Nath Dass. In execution of the said decree, Mouzah Muddunpore which belonged to the joint family was sold. In the suit Chooman, an undivided brother of Mosahab, was not joined. The question arose as to the validity of the execution sale and how far it is binding on both the brothers or either of them. Their Lordships of the Judicial Committee held the sale to be valid and binding against both, and observed thus :

> Acting on the principle which follows from their finding that this family was joint, it must be assumed that Mosahab Dass is sued as a representative of the family and that it must further be assumed that Nath Dass in taking the lease of the Mouzah here referred to, Ramnugger, in respect of which the rent was due must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from the family ..... Looking to the substance of the case, this decree is a decree against the representative of the family in respect of a family debt and that it is one which could be properly executed against the joint property of the family, and that Muddunpore was a part of that joint property.

This decision clearly lays down that where a decree has been obtained against the manager as representative of the joint family in respect of a joint family liability it will be binding on his undivided brothers and the entire joint family property can be taken in execution though the undivided brother was not made a party to the suit. This principle would *a fortiori* apply to the case of a father and son. I think it is unnecessary to refer to the other Privy Council decisions as they have been already dealt with at length by my learned brother Venkatasubba Rao, J. in his judgment. Therefore, where a father or other manager is sued as a representative of a family, the other members of the family must be held to be substantially parties to the suit through such manager. The fact that they are not parties *eo nomine* will not render them any the less parties to the suit. It was on this principle held that where a manager dies during the pendency of the suit or after decree, the person who succeeds him as manager can be brought on the record and the other members of the family need not be made parties. A judgment against a person sued in a representative character is a judgment against every individual member covered by the representation and therefore the bar of res judicata is held to apply to a member of a family not a party *eo nomine* to a litigation represented by its manager : *vide* 51 Bom 450.[3] Once the liability is declared a family liability, every item of the joint family property is bound to satisfy that liability; the question of division or non-division hardly arises.

The principle of Hindu law is that members who are united at the time a joint family liability is incurred, are not absolved from their liability by the fact that they became subsequently divided : *vide* 22 Mad 166[18] at pp. 170 and 171. So far as a creditor is concerned, he is entitled to have recourse to every item of the joint family property so long as it is in the hands of the persons who are under the law liable for his debt. When they must be held to be parties to the suit, it is immaterial what the character of the property in their hands is, whether it is still undivided property or has become separate property by division, In this case, at the time of the acquisition, at the time of the first partition, at the date of the institution of the suit and at the date of the institution of the appeal, defendant 5 was sued as a representative of his family and he effectively represented the family and thus the present respondent. The question is: did that representation cease by virtue of the partition before the date of the decree in the High Court? The suit having been properly constituted, any severance of status between several members of the family would not divest the representative character of the manager therein till the other members choose to disaffirm it; he was entitled to carry on the litigation for and on behalf of the respondent and can be held accountable in respect thereof. The estate

17. Bissassur Lall Sahoo v. Luchmesur Singh, (1880) 5 C L R 477=6 I A 233 (P C).

18. Chelamayya v. Varadayya, (1899) 22 Mad 166=9 M L J 3.

of a person dying during the pendency of a suit was held to be fully represented by one of his several heirs brought on the record in his place. but only for that purpose, much more so in respect of a transaction concerning the joint family, the manager who is empowered by law to represent the other members who are interested therein must be deemed to continue to represent them till the transaction is completed as until then the joint interest in the transaction cannot be said to have ceased. But in this case it seems to me it would not lie in the mouth of the present respondent to deny the representative character of his father. At the date of the partition he must be deemed to have been quite aware of the pending litigation and when the suit property was assigned to the share of the father he must be deemed to have also been clothed with the necessary power to defend the appeal in regard thereto. If the present respondent thought that his father should not be allowed to represent him, it was his duty to have come on the record. Having failed to do so, he is precluded from now asserting that defendant 5 no longer represented him. Therefore the property in the hands of the present respondent is liable to be taken in execution of the decree for mesne profits passed in this case.

In this view it seems to me the argument based on S. 53, Civil P. C. does not arise. I may add that I also share the doubts entertained by my learned brother Venkatasubba Rao, J. in regard to the correctness of the decision which takes the view that in respect of a decree obtained prior to partition against a father alone execution cannot be levied subsequent thereto against the co-parcenary property in the hands of the son. I agree in the order proposed by my learned brother Venkatasubba Rao, J.

C.R.K./K.B. *Appeal allowed.*

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* * A. I. R. 1937 Madras 618

FULL BENCH

BEASLEY, C. J., MOCKETT AND HORWILL, JJ.

Athappa Goundan and ~~*others*~~—Accused.

v.

Emperor.

Referred Trial No. 4 of 1937, Criminal Appeals Nos. 729 and 730 of 1936, Decided on 16th March 1937, from order of Sess. Judge, Coimbatore, D/- 25-11-1936.

*** * (a) Evidence Act (1872), S. 27—Before statement is given in evidence it must be shown that fact discovered is relevant fact and that object is material object—Fact can be made relevant by evidence aliunde — Absence of evidence aliunde — Accused's statement connecting fact discovered with offence and making it relevant—Statement, even if it amounts to confession of offence, is admissible.**

The fact deposed to and the fact discovered obviously must be relevant and the fact or thing discovered can only be relevant if it is connected with the offence of which the accused is charged; and the confession in S. 27, Evidence Act, is a confession of the offence charged ~~and not of~~ anything else. Before the statement is given in evidence it must be shown that the fact discovered is a relevant fact and that the object is a material object. In cases where the things discovered as a result of the accused's information are proved to be property stolen from a person and the subject of the charges or worn by the victim of a murder just before the murder is committed, the property so discovered is directly connected with the crime and the fact thereby discovered relevant. It can be made relevant by evidence aliunde, and it can be made relevant by the statement of the accused itself. If there is no evidence aliunde, then the police will not be set in motion unless the fact discovered is connected with the case under investigation and if it is the accused's statement which connects the fact discovered with the offence and makes it relevant, then even though that statement amounts to a confession of the offence, it must be admitted because it is that that has led directly to the discovery of the fact: *Case law discussed.* [P 628 C 1; P 629 C 1]

Held: that the earlier part of the statement in this case (*see* p. 619 Col. 2) that the accused and *G* killed the victim by gagging his mouth with a cloth and throttling his neck with hands and also by putting a rope and pressing it connected the rope and the cloth gag directly with the offence and hence was admissible under S. 27.

[P 619 C 2; P 629 C 1]

Held also: that the statement that the bottle would be found in the dung heap etc., was not a confession but it constituted information leading up to the discovery of a material fact. [P 629 C 1]

*** (b) Evidence Act (1872), Ss. 30 and 27—S. 30 does not restrict confession to one recorded before Magistrate—Confession made under S. 27 can be taken into consideration against other accused tried jointly for same offence.**

There is nothing in S. 30, Evidence Act, which restricts the confession to one recorded before a Magistrate. On the other hand, Illus. A to S. 30 suggests that the section contemplates 'the taking into consideration' of a confession to an ordinary witness. It follows, therefore, that all confessions such as those under S. 27 when the accused are being tried jointly for the same offence when made by one of them affecting himself and another or others of the accused, may be taken into consideration as against the other or others under S. 30, Evidence Act: *31 Mad 127*; *A I R 1926 Bom 513* and *A I R 1931 Mad 177*, *Rel. on.* [P 629 C 2]

(c) Evidence Act (1872), S. 27 — Practice—Statements provable under S. 27 should be recorded by police in first person and should not be paraphrased—It is then for trial Judge to decide how much of such record of statements is admissible.

Statements made by an accused person which are or may be provable under S. 27, Evidence Act, should be clearly and carefully recorded by the Police Officers concerned. They should be recorded in the first person, that is to say as far as possible in the actual words of the accused. They should not be paraphrased. Obviously, if what a man says is to be used in evidence, his own words should be used and not a rendering into the third person of the purport of his statement. With such a record of the statement before him, it will then be for the trial Judge to decide how much of it is admissible under the section.

[P 630 C 1]

G. Chandrasekhara Sastry and *N. Somasundaram*—for Accused.

Public Prosecutor—for the Crown.

Order of reference.

Mockett and Horwill, JJ.—The three accused have been convicted of the murder of Sennimalai Goundan, the father of accused 3, by strangling him. Accused 1 had been sentenced to death and accused 2 and 3 to transportation for life. Accused 3 is the wife of P. W. 13. These two lived with the deceased till about a year prior to the latter's death when P. W. 13 left the house because he says the deceased and himself quarrelled. Accused 3 remained with her father, the deceased. P. W. 13 was declared to be a hostile witness at the trial but there is other evidence that P. W. 13 left the house because of accused 3's intimacy with accused 1. It is also stated that the deceased and accused 3 were quarrelling because of the frequency of accused 1's visit to accused 3. Accused 2 is an associate of accused 1. On the morning of 26th March 1936, it is in evidence for the prosecution that accused 3 was heard to cry out that her father was dead. A number of prosecution witnesses thereupon went to the deceased's house. The preponderance of the evidence is that the deceased was lying dead in or near the thatched house closely adjoining the deceased's tiled house. The exact position of his body is not material for the purpose of this reference, but a consideration of that aspect of the matter may be material for a decision on the facts. The medical evidence is quite definite that the deceased had been strangled. An inquest was held on 27th March, from 6 to 9 p. m. and it was then that the witnesses for the prosecution were examined by the investigating officer. The prosecution witnesses with the exception of P. W. 13 who, as stated above, has been declared to be hostile, agree that no explanation for the death of the deceased was suggested by accused 3. At the Sessions, but not before the Magistrate, accused 3 stated that when she woke up she found her father hanging by a rope, that she raised an outcry, that the neighbours came and cut the rope, laid her father on the cot and carried the corpse to the thatched shed. There is no evidence for the prosecution supporting this belated statement. The medical evidence on the contrary is emphatic that the deceased died by strangulation and not by hanging. The evidence for the prosecution may be placed in the following categories : (1) the unfriendly relations between the deceased and accused 3 over the latter's friendship with accused 1 and there is further evidence that accused 3 was anxious lest the deceased should transfer his property to a third person, (2) that on the night preceding the morning on which the body was discovered accused 1 and 2 were seen to go to the house of the deceased and were admitted by accused 3. This was at about 'pattial time'. They were later seen by several witnesses whispering together in the deceased's compound where the deceased was sleeping on a cot. Later that evening accused 1 and 2 were seen to leave the compound, accused 1 carrying a bottle of toddy and both intoxicated, and (3) on 29th at 6 a. m. it is in evidence that accused 1 made a statement, the purport of which is stated in Ex. G. He said :

> That at about 11 p. m. on the night of 26th March 1936, himself and Gurunatha Goundan, son of Kanda Goundan of Erangattur, together killed Sennimalai Goundan alias Sottayan by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it . . . . . that that night . . . . they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Royan of Kallippatti who got it from some other place . . . . that a small quantity was left over in one bottle only that (they) buried (1) the empty bottle, (2) a rope and the cloth gag in a dunghill next to the cattle-shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallippatti and that he would go and take them and produce them. This is known to us.

Subsequently the Sub-Inspector took accused 1 together with the Village Munsif, P. W. 15, to the dunghill and the accused

took M. O. 1, a rope, M. O. 6, a cloth, and M. O. 7 an empty bottle. Accused 1 then took the Sub-Inspector to the compound of the chatram and from near a log of wood dug up and produced M. O. 7.a, another empty bottle. From the above it will be seen that the admissibility in evidence of the statement in Ex. G is of the utmost importance in this case. Mr. G. Chandrasekhara Sastri for the accused has argued that the only portion of this statement admissible in evidence is the portion beginning with the words "they buried (1) the empty bottle" to the end. The Public Prosecutor has contended that the whole of this statement is admissible under S. 27, Evidence Act. Many authorities have been cited before us from which it is evident that the position is far from clear in this Presidency. 12 Mad 153[1] is relied on as authority in support of his contention. We may however observe that the matter is very shortly discussed in that case. 50 Mad 274,[2] a judgment of Spencer, Offg. C. J. given on a difference of opinion between Devadoss and Wallace, JJ. does not appear to be in accord with 12 Mad 153.[1] The matter has been fully discussed in a Division Bench of this High Court (Beasley, C. J. and Sundaram Chetty, J.) Cr. App. No. 38 of 1931: R. T. No. 11 of 1931, a report of which appears in 4 M Cr C 250.[3] In that case the learned Judges appear to be in complete accord with 50 Mad 274,[2] especially with regard to the following observations of Spencer, Offg. C. J. at p. 295:

> But if the accused did use the words, then they are parts of the sentence in which he gave information which led to the discovery of stolen property, and parts of sentences cannot be excluded so as to have the effect of making the whole statement incomplete and less intelligible.

The learned Judges lay down principles in this case which are in agreement with 50 Mad 274,[2] but in the result the Court decided that the confessional statement

> I have thrown into the Panayadi Corani the aruval with which I cut Seethai. I have buried in the hollow of a cut palmyra tree the ornaments which I took from her body

should be admitted eliminating the statement that it was the aruval with which Seethai was cut and that the ornaments were those which he took from her body.

It will thus be seen that in Madras there appears to be a definite variance in opinion —or at least considerable uncertainty—as to the admissibility of statements under S. 27. In other Presidencies it will be seen from the case law that opinion is by no means uniform. For instance, 10 Lah 283[4] (a Bench of seven Judges) and 45 Cal 557,[5] are directly opposed to 6 All 509[6] and 6 Pat 747.[7] The Bombay view appears to be in agreement with Lahore and Calcutta: *see* 56 Bom 172.[8] A I R 1936 Nag 200[9] follows 50 Mad 274.[2] The result of this position has become obvious for sometime past in the handling of statements under S. 27, Evidence Act, by the Sessions Courts of this Presidency. With certain exceptions there appear to be broadly speaking two schools of thought: (1) to exclude any statement at all but to record merely the fact that the accused showed the articles to the police, or (2) to record that the accused stated that the article was in a certain place, e. g., "I have put the aruval in the well". This procedure appears to be due to a commonly held view that the information in consequence of which the incriminating fact has been discovered must be limited to so much as would enable the police to find the incriminating object. Forde, J. in his dissenting judgment in 10 Lah 283[4] at p. 303, comments on this position. In view of the importance of the question which has arisen we have not heard full arguments as to the admissibility of the above statement and have not decided it but instead refer it to a Full Bench. A further point of law has arisen in this case on which an authoritative ruling is most desirable. It will be observed that in the statement made by accused 1 he implicates accused 2. It has been argued that a confession under S. 27 is not a confession such as is contemplated by S. 30,

1. Queen-Empress v. Coomar Sahib, (1889) 12 Mad 153=2 Weir 738.
2. Sogaimuthu Padayachi v. Emperor, A I R 1926 Mad 638=93 I C 42=27 Cr L J 394=50 Mad 274.
3. *In re* Periyakaruppan, (1931) 4 M Cr C 250.
4. Sukhan v. Emperor, A I R 1929 Lah 344=115 I C 6=30 Cr L J 414=10 Lah 283=30 P L R 197 (F B).
5. Amiruddin Ahmed v. Emperor, A I R 1918 Cal 88=44 I C 321=19 Cr L J 305=45 Cal 557=22 C W N 213=27 C L J 148.
6. Queen-Empress v. Babu Lal, (1884) 6 All 509=1884 A W N 229 (F B).
7. Lalji Dushadh v. Emperor, A I R 1928 Pat 162=106 I C 698=6 Pat 747=29 Cr L J 106.
8. Ganu Chandra v. Emperor, A I R 1932 Bom 286=1932 Cr C 398=137 I C 174=33 Cr L J 396=34 Bom L R 303=56 Bom 172.
9. Mt. Janunia Partap Lohar v. Emperor, A I R 1936 Nag 200=1936 Cr C 814=164 I C 964=37 Cr L J 1047=I L R 1936 Nag 78.

Evidence Act, and cannot be taken into consideration against accused 2. We accordingly refer the following matters to a Full Bench: "1. Is the whole or any part of the following statement,

> He said that at about 11 p. m. on the night of 26th March 1936, himself and Gurunatha Goundan, son of Kanda Goundan of Erangattur together killed Sennimalai Goundan alias Sottayan by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it . . . . that that night . . . they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Royan of Kallippatti who got it from some other place . . . . that a small quantity was left over in one bottle only, that . . . . . (they) buried (1) the empty bottle, (2) a rope and the cloth gag in a dunghill next to the cattle shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east to the choultry at Kallippatti and that he would go and take them and produce them. This is known to us.

alleged to have been made by accused 1 admissible against accused 1 under S. 27, Evidence Act, and, if yes, how much of it, and (2) if the answer to No. 1 is in the affirmative, can such statement or any part thereof be 'taken into account' against accused 2 under S. 30, Evidence Act?" We may add that it will be seen from Ex. G, that certain parts have been excised by the learned trial Judge on the ground of inadmissibility and it has not been argued before us that such statements are now admissible. We have however directed that in order that the Full Bench before whom this matter comes may have the opportunity of giving the fullest consideration to this matter the whole of Ex. G shall be typed and added to the record to be placed before the Bench.

OPINION.

Beasley, C. J.—The following questions have been referred to Full Bench, viz.:

> (1) Is the whole or any part of the following statement: "He said that at about 11 p. m. on the night of 26th March 1936 himself and Gurunatha Goundan, son of Kanda Goundan of Erangattur, together killed Sennimalai Goundan alias Sottayan by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it . . . that night . . . they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Royan of Kallippatti who got it from some other place . . . . . that a small quantity was left over in one bottle only, that . . . . . (they) buried (1) the empty bottle, (2) a rope and the cloth gag in a dunghill next to the cattle shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east to the choultry at Kallippatti and that he would go and take them and produce them. This is known to us," alleged to have been made by accused 1 admissible against accused 1 under S. 27, Evidence Act, and if yes, how much of it; and (2) if the answer to No. 1 is in the affirmative can such statements or any part thereof be 'taken into account' against accused 2 under S. 30, Evidence Act?

In the order of reference my learned brothers Mockett and Horwill, JJ., the referring Judges directed that in order that the Full Bench could give the fullest consideration to this matter, the whole of Ex. G which sets out the statement made by accused 1 should be typed and added to the record to be placed before the Bench. This direction has been carried out and the Court translation of Ex. G where it relates to the cloth buried in the dunghill reads as follows: "The cloth which was used for gagging the mouth". The learned counsel for the appellants agree that that is the correct translation. The facts of this case are sufficiently stated in the order of reference and I will therefore proceed to discuss S. 27, Evidence Act, which my learned brothers in their order of reference correctly say has given rise to opinions which from the case law are by no means uniform. That section reads as follows:

> Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police Officer, so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

Divergent opinions have been given by Judges upon how much of statements made by accused persons in the custody of the police in consequence of which facts are thereby discovered can be proved of which the following may be given as examples, namely that the accused has buried the weapon with which he cut or stabbed the deceased in a certain place or has stolen property which he has pledged or disposed of with certain persons, or has with the property stolen done something or has murdered some one and thrown the body into a well, or has buried a weapon, adding with which he stabbed or cut the deceased. Some Judges have taken the view that only such part of the statement as relates to the burial or disposal of the articles can be proved and that the further part of that the article had been used by the person for stabbing or cutting or that the property disposed of or pledged etc., was stolen property must be excluded; other Judges have taken the view that the latter statements can also be proved; and

the cases directly bearing on this question need very careful examination. The first of these is 11 B H C R 242[10] the head-note of which reads as follows :

Under S. 27, Evidence Act, not every statement made by a person accused of any offence while in the custody of a police officer, connected with the production or finding of property is admissible. Those statements only which lead immediately to the discovery of property, and in so far as they lead to such discovery are properly admissible. Whatever be the nature of the fact discovered, that fact must in all cases be itself relevant to the case, and the connexion between it and the statement made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements connected with the one thus made evidence, and thus mediately, but not necessarily or directly connected with the fact discovered are not admissible.

This head-note is taken bodily from the judgment of West, J. on p. 244. In that case, one Lallu disappeared from his village. On a search being made a quantity of human bones and two clothes were found in a field within the limits of the village of Baithal and the three accused were sent for by a Chief Constable on suspicion. One accused produced a bill hook and a knife from a field; another accused produced a stick; and the two showed the scene of murder together, which was also pointed out the next day by another of the accused. In the statement of the facts of the case the words used by the accused whilst in the custody of the police are not set out and therefore I do not know what they were. West, J. however gives an instance of a statement a part of which he says would be inadmissible. He says at p. 244 :

For instance a man says: 'You will find a stick at such and such a place. I killed Rama with it'. A policeman in such a case may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible. If instead of 'you will find', the prisoner had said 'I placed a sword or knife in such a spot', when it was found that too, though it involved an admission of a particular act on the prisoner's part is admissible, because it is the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. But if besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement as it has not furthered, much less caused, the discovery is not admissible.

Further on he says :

The effect is that, although ordinarily a confession of an accused while in custody would be wholly excluded, yet if in the course of such a confession information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be deposed to, though as a whole the statement would constitute a confession which the preceding sections are intended to exclude.

Next is 6 All 509,[6] a decision of a Full Bench. There, the accused gave information to the police to the effect that they had stolen a cow and calf and sold them to a particular person at a particular place. As a result of this information the cow and calf were discovered. It was held that only the statement that the accused had sold the cow and calf to a certain person could be proved under S. 27 but not the statement that the accused had stolen them. But Brodhurst, J. in the course of his judgment expresses his opinion upon the meaning of S. 27, by stating a case where a person was missing and fears were entertained that he had been murdered. The Sub-Inspector on receiving a report about this went to Rampur and on his arrival there and whilst he was standing close to a well one Gobind Kahar came up to him and said: 'I give myself up; I am guilty' and then made a voluntary and full confession stating the particulars of the crime and the reason for committing it and concluded by saying : 'The knife with which I committed the murder is, together with the body, in this well'. The well was thereupon searched and the knife and the body with a knife wound through the heart were found. Brodhurst, J. says that the Sub-Inspector when giving evidence in Court as to the discovery of the corpse and the knife was under the provisions of S. 27 of the Act competent to say that he had searched the well and found the body and a knife owing to Gobind Kahar having given the information 'the knife with which I committed the murder is, together with the body, in this well'. The learned Judge was, it is apparent, taking as an instance an actual case.

It seems difficult to reconcile Brodhurst J.'s opinion with the views of the other Judges forming that Full Bench. They excluded the statement of the accused that they had stolen the cow and the calf. But according to Brodhurst, J. if they had said that the cow and the calf which they stole they sold to Abdul Rahaman, the whole of that statement could have been proved and I am unable to see that it can make any difference because they stated first that they had stolen the cow and the calf and then that

10. Reg. v. Jora Hasji, (1874) 11 B H C R 242.

they had sold them. I will refer to this case again later on. However taking his view, the statement in either shape would have to be admitted. In 11 Cal 635,[11] it was held that S. 27 was not intended to let in a confession generally but only such particular part of it as set the person to whom it was made in motion and led to his ascertaining the fact or facts of which he gave evidence. In that case, the prisoner's statement was that he had robbed Kristo Rishi of Rs. 48 whereof he had spent Rs. 8 and had Rs. 40. Kristo Rishi was the murdered man. Norris, J. said that no facts deposed to were discovered by that statement of the prisoner but this case is cited by learned counsel for appellant 1 in support of his argument because Norris, J. at p. 641 emphatically endorses the observations of Straight, J. in 6 All 509,[6] to which case reference has already been made where he says:

> No judicial officer dealing with such provisions should allow one more word to be deposed to by the police officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. S. 27 was not intended to let in a confession generally but only such particular part of it as set the person to whom it was made in motion and led to his ascertaining the fact or facts of which he gives evidence.

Straight, J.'s observations when applied to the facts of this case are, in my opinion, of greater assistance to the learned Public Prosecutor's argument than the appellants' and I will refer to them again later. The next case is a decision of this High Court which has been relied upon successfully for many years, in support of arguments similar to the appellants', viz., 12 Mad 153,[1] a decision of Muthuswami Iyer and Parker, JJ. They state that the reasonable construction of S. 27 is that in addition to the fact discovered so much of the information as was the immediate cause of its discovery is legal evidence. The information given by the prisoner in that case was that he had deposited the cloths produced with the witnesses who delivered them up on demand and this information they held was the proximate cause of the discovery of the cloths and was admissible evidence. The Bench then said:

> If he had proceeded further and stated that they were cloths which he stole on the day mentioned in the charge from the complainant, that statement would not be evidence, for it would be only introductory to a further act on his part, viz., that of leaving the cloths with the witnesses and on that ground it would not be the immediate cause of or the necessary preliminary to the fact discovered.

This opinion was clearly obiter because the prisoner had not made any such further statement and it was not necessary to consider what would have been the position had he done so. In 26 M L J 352,[12] I think that Sadasiva Iyer, J. had that case in mind when he stated that he was bound by authority and that but for it he should himself have held that any statement which forms a simple connected narrative leading naturally to the discovery of the stolen property is admissible in evidence and the only statements which are patently irrelevant to the discovery should be excluded. The statement made by accused 1 in that case was that he and accused 2 stole the missing money and that the stolen money would be found in a heap of rubbish close to the house. In view of what he considered binding authority he held that the earlier part of the statement was inadmissible. Another case is 14 Bom 260,[13] a Full Bench decision. There the accused was charged with dishonestly receiving stolen property. In the course of the police investigation he was asked by the police where the property was. He replied that he had buried it in the fields. He then took the police to the spot where the property was concealed and with his own hands disinterred the earthern pot in which the property was kept. He made a second statement when pointing out the spot to the effect that he had buried the property there. It was held that his statement that he had buried the property in the fields was admissible in evidence under S. 27, Evidence Act, as it set the police in motion and led to the discovery of the property and the view taken by this High Court in 12 Mad 153,[1] was followed. The Court ruled out the statement that he had 'kept' the property because it was not necessarily connected with the fact discovered. In 45 Cal 557[5] the prisoners appear to have made long statements although what they said is nowhere stated in the judgment. As a result of the statements, facts were discovered.

11. Adu Shikdur v. Queen-Empress, (1885) 11 Cal 635.

12. Manjunathaya v. Emperor, A I R 1914 Mad 61=24 I C 845=15 Cr L J 533=26 M L J 352.

13. Queen-Empress v. Nana, (1890) 14 Bom 260 (F B).

The statements set out the whole history of the investigation and it was held as in the other cases that only the particular information which led to the discovery could be proved and Shamsul Huda, J. observes:

> If therefore an accused person were to state to a police officer that he killed *A* with a knife and concealed the dead body at a particular place, all that is admissible is that the information that he had concealed the dead body in that place but the further information that he himself had killed *A* is not admissible under S. 27.

10 Lah 283[4] is a decision of a Full Bench of seven Judges. The question there was:

> *A* is being tried under S. 302, I. P. C., for having committed the murder of *B* who is proved to have suddenly disappeared from his house and whose dead body was recovered from a well two days later. At the time of his disappearance *B* was wearing certain ornaments, but these ornaments were not found on his body at the time of its recovery from the well. During the investigation *A* is alleged to have made a statement to the police in these terms: "I had removed the karas, had pushed the boy into the well and had pledged the karas with Allah Din", and in consequence of the information so received the karas were recovered from Allah Din which were identified as those worn by *B* at the time of his disappearance. Is the whole or any part of the aforesaid statement admissible against *A* under S. 27, Evidence Act, and if so, how much of it?

The Full Bench held (Fforde and Jai Lal, JJ. dissenting), that the statement by the accused that he had pledged with Allah Din the karas subsequently recovered from the latter was admissible under S. 27, Evidence Act, but that the rest of the incriminating statement could not be received in evidence. Shadi Lal, C. J. says that the fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing or it may be a material thing in relation to the place or the locality where it is found and that taking the case before them as an illustration the fact discovered was not the karas simpliciter but the karas being found in the possession of Allah Din and that it was necessary to draw that distinction because the amount of the information admissible is limited by the precise fact discovered thereby or in other words the information to be admitted must relate distinctly, not the karas, but to the karas in relation to their possession by Allah Din.

I must observe that the importance of the last named is that the karas in the possession of Allah Din were proved to be the karas which the boy was wearing when he was last seen alive. Therefore the information given by the accused that he had pledged them with Allah Din was by itself sufficient to make the subsequent discovery of them in the possession of Allah Din a highly relevant fact and indeed a very damaging one to him. Had the karas not been shown to have been those worn by the deceased, then in my view the relevant fact would have been discovered in consequence of the information given by the accused limited to that statement and there would be no connexion at all between the karas and the offence charged; and this to my mind is a very important point because it appears to me that in every case which has been cited where only such part of the information as relates to the disposal of the articles has been admitted the articles themselves were the stolen articles or clothes or jewels worn by the deceased or the dead body of the victim himself and were thus definitely connected with the offence charged and needed the inclusion of no further matter in the information in order to make them material objects because not only must the information relate distinctly to the fact discovered but the fact discovered must be a relevant fact. Shadi Lal, C. J. agrees that the judgments of the High Courts in India which were cited did not disclose a complete unanimity as to the extent of the information admissible in evidence under S. 27, but he takes the view that the consensus of judicial opinion however is in favour of the view that the section allows only so much of the information as leads directly and immediately to the discovery of a fact but that the portion of the information which merely explains the material thing discovered cannot be proved. In dealing with those opinions he says on p. 296:

> Suppose a prisoner on being asked about the weapon of offence says 'I buried a hatchet in my field. I killed *A* with it'. Now, it is indisputable that the recovery of a hatchet from the field renders only the first part of the statement admissible and that the second part cannot be given in evidence. But if the police officer converts the two sentences into one and represents the accused as saying, "the hatchet with which I killed *A* I buried in my field", then according to those judgments, the whole of the above statement would be admissible.

He, however, does not agree that it is. In the course of his judgment he refers to a Madras decision, namely, 50 Mad 274[2] where this High Court admitted in evidence the statement of the accused that 'the properties stolen from the mutt were

'buried by me and others in the Cauvery bank'. He expresses the doubt whether the portion of the statement 'stolen from the mutt' could be admitted on the strength of the decision in 12 Mad 153,[1] already referred to. I will refer to 50 Mad 274[2] later on. Both the dissenting Judges, Fforde and Jai Lal, JJ., definitely take the opposite view and the reasons stated by them for doing so, with all respect to the other members of the Full Bench seem to me to be correct. Fforde, J. says that the fact, i. e., the 'thing' must be connected with the crime in question in order to come within the rule of relevancy laid down in S. 5 of the Act; and this is in my view obviously correct and no one has disputed that the fact must be a relevant fact. He observes quite rightly that in all the cases which have come before the Courts the 'fact discovered' has been the body of the murdered person, the instrument of the crime, the spoils of the robbery or some other incriminating object connected with the crime under consideration and that it follows that before a confessional statement made by a person accused of an offence who is in the custody of a police officer may be proved against him, two conditions must be observed, firstly, that some incriminating things must be proved to have been found as the direct result of the information supplied by the accused and, secondly, it must be confined to that portion which refers exclusively to the thing found and that the rule may be expressed in this way; when any incriminating object is proved to have been found as the result of information given by a person accused of any offence in the custody of a police officer that portion of the information which has led to the object being found may be proved—provided it refers clearly to that object, even though the information provable is self-incriminating. On p. 304, Fforde, J. says :

> What is it which sets the police in motion and leads to the discovery of property ? Usually, it is the statement by the accused that he has hidden in some place some object connected with the crime. Take an actual case. The accused says : "The chhavi with which I killed *A* is hidden under a heap of manure in my haveli". What part of this information must be deemed to have set the police in motion and led to the finding of the chhavi ? Surely, not merely the words 'the chhavi under a heap of manure in my haveli'. By themselves those words would be meaningless. They would hardly be likely to set the police in motion. Is it not the connexion of the chhavi with the murder under investigation which set the police in motion and led to the discovery ? If the words 'with which I killed *A*' can in this sense be said to have led to the discovery of the chhavi, then the whole of that piece of information may be proved—though it amounts to a confession, as the words certainly relate distinctly to the fact discovered, i. e., to the chhavi.

He refers to 50 Mad 274[2] and agrees with the opinion of Spencer and Devadoss, JJ. Jai Lal, J. in his judgment on p. 324 makes observations also with which I entirely agree, viz. :

> I would put the case in another form. The object of the prosecution in proving the information is to show, not that a certain thing was found in a particular place, but that the accused had the knowledge—invariably guilty knowledge, and in some cases possession of a thing which was connected with the crime. The location of the thing is not so very material. It may be with *A*, *B* or *C* or may be in one place or the other. The important consideration is always the thing discovered and its connexion with the crime. Divorced from the thing, therefore, the information becomes both useless and irrelevant. I will illustrate what I mean by giving an instance: supposing the prosecution merely proves that a certain thing was found in a particular place as a result of information supplied by the accused but fails to prove connexion of the thing so discovered with the crime, is the evidence relevant in the case ? I think not. The attempt of the prosecution therefore always is to establish the connexion of the thing discovered with the crime and therefore it is necessary for them to prove as a first step that the particular thing was discovered as a result of the information and then to prove its connexion with the crime. Another way of looking at the same topic is this : supposing the witness in one case says "as a result of information given by accused I recovered some karas from Allah Din", and in another case he says "as a result of information given by the accused I recovered karas which the deceased had on his person when he was last seen alive," which of these two statements is relevant to the case ? I have no hesitation in saying that it is the last statement which is relevant or has any bearing on the case. It is therefore not so much the reference to the place where certain property is found that is the important part of the information but it is the incriminating thing recovered on which stress is always laid. Without a description of the thing discovered or its connexion with the crime, whether this is done by means of the statement of the accused or by other evidence, the information is of no value and in practice the police never bothers to discover the thing unless the accused by his statement has connected it with the crime. What has therefore led to the discovery of the article is the information about its connexion with the crime and its location.

Before dealing with 50 Mad 274,[2] 26 M L J 352[12] and 4 M Cr C 250,[3] I must refer to another decision of the Bombay High Court, a decision of the Calcutta High Court and a decision of the Patna High Court which support the appellant's contention. The first case is 56 Bom 172.[8]

There each of the accused gave information to the police that he would point out the place where his share of the property stolen in a dacoity case was buried and offered to produce the same. The Court held that the words "his share of the property" and "stolen in the Dahiwadi dacoity" must be excluded on the ground that they were not necessarily connected with and did not distinctly relate to the discovery of the property. Therefore the only part of the information admitted was that the accused would point out the places where the property was buried and that they offered to produce the same; 34 C W N 106[14] is to the same effect. In 10 Pat 153[15] the person who was accused of murder made a statement to the effect that he and two others had hid the corpse of the victim in a mine into which they had descended by means of a wire rope hanging from a palas tree at the entrance to the incline, and in consequence of the information so received the body and clothes of the deceased were discovered. It was held that the whole of the statement that the prisoner himself had put the body into the incline was receivable in evidence under S. 27, Evidence Act. There was no statement by the prisoner that the body was that of a man murdered by him or that he had murdered the man and hidden the corpse in the mine. Since it is generally accepted by all High Courts that the statement of the accused that he hid or buried material objects is admissible under S. 27 where the material objects are discovered in consequence of his statement and it is not contested here by the appellants that such a statement is admissible, this case is not of much assistance; but 10 Lah 283[4] is quoted with approval in the judgment and to that extent it does support the appellants' case, though Scroope, J. on p. 159 does say :

> On the other hand, we cannot garble the statement made to the police so as to render it absolutely innocuous to the prisoner and remove it entirely from the nature of a confessional statement.

I now come to the Madras cases. I have already referred to 12 Mad 153[1] and also to 26 M L J 352[12] where Sadasiva Ayyar, J. clearly expresses a view contrary to that in 12 Mad 153[1] and would admit a statement by the accused, "I committed this theft and I have concealed the stolen property in such and such a place", but in view of binding authority he is forced to hold otherwise. He did however admit

> that portion signifying that the property stolen from the dabbi, about which the police were then making an investigation, will be found in the rubbish heap.

Then there is the recent case of 50 Mad 274,[2] which was decided by Spencer, Offg. C. J., on a difference of opinion between Devadoss and Wallace, JJ. He held agreeing with Devadoss, J., that if an accused makes a statement under S. 27, Evidence Act, the whole of the statement which leads to the discovery of the stolen article is admissible and it should not be cut up so as to confine it only to the actual words which the accused may use to express the fact that he had hidden the properties. Wallace, J. took the contrary view and held that only the statement by the accused that he had hidden the properties should be admitted. The accused in that case were charged with murder under S. 302, I. P. C., and the information given by the accused was that "the properties stolen from the mutt were buried by me and others in the Cauvery Bank". The case for the Crown was that this property was worn by or on the person of the victim who was the thambiran of the mutt. The part of the statement in controversy was "stolen from the mutt". Devadoss, J. in his judgment cites a number of decisions bearing on the point and subjects them to a very careful examination and amongst others refers to the observations of Brodhurst, J. in 6 All 509[6] stating on p. 281 :

> As mentioned by Brodhurst, J., in 6 All 509[6] if the accused says 'the revolver with which I shot the deceased is in this well, can it be said that that statement is inadmissible'? If the accused says : 'I have hidden the stolen properties in this place' the whole statement must be taken together. If he does not make a statement that the properties are stolen there is no confession at all. S. 27, Evidence Act, does contemplate a confession.

The appellants' contention in that case was that the statement of the accused that the properties were in a particular place was admissible but that any statement which carried an explanation as to how the properties came to be there was inadmissible in evidence as well as

14. Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhajoo Majhi, A I R 1930 Cal 291=1930 Cr C 379=125 I C 733=57 Cal 1062=34 C W N 106.

15. Sonaram Mahton v. Emperor, A I R 1931 Pat 145=1931 Cr C 385=131 I C 797=32 Cr L J 792=12 P L T 481=10 Pat 153.

the statement that they were stolen properties; in other words, only the statement that the property was buried in the Cauvery bank was admissible, and reliance was placed upon 12 Mad 153[1] and the Full Bench decision in 6 All 509.[6] Neither of these cases however supported the appellants' contention there that the statement that the accused had buried the articles was not receivable in evidence though certainly they supported the contention that the statement that the articles were stolen must be excluded. Spencer, J., in his judgment adheres to the view expressed by him in 14 M L W 418[16] that

> the statement of an accused that he had in his possession certain stolen property is admissible in evidence even though he himself produced the property.

Upon this point he agrees with Devadoss, J., and he also agreed that if an accused makes a statement which is admissible under S. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and that sentence should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he has hidden the properties. The opinion of Devadoss, J., was quoted with approval by Fforde, J., in 10 Lah 283.[4] Next there is the case cited by my learned brothers, Mockett and Horwill, JJ. in their order of reference, namely, *In re Periyakaruppan* a decision of myself and Sundaram Chetty, J. reported in 4 M Cr C 250.[3] There the prisoner made a statement to the police during investigation that he threw into a channel the aruval with which he cut the deceased and buried in the hollow of a tree the ornaments worn by the deceased. He also showed the places to the police wherefrom they were taken out. In this case again there was a strenuous argument on the appellant's behalf as in 50 Mad 274,[2] that the statement by the accused that he threw into the channel the aruval and buried the ornaments in the hollow of the tree should be excluded as being inadmissible; but we say:

> It is quite clear that that part of the statement of the appellant where he says that he had hidden the aruval and buried the other ornaments is admissible in evidence against him. Otherwise his evidence is incomplete and may even be unintelligible.

We did not admit the statement that it was the aruval with which the accused cut, nor the statement that the ornaments were those which he took from her body. To that extent the judgment is inconsistent with 50 Mad 274[2] and is opposed to the view of Fforde and Jai Lal, JJ., in 10 Lah 283,[4] and the opinion of Sadasiva Iyer, J., in 26 M L J 352,[12] but the learned Public Prosecutor has reminded me that the question of the admissibility of that part of the accused's information was never argued at all and that as a matter of fact he was not called upon to argue the case on behalf of the Crown, the case on the evidence before us having been very clearly proved without the assistance of that part of the confession. It seems to me, therefore, that we assumed that those words should be excluded without hearing any argument to the contrary, an assumption which I now think was incorrect. Then there is the decision of the Patna High Court in 6 Pat 747.[7] There the accused in answer to the investigating police officer stated that he threw the weapon with which he assaulted the deceased at a certain place and the weapon was discovered as the result of that information and the statement consisting of the assertion that the weapon had been thrown at a particular place and that it was the weapon with which the offence was committed was held admissible under S. 27. This is directly in agreement with the view taken in 50 Mad 274.[2] On p. 757 Mullick, Ag. C. J. says:

> It is contended on the authority of some cases that the prosecution is only entitled to prove that the accused in answer to a certain question gave information which led to the discovery of the weapon; but common sense requires that the discovery should be connected with and be relevant to the investigation. The omission to connect the weapon with the offence would render the provisions of S. 27, Evidence Act wholly nugatory. The whole confession of a prisoner in police custody cannot of course go in but where the confession includes a statement that a weapon was used for committing the offence charged that part of the confession can certainly go in if it leads to the discovery of the weapon,

and he cites 50 Mad 274,[2] in support of his opinion. Before leaving these cases, I will again refer to 6 All 509.[6] There the fact that the accused had sold the cow and calf to a particular person was relevant fact because they were identified as being the property of the person from whom they were stolen. They were therefore connected with the offence charged against the accused, namely, assisting in concealment of stolen property (S. 414, I. P. C.). The cow and the calf were

16. *In re* Nainamalai Konan, A I R 1921 Mad 679=23 Cr L J 697=14 M L W 418.

shown to have been stolen and the statement of the accused that they had sold them to a person one Abdul Rahman in whose possession as a result of the information they were found to be by the police also directly connected the accused with that offence without the further information that the accused had stolen them and that is where the observations of Straight, J. which I have set out earlier in my judgment apply, viz., that not one word more than is absolutely necessary to show how the fact that was discovered is connected with the accused so as in itself to be a relevant fact against him can be deposed to by the police officer, since the fact discovered must also be connected with the offence as well as with the accused; it follows from this that if the statement of the accused does connect it with the offence then that is admissible also.

The cases to which I have referred cleary show that there is a preponderance of opinion supporting the appellants. Nevertheless, I am more impressed with the reasons given in support of the minority view. The fact deposed to and the fact discovered obviously must be relevant and the fact or thing discovered can only be relevant if it is connected with the offence of which the accused is charged; and the confession in the section is a confession of the offence charged and not of anything else. Before the statement is given in evidence it must be shown that fact discovered is a relevant fact and that the object is a material object. In cases where the things discovered as a result of the accused's information are proved to be property stolen from a person and the subject of the charge or worn by the victim of a murder, just before the murder is committed, the property so discovered is directly connected with the crime and the fact thereby discovered relevant. It can be made relevant by evidence aliunde, and, it can be made relevant by the statement of the accused itself. Suppose there is no evidence aliunde, what warrant is there for saying that the part of the statement of the accused that makes it relevant must be excluded because it amounts to a confession? Is there any warrant for garbling the statement in order to make it innocuous to the accused and in the process causing it to be irrelevant and consequently inadmissible in evidence. That is often the effect of removing from a statement the confessional portion, as what is left is by itself meaningless. Take the present case. If the appellants' contention is correct, only the following words can be admitted:

> They buried (1) the empty bottle (2) a rope and the cloth gag used for gagging the mouth in a dung hill next to the cattle shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go and take them and produce them.

As it stands the statement is unimportant as, without more, the empty bottle, the rope and the cloth gag are not connected with the offence. There is nothing to show that the rope was the rope used on the neck of the deceased or that the cloth was used to gag him with and indeed there is no evidence at all otherwise to show that the victim had been gagged. I am clearly of the opinion that without the earlier portion of the statement no relevant fact was discovered by the police as a result of it. I will give an example which supports my view. *A* is murdered and the medical evidence shows that he died as the result of a wound which is consistent with its having been caused by a sharp cutting weapon. *B*, an agriculturist, is accused of the murder and whilst in custody states to the police: "I threw the bichuva with which I cut *A* into the back room of my hut". The police go to his hut and there find the bichuva. They have discovered a relevant fact. Strike out the words 'with which I cut *A*' and all that remains is 'I threw the bichuva into the back room of my hut'. What is there to connect the bichuva with the murder? Every agriculturist has one bichuva or more in his possession. What bichuva is this? There is no evidence otherwise that it was the bichuva with which the murder was committed. It is merely a bichuva and if the police discover it they have not discovered a relevant fact. The statement, the confessional part having been struck out, is irrelevant, and none of it would go in under S. 27; and indeed, were that the law, no attempt to put it in would ever be made.

Further, it is undisputed that the information must set the police in motion, because it is in consequence of it that the discovery is made. Would the police be set in motion merely by the statement of the accused that he threw a bichuva into the back room of his hut if there is no

evidence that it is the instrument of the crime ? If there is no evidence aliunde, then the police will not be set in motion unless the fact discovered is connected with the case under investigation and if it is the accused's statement which connects the fact discovered with the offence and makes it relevant, then even though that statement amounts to a confession of the offence, it must be admitted because it is that, that has led directly to the discovery of the fact. If this reasoning is applied to the present case, then the earlier part of it that the accused and Gurunatha Goundan killed the victim by gagging his mouth with a cloth and throttling his neck with hands and also by putting a rope and pressing it connects the rope and the cloth gag directly with the offence and without it they are quite unconnected.

Mr. Chandrasekhara Sastri, the learned counsel for appellant 1, contended that in none of the cases cited was the confessional statement so lengthy as here. I agree. The statement objected to has usually consisted of only a few words such as 'stolen from', 'we stole from' etc., but in my opinion if those statements are admissible in evidence under S. 27 for the reasons already stated it makes no difference that the statement consists of 10 words or 20 words so long as they are necessary to make the fact discovered a relevant one being taken of course not to allow more words to be deposed to than are absolutely necessary. With regard to the information relating to the two bottles of illicit arrack and the discovery of one of them with some arrack in it in a heap of mud in the corner of the compound of the choultry, and the other empty in the dung heap, it is to be observed that this is not within that part of S. 27 which, given the circumstances required therein, makes admissible in evidence a confessional statement. The statement that the bottle would be found in the dung heap, etc. is not a confession but it constitutes 'information' leading up to the discovery of a fact which fact is made material because there is evidence that at a time material to this case the accused was in the near vicinity of the scene of murder carrying a bottle and intoxicated which fact is wholly denied by accused 1 in every respect.

Upon the second question referred, in my view, so much of the statement set out in Question 1, as is admissible against accused 1, can be taken into consideration as against accused 2. I see no reason for drawing any distinction between the confession in S. 27 and the confession which cannot be proved at all under S. 25, and under S. 26 only when it is made in the immediate presence of a Magistrate or a confession made in Court or to a member of the public. There is nothing in the section which restricts the confession to one recorded before a Magistrate. On the other hand, Illustration A to S. 30 suggests that the section contemplates "the taking into consideration" of a confession to an ordinary witness. It follows therefore that all such confessions when the accused are being tried jointly for the same offence when made by one of them affecting himself and another or others of the accused, may be taken into consideration as against the other or others under S. 30, Evidence Act. In support of this view there are 31 Mad 127,[17] 50 Bom 683[18] and 54 Mad 75.[19] I would therefore answer this question in the affirmative. The question of whether the same considerations apply to accused 3 does not arise as all references to her were deleted by the trial Court and I am only dealing with such part of the statement as was admitted. My answer to question 1 is that the following statement is admissible in evidence under S. 27 of the Act, viz. :

> He stated that at about 11 o'clock in the night ot 26th March 1936, he and Gurunatha Goundan son of Erangattur Kanda Goundan together murdered the deceased Sottayan alias Sennimalai Goundan by gagging his mouth with cloth by pressing him with rope . . . . that that night . . . . they got two bottles of illicit arrack . . . . that a small quantity was left over in one bottle only . . . . After (1), the empty bottle, (2), a rope and the cloth which was used for gagging the mouth have been buried in cowdung pond adjoining the cattle-shed in the compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at Kallipatti and that he would go there, take them out and give.

And, as I have said in my answer to Question 2, the whole of that statement can be taken into consideration as against accused 2 also. It is necessary to add for the information of the Sessions Judges and the police that as pointed out in

17. Sankappa Rai v. Emperor, (1908) 31 Mad 127 =7 Cr L J 325=18 M L J 66.
18. Shiva Bhai v. Emperor, A I R 1926 Bom 513 =97 I C 660=27 Cr L J 1140=50 Bom 683 =28 Bom L R 1013.
19. *In re* Periyaswami Moopan, A I R 1931 Mad 177=1931 Cr C 281=129 I C 645=32 Cr L J 448=54 Mad 75=59 M L J 471.

Cr. Appeals Nos. 615 and 660 of 1936,[20] by a Bench of this High Court, statements made by an accused person which are or may be provable under S. 27, Evidence Act, should be clearly and carefully recorded by the police officers concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. Obviously, if what a man says is to be used in evidence his own words should be used and not a rendering into third person of the purport of his statement. With such a record of the statement before him it will then be for the trial Judge to decide how much of it is admissible under the section. I might add that no point has been taken by the accused's advocate, in this case that the statement before us was an inaccurate paraphrase. The making of any such statement was wholly denied. I cannot leave this case without saying that in my opinion the case for appellant 1 has been most ably argued by Mr. Chandrasekhara Sastry, his learned counsel. Although his efforts have been unsuccessful they clearly deserve such a tribute.

Mockett, J. — I agree. I am not, as I intended, delivering a separate judgment in this case as I have had an opportunity of reading the judgment which has been delivered by my Lord the Chief Justice and there is nothing which I can usefully add to that judgment which entirely expresses my views on this most important topic. Moreover I consider that it is most desirable that the Sessions Courts of this Presidency should be able to look for guidance to a single judgment expressing the views of the Full Bench. I would only say that in construing this section of the Evidence Act, I have endeavoured to follow the direction of the Judicial Committee relating to the construction of Indian statutes in 55 I A 18[21] at p. 23, namely,

> to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration, derived from the previous state of the law or of the English law upon which it may be founded.

In this respect I find myself in respectful disagreement with the observations of Lort-Williams, J., at the beginning of his judgment in A I R 1930 Cal 291[14] at p. 292. The learned Judge's views as to the correct method of construing the same S. 27, Evidence Act, do not seem to me to be in accord with the above judgment of the Judicial Committee. If it were not for the very divergent views which have been held regarding this matter in this and other High Courts, I should almost have said that the words of this section are clear enough by themselves if they are read free from the considerations which the Judicial Committee have prohibited. I also agree with the comments on the various cases in the judgment which my learned brother Horwill, J. is about to deliver.

Horwill, J.—I would like to add to the judgment of my Lord the Chief Justice, with which I completely agree, that the weight of authority against the view we have here held is much less than the array of authorities adduced by the defence would at first sight lead one to believe : 11 Bom H C R 242,[10] purports only to be a minute on S. 27 for the instruction of the Court of that Presidency, without reference to the particular facts of that case. The minute covers not only the point that has been raised before us but all the other aspects of S. 27. The arguments put forward in that case must have been of the most general kind and no authorities seem to have been discussed or considered. Very much the same remarks can be made regarding 12 Mad 153,[1] except that that case confined itself to the question which we have been considering. In 6 All 509,[6] the real point for consideration, which was discussed at great length in the principal judgments of that case, was whether S. 27, Evidence Act, governs S. 26 only or S. 25 as well as S. 26. The majority of the Judges held that S. 27 controls S. 25 also, although Broadhurst, J. and Straight, C. J. held very different views regarding the extent to which the statement actually made could be admitted in evidence.

In 11 Cal 635,[11] Norris, J. who delivered the judgment of the Court, thought that no relevant fact had been discovered in pursuance of the confessional statement and so although he approved of the remarks of Straight, C. J. in 6 All 509,[6] the question as to how much of a statement such as we have been considering could be admitted did not there directly arise. That part of the sentence admitted in 14 Bom 260,[13] probably did not differ materially

20. Public Prosecutor v. Venkoba Rao, Criminal Appeals Nos. 615 and 660 of 1936.
21. Ramanandi Kuer v. Kalawati Kuer, A I R 1928 P C 2=107 I C 14 = 55 I A 18 = 7 Pat 221 (P C).

from what would be admissible upon an application of the principles enunciated by my Lord the Chief Justice in his judgment above. The identity of the property was fixed by the question put by the police to the accused and the portion considered inadmissible by the Judges in that case still leaves a sentence which is complete in itself. The accused was asked what he had done with the property and he replied: 'I have kept it and will show'. The portion 'have kept it and' was held to be inadmissible. That would leave the answer to the question of the police as 'I will show' which makes perfectly good sense. 45 Cal 557[5] was concerned with the admissibility of a confession made at the time of discovery ; and it was rightly held that such a confession did not lead to the discovery of the property. Certain ornaments taken in a dacoity were dug up and when they were brought to light the accused said: 'I got these ornaments as my share in the Rajoi dacoity'. This confession was very obviously inadmissible. 56 Bom 172[3] was one of those difficult cases in which the actual words used by the police in questioning the accused and the words used by the accused in reply were not known. Only the general purport was given and Beaumont, C. J. in the principal judgment in that case, said :

It was the duty of the Judge to dissect the evidence regarding the confession and to divide the sentence into its component parts and only admit that part which led to the discovery of the particular fact, viz., the hidden property.

In such circumstances this procedure seems justifiable. In 34 C W N 106,[14] a contrary view to that held by us was undoubtedly arrived at ; but some of the remarks made by Lort-Williams, J. in the principal judgment in that case are instructive as showing why it is that such divergence of opinion exists with regard to the proper interpretation of S. 27. He says :

There is a school of legal thought in India which holds that in construing Acts of the Indian Legislature, the natural meaning of the sections should be given effect to regardless of previous decisions, and especially of decisions other than those of Indian Courts. The Evidence Act in general and S. 27 in particular are examples which in my opinion indicate the falsity of this point of view.

He comes to the conclusion that some restricted or limited meaning, narrower than the natural meaning, must be given to those words. This in our opinion is contrary to the canon of interpretation laid down by their Lordships of the Privy Council in many cases, of which 55 I. 18[21] at p. 23, may be quoted as an example. The judgment of Lort-Williams, J. except with regard to the method to be adopted in interpreting S. 27, supports the view which we have here taken. He says :

If their natural meaning were given to the words of S. 27 regardless of their parentage and history, I am satisfied that the result would be contrary to the intention of the Legislature. It would be so wide as to render S. 26 practically useless . . . . If therefore so much of the information as is clearly connected with, or has reference to, the fact thereby discovered, is admissible under S. 27, it is difficult to see where the line can be drawn.

In other words he was of the opinion that when a confession to the police which would be inadmissible under S. 26 leads to the discovery of property, the whole confession may be admissible if the natural interpretation of S. 27 were adopted. That is exactly our view. It is the attempt to interpret S. 27 in the light of the existing English law that has led a great many Courts to give an interpretation to that section which is not warranted by the words used, and especially is this the case in 10 Lah 283,[4] which has been so fully discussed by my Lord.

C.R.K./S.C. *Answer accordingly.*

A. I. R. 1937 Madras 631

PANDRANG ROW, J.

Majeti Kasi Viswesra Rao—Applt.

v.

Pulletikurti Varahanarasimham and *others* — Respondents.

Second Appeals Nos. 265 and 361 of 1935, Decided on 12th October 1936.

(a) Hindu Law — Ancestral property — Father bequeathing self-acquired property to son—Will showing no intention that property should be deemed to be self-acquired—Property held must be deemed to be ancestral in hands of son.

It is left to the father to determine whether the self-acquired property which he gives to his son shall be ancestral or self-acquired, and further unless there is any expression of intention or wish that the property should be deemed to be self-acquired, it must be held that the property is to be enjoyed as ancestral property. [P 633 C 1]

Where in a case the father bequeathed his self-acquired property to his adopted son but no intention that the property was to be self-acquired property of the son could be gathered from the will :

Held : that the property must be deemed to be ancestral in the hands of the son : *24 Mad 429, Rel. on.* [P 633 C 1]

(b) Hindu Law—Alienation—Alienation by one coparcener—Suit by others to declare it void to extent of their shares—Share of alienee is to be determined with reference to date of alienation.

Where alienation of joint family property has been made by a coparcener and other coparceners bring a suit for a declaration that the alienation is void to the extent of their shares, the share to which the alienee would be entitled is to be determined with reference to the date of alienation and not to the date of the institution of the suit: *35 Mad 47, Foll.* [P 633 C 2 ; P 634 C 1]

G. Lakshmanna and *G. Chandrasekhara* — for Appellants.

P. Satyanarayana Rao — for Respdts.

Judgment. — These appeals are from the decree of the Subordinate Judge, Ellore, dated 4th March 1935, reversing on appeal the decree of the District Munsif of Tanuku dated 16th February 1933 in O. S. No. 601 of 1931, a suit in forma pauperis for recovery of certain immoveable properties together with mesne profits by the plaintiffs who were three in number. The plaintiffs are brothers, being the sons of one Suryam who according to them was the adopted son of one Buchayya. The plaint properties were admittedly the self-acquisitions of this Buchayya, and the plaintiffs' case was that their father Suryam took these properties as joint family properties and enjoyed them as such, though there was a will in respect of these properties by Buchayya in favour of Suryam. Suryam sold some of the properties under Ex. 2 in 1919 to defendant 1 and some other properties under Ex. 8 in 1924 to defendant 2. The suit is in effect to recover possession of these properties avoiding the alienations referred to above. The suit was resisted by both the defendants on several grounds, which are reflected in the issues framed by the trial Court. Except on the issue relating to the adoption of Suryam, the findings of the trial Court were in favour of the plaintiffs. But on this question of adoption the trial Court found that the adoption had not been proved, and as a result of this finding alone, the suit was dismissed by the trial Court. The trial Court states in its judgment that, otherwise its decree would have been to the effect that Ex. 2 would be valid only to the extent of a half share owned by Suryam and that Ex. 8 would be valid only to the extent of one fourth share owned by him. On appeal by the plaintiffs, the learned Subordinate Judge differed from the trial Court as regards the question of adoption, and found that the adoption was true and valid. He accordingly allowed the appeal and decreed that the plaintiffs were entitled to recover three-fourths share of the properties covered both by Exs. 2 and 8 with mesne profits on that three-fourths share at Rs. 45 a year. The present appeals are by the two defendants, S. A. No. 265 of 1935, being the appeal by defendant 2 and S. A. No. 361 of 1935 being by defendant 1.

No attempt whatever has been made in these appeals to question the correctness of the finding of the lower appellate Court on the question of adoption. I must therefore proceed on the basis that the adoption has been proved and consider whether in view of that finding, the judgment appealed from is wrong. The first question that arises for decision in both these appeals is whether the plaint properties were taken by Suryam as joint family properties or whether they are his self-acquired properties. It is common ground that the properties which were admittedly self-acquired properties of Buchayya, his adoptive father, came to him not by way of succession but by virtue of the will executed in 1911 by Buchayya, Ex. I. That will recites the fact that the testator had adopted Suryam and performed his marriage and that therefore Suryam should be the owner of all his properties, moveable and immoveable and enjoy the same from son to grandson and so on in succession with powers of gift and sale. There is also a provision in the will to the effect that whether or not the adoption of Suryam is legal the properties have been given to Suryam to be enjoyed as of right after his death. It is clear from the will that the intention of the testator was that the properties should go to his adopted son Suryam, and it was only to make assurance doubly sure that he further provided that even if the adoption were found to be not legal, Suryam was to get the properties all the same. Now that it has been found that Suryam was validly adopted by the testator, it must be taken that the properties were given by Buchayya by will to his adopted son. The words in the vernacular which have been translated as "enjoy the properties from son to grandson and so on in succession with powers of gift and sale" are the usual words employed in order to indicate that the entire ownership is to pass. They do not show in my opinion any intention on the part of the testator as to whether his adopted son, the legatee, is to take the properties as self-acquired properties or as joint family properties.

On the question whether self-acquired property bequeathed by a Hindu father to his son is the separate property of the son or whether it is ancestral in his hands as regards his sons, there is a difference of opinion between the different High Courts, which is referred to by their Lordships of the Judicial Committee in 45 All 596.[1] The question cannot be said to be absolutely settled as their Lordships of the Judicial Committee declined in that case to settle the difference of opinion, but deferred it to a later occasion. Till their Lordships of the Judical Committee settle this difference, I am bound to follow the view that has been adopted and followed in Madras ever since 24 Mad 429[2] and that view is against the appellants. That view is that it is left to the father to determine whether the property which he gives shall be ancestral or self-acquired, and further, that unless there is any expression of intention or wish that the property should be deemed to be self-acquired, it must be held that the property is to be enjoyed as ancestral property. In the particular will, Ex. 1, there is nothing from which any intention can be gathered of Buchaya's wish or intention that the properties were to be the self-acquired properties of Suryam. I am therefore unable to accept the arguments on the side of the appellants or to dissent from the conclusion arrived at by the lower appellate Court on this question, viz., that the properties must be deemed to be ancestral properties in the hands of Suryam.

Both the Courts below have found accordingly that the sale deeds Exs. 2 and 8 are not valid and binding on the plaintiffs. In Ex. 2, the consideration is stated to be Rs. 1,460 and the only portion thereof which can be said to have been utilized for any debt binding on the plaintiffs is the amount covered by Ex. 5, that is to say, about Rs. 152. As regards the other alienation, Ex. 8 out of the total consideration of Rs. 1,900, Rs. 600 is said to have been required for the purpose of paying off an antecedent debt of Suryam due to one Veeracharyulu. But it would appear that even this debt was not paid by Suryam out of the consideration received by him. In any case, I see no reason to differ from the concurrent findings of both the Courts below that neither of these deeds of sale is binding on the plaintiffs and that plaintiff 1 in any case who had been born long before even Ex. 2 is entitled to ignore them.

In this connexion, it has been argued that even if the sales are invalid and not binding on the plaintiffs, the alienees are entitled to some equities, defendant 1 in respect of Ex. 2 to the extent of Rs. 152 and defendant 2 in respect of Ex. 8 to the extent of at least Rs. 600. I am not satisfied that these equities exist in the present case. It has not been shown that the debts in question which were due by Suryam, viz., a debt of Rs. 150 under Ex. 5 and the debt of Rs. 600 due to Veeracharyulu could not have been paid from Suryam's share of the consideration. The sales are of course valid so far as the share of Suryam is concerned and this share was sufficient to satisfy both these debts. It is not possible therefore to say that the sons' shares have in any way been benefited by reason of the payment of these debts The sons' obligation to pay their father's debts ceases to exist when the father's debt has been discharged. That obligation also can be enforced against the sons only by the creditor. In this case, the defendants are not the creditors. Defendant 2 certainly does not stand in the shoes of the creditor because it is not his case that he has paid the creditor of Suryam, viz., Veeracharyulu, at any time. This claim to equity is moreover put forward for the first time in second appeal. There is no reference to it in the judgments of either of the Courts below and I do not think it is possible to adjudicate upon this claim in second appeal in the absence of sufficient material.

The only other point that arises for determination in these appeals is the share that can be claimed by defendant 1 under Ex. 2. On this point, the trial Court was of opinion that the share was one half, that is, the share which was owned by Suryam, the vendor at the time of Ex. 2. The lower appellate Court however thought that 64 M L J 66,[3] was authority for the position that the share should be calculated with reference

1. Lalram Singh v. Deputy Commissioner, Pratapgarh, A I R 1923 P C 160=76 I C 922=45 All 596=26 O C 257=50 I A 265 (P C).
2. Nagalingam Pillai v. Ramachandra Tevar, (1901) 24 Mad 429=11 M L J 210.
3. Muthukumara Sethupathiar v. Sivanarayana Pillai, A I R 1933 Mad 158=141 I C 122=56 Mad 534=64 M L J 66.

to the time when the suit was brought and not at the time when the alienation took place and accordingly held that even as regards Ex. 2, the plaintiffs' share was three-fourths and Suryam's share only one-fourth. I am of opinion that this view adopted by the lower appellate Court is not correct. The law on the subject is practically settled in this Presidency ever since 35 Mad 47,[4] and that decision has been followed in a number of subsequent cases, and I see no reason whatever for not following what has been accepted as settled law for so many years. The law as stated there is that the share is to be determined as on the date of the alienation, and it follows from this that the share to which defendant 1 is entitled is one half and the other half alone can be claimed by the plaintiffs so far as the properties concerned in Ex. 2 are concerned, that is, plaint item 1. The appeal by defendant 1 therefore succeeds as regards this point. It follows as a consequence that the mesne profits awarded by the lower appellate Court should be reduced from Rs. 45 a year to Rs. 30 a year so far as this item is concerned. In other respects, this appeal of defendant 1 fails. The other second appeal fails altogether and is dismissed with costs. In the appeal by defendant 1, viz., S. A. No. 361 of 1935, parties will bear their own costs. Leave to appeal refused.

C.R.K./S.C. *Order accordingly.*

4. Chinnu Pillai v. Kalimuthu Chetty, (1912) 35 Mad 47=9 I C 596=21 M L J 246.

A. I. R. 1937 Madras 634

MOCKETT AND HORWILL, JJ.

Public Prosecutor — Appellant.

v.

Bandi Pedda Venkata Nari—Respdt.

Criminal Appeal No. 697 of 1936, Decided on 18th March 1937.

Penal Code (1860), Ss. 300 and 302—Nature of weapon—Court should consider nature of material object and force used in deciding whether intention and knowledge can be attributed to accused under S. 300—Single blow on head with rice pounder — Accused can be convicted of murder.

The proper way in which to decide whether an offence has or has not been committed under S. 300 read with S. 302, I. P. C., is to apply the words of the section to the facts and to see how the facts satisfy the essentials of the section. But it is obvious that the nature of the material object used and the force used while committing an offence must be useful guides to the trial Court in arriving at a decision as to whether the intention and knowledge referred to in S. 300, I. P. C., can be attributed to the accused. [P 637 C 1]

Where during the struggle between the accused and another, the deceased intervened and the accused struck the deceased on the head with a blow of a rice pounder, a very heavy piece of wood and requiring ordinarily the use of two hands for its use, and thereby caused the death of the deceased :

Held* : that even though the death resulted only due to a single blow, the accused could be convicted of murder : *A I R 1916 Bom 191, Dist.*; *A I R 1931 Mad 420, Rel. on. [P 636 C 2]

A. Narasimha Iyer — for Appellant.

C. R. Pattabhiraman—for Respondent.

Mockett, J.—This is an appeal by the Crown against the acquittal of accused 1 of murder. He was in fact convicted of an offence under S. 326, I. P. C., and sentenced to rigorous imprisonment for three years. On another charge in relation to an offence committed against another person (P. W. 1) he was convicted under S. 324, I. P. C., and sentenced to rigorous imprisonment for one year, the sentences to run consecutively.

Now, with all respect to Mr. C. R. Pattabhiraman's arguments, we do not think there is any room for doubt with regard to the facts of this case which are simple enough. There is a wealth of evidence to establish them and we only propose to set out shortly what they amount to. The accused lives opposite to P. W. 1 as will be seen in the plan. Accused 1 was bathing in the street opposite to his house, thereby causing 'slush' on the road. P. W. 1 protested and asked him to go and bathe in his backyard. It seems to us a not unreasonable request. The accused said that he proposed to go on bathing where he was, whereupon P. W. 1 caught hold of his water-pot. So did accused 1 and in the process the pot broke. Accused then went to his house shouting abuse and brought out M. O. 1, a rice pounder which is two yards long and between 2 and 3 inches in diameter. We have compared it with one of the maces carried by the chobdars of this Court. It is about 6 inches longer and slightly thinner than the top of one of those maces. It is a very heavy piece of wood and would appear to require the use of two hands by an ordinary man. With this rice pounder, the accused struck P. W. 1 on the head, and P. W. 1 is not able to tell us very much more because he stated that he did not recover consciousness until about an hour later. P. W. 1 was fortunate. He had 'a contused transverse wound 1 inch by 1/4 inch skin deep, on the right parietal eminence 4½ inches above the right ear, described in Ex. F as not of a

serious nature. The next thing that happened was that the deceased woman, the aunt of P. W. 1, ran up crying out that her nephew was being killed, whereupon accused 1 struck her on the head also with M. O. 1. She fell down unconscious and bleeding and died on 6th May 1936, this occurrence being on the 29th April. In her case, her skull was fractured. The fracture is described as follows in Ex. E:

> There is fissured stillat fracture of the frontal bone commencing from coronal section 1½ inches to right of middle line, runs obliquely down to left orbital foramen, passes through orbital plate, ends at ethnoid bone. Measures 5½ inches.

Then :

> From the middle of frontal part there was a fissured fracture transversely to the right 1½ inches and then down to orbital ridge 1½ inches and on the right orbital rood 1½ inches and ends at ethnoid bone. There was a clot under the fracture, the membranes were congested, and the doctor states that she died of meningitis due to the injuries received. There was a slight depression of the brain under the clot.

Now, the only question that can arise in this case because, as we have already said, we are quite satisfied about the facts to which several witnesses have spoken, is what offence has accused 1 committed ? The learned Sessions Judge deals with that in para. 7 of his judgment. The following are some of the observations he makes in that paragraph :

> From the lie of the case according to the showing of the prosecution itself, it is manifestly clear that there was no intention on the part of accused 1 to cause Yerikalamma's death.

Why such an absence of intention should be so manifestly clear is not wholly apparent. But it is to be observed that the Judge states that the Public Prosecutor 'very fairly admitted this'. The Judge goes on to say that it is not clear from the evidence that there was any deliberate aim at the head :

> It was not a premeditated act. It is a case of total absence of motive of any kind whatsoever. It was in a sudden fit of temper, infuriated by the sight of his broken pot, that accused 1 in a momentary flash went into his house and came out with a rice pounder and dealt a blow with it.

One may pick up a rice pounder "in a momentary flash", but it is difficult to understand how one can so describe going into a house, picking up an object and bringing it out. A point was made that the rice pounder was not fetched by the accused for the purpose of striking the deceased. That appears to be true. He fetched it for the purpose of striking P. W. 1, and having struck P. W. 1, one might have expected that his temper would have abated. What did this woman do ? All she did apparently was to object to her nephew being felled to the ground. For that she received a blow on her head which killed her. But says the learned Judge:

> The circumstances very clearly indicate to my mind both in respect of the intention and the knowledge on the part of accused 1 nothing but an idea to chastise P. W. 1 and when Yerikalamma *eo instanti* intervened, in the same fit of temper, he chastised her also in order apparently to drive her away.

Such is the learned Judge's description of two blows from a weapon—because that is an accurate description of M. O. 1—which has only to be seen for one to appreciate that chastisement is a singularly inappropriate phrase to apply to any use of it. The Judge considers that "it is a fairly heavy weapon which, used as a weapon of offence, can surely cause death" and then surprisingly enough, after his observations about the chastisement, goes on to say, "it is undoubtedly a deadly weapon". The learned Judge ultimately finds that :

> It would not be a violent inference from the circumstances of the case that accused 1 must have been aware that the act would result in grievous injury to Yerikalamma.

The result of his conclusions is that he feels convinced that the facts proved established an offence under S. 326 so far as the attack upon Yerikalamma was concerned. We are wholly unable to agree with either the reasons or the conclusions above set out. Under S. 300, I. P. C., it is, except in cases set out in that section murder, if the act by which the death is caused, is done with the intention of causing death, or (2) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused or (3) if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or (4) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. Now, it seems to us that when a man using great violence hits a woman, or indeed anyone, with an object such as M. O. 1, it is not unreasonable for the Court to infer that he did so

with the intention of causing death. But even if the Court is not prepared to draw that conclusion, can there be any doubt that the use of such a weapon must show an intention to cause such bodily injury as the offender knows to be likely to cause death? If neither of these inferences appealed to the trial Court, it must surely be that that act was done with the intention of causing bodily injury to any person. With what intention was the blow on the head struck with such a weapon as M.O.1? Can it possibly be less than with the intention of causing such bodily injury as ensued? If that is so, it is in evidence by the doctor that the external injury was by itself sufficient in the ordinary course of nature to lead to death. He says:

> As a matter of fact, it caused by itself death in this case, without any other supervening cause or factor.

There was a hard clot already found under the fracture pressing against the brain causing "depression" in the words of the doctor:

> This was what caused the inflammation of the membrane leading to meningitis. It should have formed immediately after the injury and should have caused unconsciousness.

We have therefore no doubt whatever on the evidence that the lower Court could have found that the intention of the accused was to cause the death of this woman. Alternatively, it must be that one or the other of the intentions set out in S. 300, is proved. In view of the nature of M. O. 1, which can properly and accurately be described as a 'club', Illus. (c) to S. 300 exactly applied if the trial Judge found as he did that the accused had no intention to cause death. Illus. (c) reads as follows:

> *A* intentionally gives *Z* a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence. Here *A* is guilty of murder, although he may not have intended to cause *Z's* death.

It is sufficient for the purpose of our conclusion if we say that we find on the evidence that this case comes within S. 300, Illus. (c). If that is so the accused is prima facie guilty of murder. Can the case be brought within any of the exceptions to that section? No attempt has been made to do so. It is not necessary to set out those exceptions. It is enough to say that none of the circumstances in this case bring the accused within the benefit of any of them. The only one that could possibly be urged is Excep. 4, but there was no sudden fight with the deceased nor was there a sudden quarrel with her. All that happened was that she endeavoured to intervene between the accused and P. W. 1 and was struck down with M. O. 1, the use of which on an unarmed woman obviously constitutes "taking undue advantage" and "acting in a cruel or unusual manner".

Now, the case law on this subject has been dealt with by the learned counsel who have argued this case, and our attention has been drawn to certain decisions. The first to be noticed is the decision of the Bombay High Court reported in 41 Bom 27.[1] With regard to that decision, a careful perusal of the judgment shows that the learned Judges conceded that the Sessions Judge had followed what in a majority of cases had been held to be the right and logical course. He had inferred the intention from the extent of the injury and nature of the weapon used which in that case was an iron-shod stick. The learned Judges then pointed out that juries are disposed to take a liberal and less logical view and to look at all the surrounding circumstances with the object, if possible, of reducing the offence. The learned Judges go on to say that they were disposed to take a more lenient view of the offence committed because death was caused by a single blow, and so it was more difficult to be absolutely certain what degree of bodily injury the offender intended. And they ultimately came to the conclusion that exceptional cases and circumstances warranted them, sitting as Judges, in taking what might be a jury's view rather than a Judge's point of view. In the result, the conviction for murder was altered to one for culpable homicide not amounting to murder. If the head-note of this decision correctly represents the finding of the learned Judges it might well be said that this is a decision on the special facts of that case and lays down no general proposition of law. If it is intended as it was cited before us, to establish the proposition that in the case of a single blow, whatever the weapon, the accused should not be convicted of murder, then we must record our respectful dissent. We still however consider that that was a special decision with regard to the special facts. So far as this High Court is concerned, our attention has been drawn

1. Emperor v. Sardar Khan, A I R 1916 Bom 191=36 I C 578=41 Bom 27=17 Cr L J 530 =18 Bom L R 793.

to a decision in *R. T. No. 132 of 1930*[2] in which the Chief Justice and Sundaram Chettiar, J. held that to strike a man on the skull using considerable force is an act so imminently dangerous that it must in all probability cause death and constituted the offence of murder under S. 302. In the judgment occur the following words :

> We are satisfied that the appellant struck this very severe blow on the head of the deceased and caused his death. He must be taken to have known that to strike a man on his skull with a stick using considerable force was an act so imminently dangerous that it must in all probability cause death and that he did so without any possible excuse. This therefore is the offence of murder and nothing short of it.

We respectfully agree with that decision. There is however another decision, *R. T. No. 72 of 1931*,[3] in which Jackson and Cornish, JJ. held that in a case where a son hit his father with a crowbar on head on small provocation, he had committed an offence under S. 324 and not the offence of murder. My learned brother Horwill and myself have already expressed our view about that decision in C. A. Nos. 590 and 591 of 1936. We there stated :

> We only desire to say a word about that case, because it has referred to us as an authority. The learned Judges held that an accused person who hit the deceased on the head with a crowbar which fractured his skull did not commit an offence graver than the one under S. 324, I. P. C. There might have been special circumstances in that case which induced the learned Judges to arrive at the decision which they did. We only desire to say that if as is suggested to us it is an authority for the proposition that a man who hits somebody else on the head with a crowbar causing death is guilty of nothing more than an offence under S. 324, then we must record our respectful dissent.

It seems to us that the proper way in which to decide whether an offence has or has not been committed under S. 300 read with S. 302 is to apply the words of the section to the facts and to see how the facts satisfy the essentials of the section. But it is obvious that the nature of the material object used and the force used must be useful guides to the trial Court in arriving at a decision as to whether the intention and knowledge referred to in S. 300, I. P. C., can be attributed to the accused. With great respect to the learned Judges in the Bombay case to which we have referred, we think that it is a somewhat perilous course instead to call in aid the somewhat nebulous considerations which influence the conclusions of a jury. The result of these conclusions is that this appeal will be allowed, and for the conviction under S. 326 there will instead be a conviction under S. 302. Many of the observations of the learned Sessions Judge are distinctly relevant on the question of sentence. This offence was committed without any long pre-meditation and certainly in a rage, and we do not consider that the capital sentence is called for. The accused will be sentenced to transportation for life. This sentence will run concurently with the sentence of one year's rigorous imprisonment under S. 324, I. P. C., already imposed on him.

C.R.K /W.D. *Appeal allowed.*

2. *In re* Kesava Chetti, A I R 1931 Mad 420=1931 Cr C 468=130 I C 847=32 Cr L J 623.
3. Muthu Goundan v. Emperor, (1931) M W N 765.

A. I. R. 1937 Madras 637

HORWILL, J.

Abdur Rahiman Kutty—Petitioner.

v.

Emperor.

Criminal Revn. Case No. 362 and Petn. No. 333 of 1936, Decided on 3-2-1937.

Child Marriage Restraint Act (1929), S. 8—S. 8 of Act and S. 10 (2), Criminal P. C., are to be read together — Additional District Magistrate empowered with powers of District Magistrate under S. 10 (2) Criminal P. C. can try offence under the Act.

It is a well-known canon of interpretation that two statutes should be reconciled if they can be. [P 638 C 1]

Inasmuch as no reference is made in S. 8, Child Marriage Restraint Act, to S. 10 (2), Criminal P. C., S. 8 of the Act can be read without difficulty with S. 10 (2) of the Code. An Additional District Magistrate, therefore, who has been given all the powers of a District Magistrate is empowered to try a case under the Sarda Act also : *1928 M W N 633, Expl.* [P 638 C 2]

V. L. Ethiraj, A. S. Sivakaminathan and *K. S. Jayarama Iyer*—for Petitioners.

K. Venkataraghavachari and *Public Prosecutor* — for the Crown.

Order.—The only question in this criminal revision case is whether an Additional District Magistrate is empowered under S. 8, Sarda Act (Child Marriage Restraint Act, 19 of 1929) to try cases under that Act. The District Magistrate took cognizance of the case but transferred it to the Additional District Magistrate for trial; and it is contended that the District Magistrate could not do so, but was bound to try the case himself, even though the Additional District Magistrate was given under S 10 (2), Criminal P. C., all the powers of a District Magistrate. There can be no doubt that if S. 8,

Sarda Act, makes it clear that Additional District Magistrates should not try such cases, then the mere fact that an Additional District Magistrate is empowered with all the powers of a District Magistrate under 10 (2), Criminal P. C., would not empower him to try a case under the Sarda Act, but it is a well-known canon of interpretation that two statutes should be reconciled if they can be. I agree with Mr. Jayarama Iyer that an Additional District Magistrate is not a District Magistrate. S. 10 (3) of the Code makes an Additional District Magistrate subordinate to the District Magistrate, so that the District Magistrate has certain power under S. 520, Criminal P. C., for example, over the Additional District Magistrate. The question is, however, whether S. 8, Sarda Act intended to exclude trial by Additional District Magistrates. In reading that section it has to be assumed, unless the contrary is quite clear, that it was not intended to take away the powers given to the Additional District Magistrates under S. 10 (2) of the Code. S. 8 reads :

> Notwithstanding anything contained in S. 190, Criminal P. C., 1898, no Court other than that of a Presidency Magistrate or a District Magistrate shall take cognizance of or try any offence under this Act.

It may be noted that no reference is made to S. 10, Criminal P. C. One would have expected S. 10 to have been coupled with S. 190, if the Legislature had intended to exclude the jurisdiction of an Additional District Magistrate. If this section had been worded positively merely empowering District Magistrates to take cognizance of offences under the Act, the present argument would probably never have been put forward; for nowhere in any Act are Additional District Magistrates coupled with a District Magistrate; so that where District Magistrates are given any powers those of the Additional District Magistrates are presumed. A handle for the present contention is afforded by the fact that the section reads more strongly in the negative form :

> No Court other than a Presidency Magistrate or a District Magistrate shall take cognizance of or try any offence under this Act.

This negative form is necessitated by the opening words of the section, "Notwithstanding anything contained in S. 190, Criminal P. C". Had it not been for these words a Sub-Divisional Magistrate or Magistrate especially empowered could have taken cognizance of the offence under S. 190 of the Code. In order to prevent these officers from taking cognizance of an offence under S. 190, Criminal P. C., it was necessary to word S. 8, Sarda Act, so as to limit the taking of cognizance and trial to the other Magistrates mentioned in S. 190, Criminal P. C., viz., Presidency Magistrates and District Magistrates. S. 8, Sarda Act, makes no mention of Additional District Magistrates because S. 190, Criminal P. C., does not. I do not therefore find any difficulty in reading S. 8, Sarda Act with S. 10 (2), Criminal P. C., and holding that an Additional District Magistrate who has been given all the powers of the District Magistrate is empowered to try a case under the Sarda Act also. My attention has been drawn to the judgment of Reilly, J., in 1928 M W N 633.[1] After a trial by a Sub-Magistrate, stolen property was handed over to the accused. An appeal was preferred by the complainant to the Sub-Divisional Magistrate, who passed an order returning it to the complainant. In revision it was held by a Full Bench that an appeal lay only to the District Magistrate and that the Sub-Divisional Magistrate had no jurisdiction. The case then went back to the District Magistrate, who transferred it to the Additional District Magistrate. The matter again came before this Court in revision and Reilly, J. passed the following order :

> Following the opinion of the Full Bench I must hold that the Additional District Magistrate had no jurisdiction to hear the appeal. His order is therefore set aside. The appeal is transferred to the District Magistrate.

It is seen that Reilly, J. gave no reason at all for his order; but he apparently felt himself bound by the actual words used by the Full Bench that it was only the District Magistrate who could hear the appeal. The Full Bench certainly did not decide that an Additional District Magistrate specially empowered could not have heard the appeal. This petition is accordingly dismissed.

C.R.K./K.B. *Petition dismissed.*

1. Maria Pillai v. Gopalakrishna Iyer, (1928) M W N 633.

A. I. R. 1937 Madras 638

KING, J.

Ayitham China Suryarao

v.

Maddala Suryachandra Rao.

Civil Revn. Petn. No. 562 of 1935, Decided on 2nd March 1937.

Registration Act (1908), Ss. 17 and 49—Partition deed—As term of partition and to equalize shares on partition between minor and his uncle, guardian of minor executing pro-note in favour of his uncle—Some partition lists prepared but not registered though registrable under S. 17 — Suit on pro-note—Unregistered partition lists cannot be received in evidence to prove necessity for execution of such pro-note — Nor oral evidence of terms of partition is admissible under S. 91, Evidence Act.

As a term of partition and in order to equalize the shares of the minor and his uncle it was arranged that the uncle should pay off all debts due from the family and that the minor should execute pro-note in the uncle's favour. Accordingly the mother, as guardian of the minor executed a pro-note. At the time of the partition the partition lists were prepared but were not registered though required to be registered under S. 17, Registration Act. On a suit being filed by the uncle for the recovery of the amount due on the pro-note against the minor, it was contended that the minor was not liable for the debt of the pro-note as there was no necessity for such debt :

Held : that the unregistered partition lists not being registered, though required to be registered under the Registration Act, could not be admissible in evidence by virtue of S. 49 of the Act. The plaintiff therefore was debarred from adducing in evidence the partition lists to prove the necessity for the execution of the pro-note in suit. [P 639 C 2]

Held also : that the plaintiff was debarred from adducing any oral evidence to prove the terms of the partition under S. 91, Evidence Act, as he could not tender in evidence the partition lists for want of registration : *A I R 1931 Mad 580* and *A I R 1934 Rang 303, Rel. on.* [P 640 C 1]

V. Viyyanna — for Petitioner.

V. Suryanarayana—for Opposite Party.

Order. — The minor defendant in this case, with his mother as guardian, and his two uncles, one of whom is Narasimhamurti, P. W. 3 effected a partition of their immoveable property in October 1930. As one of the terms of that partition, and in order to equalize the shares of the three members of the family, it was arranged that P. W. 3 should pay off all the family debts and that the other two should execute promissory notes in his favour for Rs. 1,500 and Rs. 700 respectively. Accordingly defendant's mother executed the suit promissory note in favour of P. W. 3 for Rs. 700 on the same day. This note was transferred by P. W. 3 to the plaintiff who has now sued the defendant upon it.

The main defence raised was that the minor defendant is not liable upon the pro-note. In order to meet that defence it was necessary for plaintiff to prove that the pro-note was executed for necessity. To prove this he called P. W. 3, who spoke to the terms of the partition. In cross-examination he admitted that there were unregistered partition lists in existence. The lower Court held that these lists were inadmissible in evidence and consequently that there was no valid partition, and no valid debt binding upon the defendant. Against this decision plaintiff has filed the present civil revision petition. I am unable to agree with the language in which the lower Court has formulated its decision. It is well settled that there can be a valid partition without any document at all : *see* 51 All 79.[1] But the real question is whether plaintiff is debarred from proving the terms of this partition once the existence of the unregistered partition lists is established. If he cannot prove those terms, he cannot prove the necessity for the defendant's guardian to execute the pro-note and he must fail. Not without reluctance I have come to the conclusion that the lower Court's decision is right.

I have had a translation of one of the partition lists before me and it is obvious from it, indeed it was not seriously challenged by petitioner's learned advocate that it is a document which requires registration under S. 17, Registration Act. Under S. 49 it cannot therefore be received in evidence unless it satisfies one of the conditions of the proviso. This is not a case in which plaintiff can take advantage of S. 53-A, Transfer of Property Act, for that section relates only to the retention of immoveable property of which P. W. 3 or plaintiff might be in possession. Nor do I see how the promise to pay Rs. 700 can be called a 'collateral transaction'. It is obviously one of the terms of the partition itself, and 55 Mad 72[2] and A I R 1934 Rang 303[3] are clear authority for the position that though plaintiff's claim is a claim for money only, if it is part of an agreement which affects immoveable property and that agreement must be regarded as 'an indivisible whole to effect a fair distribution of the assets' (to quote from 55 Mad 72,[2]) plaintiff cannot be permitted to tender his unregistered docu-

1. Ram Gopal v. Tulshi Ram, A I R 1928 All 641=116 I C 861=51 All 79=26 A L J 952 (F B).
2. Samuvier v. Ramasubbier, A I R 1931 Mad 580=132 I C 305=55 Mad 72=60 M L J 527.
3. Bhabi Dutt v. Ramalalbyamal, A I R 1934 Rang 303=152 I C 431.

ment in evidence. Plaintiff being thus unable to tender the partition list in evidence, is next confronted with S. 91, Evidence Act, which lays down in unmistakable language that he cannot also tender any oral evidence of the terms of the partition. The result is that he can give no evidence at all of those terms, and cannot prove any necessity for the execution by defendant's guardian of the pronote. This civil revision petition must accordingly be dismissed with costs.

C.R.K./W.D. *Petition dismissed.*

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* A. I. R. 1937 Madras 640

VARADACHARIAR, J.

Meenakshi Ammal and *another* — Appellants.

v.

Ramaswami Josier and *another* — Respondents.

Second Appeal No. 1279 of 1932, Decided on 4th November 1936.

*** Hindu Law — Succession — Among Sudras, illegitimate son can inherit his putative father's property and there is right of inheritance between mother and illegitimate daughter—This principle cannot be extended to establish sapindaship between putative father and illegitimate daughter and hence also illegitimate grand-daughter—In presence of legitimate heirs illegitimate grand-daughter cannot succeed her grandfather.**

The general principle of the Hindu law is to limit heirship to legitimate issue but in the case of illegitimate sons amongst Sudras a special exception has been made by the texts. But the recognition of sapindaship between the illegitimate son and his putative father and the recognition of a right of inheritance between the mother and the illegitimate daughter will not warrant an extension of sapindaship to other relations. There is no sapindaship between putative father and the illegitimate daughter and hence between grandfather and illegitimate grand-daughter. Therefore in presence of legitimate heirs an illegitimate grand-daughter is not entitled to succeed to her grandfather : *A I R 1918 Mad 1346 (F B)* and *A I R 1921 Bom 137, Ref.* [P 640 C 2]

K. S. Desikan — for Appellants.

M. Krishna Bharathi for *S. Muthiah Mudaliar* — for Respondents.

Facts.—Three suits were instituted by two common plaintiffs for possession with mesne profits of the property belonging to one Murugayi on the ground that they are the daughters of Murugayi's daughter Dharmu Ammal and are therefore the nearest heirs to Murugayi. The defendants claimed the property through one Venkatachala Chetty, Murugayi's sister's son's son, on his alleged right of inheritance as Murugayi's nearest heir. Admittedly Dharmu was the legitimate daughter of Murugayi and the plaintiffs are Dharmu's illegitimate daughters. The District Munsif decreed the suit in favour of the plaintiffs. On appeal the District Judge found that although the plaintiffs are the heirs of Murugayi they are excluded by Venkatachala Chetty who was entitled to inherit Murugayi's property on the ground that any legitimate heir excludes an illegitimate daughter and therefore also an illegitimate grand-daughter. Against this decision the present second appeal has been preferred by the plaintiffs.

Judgment.—The parties are governed by the ordinary Hindu law and not by any rule of custom as in the case of dancing girls. The general principle of the Hindu law is undoubtedly to limit heirship to legitimate issue but in the case of illegitimate sons amongst Sudras a special exception has been made by the texts. One should ordinarily have thought (on the analogy of the principle *expressio unius)* that this itself is a clear indication against recognizing similar exceptions by way of analogy. The decision in 41 Mad 44[1] proceeds on the footing that as the special text relating to the illegitimate son must proceed on the footing of a recognition of sapindaship between the illegitimate son and his putative father, the latter may well be held to be a sapinda of the illegitimate son and as such entitled to inherit his property. There is no scope for the extension of this reasoning by analogy. Similarly the recognition of a right of inheritance as between the mother and the illegitimate daughter (45 Bom 557[2]) will not warrant an extension of sapindaship to other relations because in that very case the learned Judges were not prepared to postulate sapindaship between the putative father and the illegitimate daughter. The opening sentence in p. 763 of Ghose's Hindu Law (Edn. 3) restricts the illegitimate child's inheritance to the mother's property. The decision of the lower appellate Court is right and the second appeal must be dismissed with costs. (Leave to appeal granted).

C.R.K./P.R. *Appeal dismissed.*

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1. Subramania Aiyar v. Rathnavelu Chetty, A I R 1918 Mad 1346=42 I C 556=33 M L J 224=41 Mad 44 (F B).
2. Dundappa v. Bhimawa, A I R 1921 Bom 137 =59 I C 561=45 Bom 557=22 Bom L R 1306.

A. I. R. 1937 Madras 641

VENKATARAMANA RAO, J.

G. Krishnaswami Naidu — Petitioner.

v.

Municipal Council, Bellary, and *another* — Opposite Parties.

Civil Revn. Petn. No. 969 of 1936, Decided on 18th December 1936, against decree of Dist. Munsif, Bellary, D/- 22nd June 1936.

Practice—Parties—Suit against Municipality for declaration that plaintiff is owner of vacant site—Municipality setting up title in Government—Site given to Municipality for municipal purposes—Government is necessary party to avoid multiplicity of proceedings and must be joined as party.

In a suit where a claim to property is asserted against a Municipality, the question whether the Government is a necessary party or not would depend upon the facts of each case and no general rule can be laid down. [P 641 C 2]

In cases where the plea of jus tertii is set up, it is generally considered desirable to make the person whose title is set up, a party to the suit to avoid multiplicity of litigation. Therefore in cases where the interests of the public are involved and the ownership of the Government is in question, it is very desirable and sometimes quite necessary to make the Government a party and avoid multiplicity of proceedings. [P 642 C 1]

The plaintiff brought a suit against the Municipality for a declaration that he was the owner of a vacant site and that the Municipality was not entitled to interfere with its use. The defence of the Municipality was that the title in the site was in the Government and the site was given to them for municipal purposes and therefore Government must be made a party to the suit:

Held: that in the circumstances of the case the Government was a necessary party to the suit: *25 Mad 635*; *15 Mad 292* and *A I R 1923 Bom 456*, *Ref.* [P 642 C 1]

D. R. Krishna Rao — for Petitioner.

S. Ranganadha Ayyar, K. S. Champakesa Ayyangar for *Govt. Pleader* — for Opposite Parties.

Order.—This is an application to revise the order of the District Munsif of Bellary directing that the Government should be impleaded as a party to the suit. The reason given by him is, apart from the question whether the Government is a necessary party or not, that he considers it desirable that it should be a party to the suit. The question is, whether in the exercise of his discretion under O. 1, R. 10, Civil P. C., the District Munsif has gone wrong and it is therefore unnecessary for me to consider the decisions in 15 Mad 292[1] and 47 Bom 306,[2] as they only hold that in a suit where a claim to property is asserted against the Municipality, the Government is not a necessary party. Whether the Government is a proper party or not, would depend on the facts of each case and no general rule can be laid down. This action relates to a vacant site and the plaintiff claims a declaration that he is the owner thereof and that the Municipality has no right to interfere with any use he may make of it. The main defence of the Municipality is that the site forms part of Survey No. 504-V and is registered in the village accounts as "Kuntha" and "Rastha," that the title thereto is in the Government and the same has vested in it for municipal purposes and that the Government should be made a party. Thus the claim is in respect of property which is asserted to be a public pathway. If it is so, prima facie the title would be in the Government and in such cases, though the right of the Municipality to assert its claim over it for municipal purposes may be lost by adverse possession, the title of the Government would not be lost unless it is shown that the property was held adversely for over a period of 60 years and it would be open to the Government to remove any obstruction on the property and dedicate it again to a highway. This view was taken by Bhashyam Ayyangar, J. in 25 Mad 635,[3] at pp. 650 and 651. In remanding the case for disposal in second appeal, the learned Judge considered it desirable to make the Government a party in that suit. There a similar claim was made against the Municipality and in the course of the judgment the learned Judge made the following observation:

> As some of the issues now to be sent for trial involve the question of the right of the Government to the ownership of the soil in public streets, and as all the material documents bearing on this question will be in the possession of Government, I think it desirable that the Secretary of State for India in Council should be joined as a party to the suit and appeal in this and the connected second appeals. . . .

In this case the Municipality did not assert a title in itself but set up title in the Government and claims to exercise

1. Krishnayya v. Bellary Municipal Council, (1892) 15 Mad 292.
2. Nathalal Ramdas v. Nadiad Municipality, A I R 1923 Bom 456=79 I C 192=47 Bom 306=25 Bom L R 58.
3. Sundaram Ayyar v. Muuicipality of Madura, (1902) 25 Mad 635=12 M L J 37.

certain rights over the site in question by virtue of the vesting of the said property by statute for limited purposes. In cases where the plea of jus tertii is set up, it is generally considered desirable to make the person whose title is set up, a party to the suit to avoid multiplicity of litigation. Therefore in cases where the interests of the public are involved and the ownership of the Government is in question, it is very desirable and sometimes quite necessary to make the Government a party and avoid multiplicity of proceedings. Mr. Krishna Rao contends that the plaintiff will be put to considerable hardship by the addition of the Government as a party in the matter of proof, presumptions of law and similar matters by reason of the peculiar position of the Government. True, but that would not affect the question where a declaration of absolute title to property is asked for as against persons in whom the property has for the time being vested for specific purposes, without the freehold vesting in them. It is desirable that the person really interested in the property should be a party to the suit.

One of the reasons given by Bhashyam Ayyagar, J. is that most of the documents bearing on title will be in possession of the Government and not with the Municipality. Mr. Krishna Rao says that in most cases Government declines to produce documents on the ground of privilege. I do not expect the Government to take an unreasonable attitude and the Court will certainly afford all facilities in the matter of production of documents by the Government. One matter I must notice. It is surprising that the Government should have taken the plea that notice under S. 80, Civil P. C., should have been given to it and the absence of any such notice is a bar to any claim against it. Mr. Champakesa Ayyangar for the Government frankly admits that this plea ought not to have been taken and states it would not be pressed. The decision of the lower Court in exercising its discretion in making the Government a party to the suit is correct and I do not propose to interfere with it in revision. In the result the civil revision petition is dismissed with costs.

C.R.K./K.B. *Revision dismissed.*

A. I. R. 1937 Madras 642

VENKATARAMANA RAO, J.

Mohammad Yusuf and *others* —
Plaintiffs — Appellants.

v.

Narayana Pillai and *others* —
Defendant 4 — Respondents.

Second Appeal No. 558 of 1932, Decided on 26th February 1937, against decree of Dist Court, Negapatam, in A. S. No. 168 of 1931.

Limitation Act (1908), S. 20 (2)—Applicability—Assignee of mortgagee rights and also of equity of redemption—Perception of rents and profits by such person cannot be said to be only in capacity of mortgagee.

For the applicability of S. 20, Cl. (2), Lim. Act, the perception of rents and profits must be by a person in the capacity of a mortgagee only. Where a person is an assignee of the mortgagee and also of the ultimate equity of redemption, that is, the assignee of the rights of the mortgagor in the property, the perception of rents and profits by such person cannot be said to be only in the capacity of a mortgagee : *A I R 1922 Cal 114* and *A I R 1926 P C 68, Disting.* [P 643 C 2 P 644 C 1]

K. Rajah Ayyar, K. Aravamudu Ayyangar and *N. R. Raghavachariar* — for Appellants.

G. Jagadisa Iyer — for Respondents.

Judgment.—The question involved in this second appeal is one of limitation. The facts necessary for its disposal may be briefly stated. The suit property belonged to one Doraisami Pillai who mortgaged it to one Narayanasami Ayyar in 1903. Subsequent to this mortgage, Doraisami Pillai executed another mortgage of the said property and some other property in favour of one Swaminath Pillai in 1905. In 1906, Narayanasami Ayyar instituted a suit on his mortgage, O. S. No. 265 of 1906 on the file of the District Munsif's Court of Tiruvarur, without impleading the second mortgagee Swaminath Pillai, and in execution of the decree obtained thereon, purchased the property in 1908 and took delivery of the same in March 1909. In 1915 the suit property was sold to the plaintiff's father and it was in the possession of the plaintiff's family till 1928, when the plaintiff was dispossessed in execution of the decree obtained by defendant 4. Swaminath Pillai assigned his mortgage in 1910 to defendant 4 who filed O. S. No. 33 of 1920 in the sub-Court of Mayavaram for the realisation of the monies due under the mortgage. He therein impleaded the plaintiff as a party defendant to the suit.

A decree for sale was passed therein and it was confirmed by the appellate Court in appeal, and the appellate decree (Ex. D) ran thus :

> The mortgaged property hereunder described be sold subject to the prior mortgage of Ex. 1 on which Narayanasami Ayyar had obtained a decree in O. S. No. 265 of 1906 on the file of the Tiruvarur District Munsif's Court.

Defendant 4 applied for execution of the decree which he obtained and brought the suit property to sale subject to the mortgage in favour of Narayanasami Ayyar and purchased the property and obtained delivery of possession in July 1928. The plaintiff having been dispossessed filed the present suit for recovery of the money due on the mortgage Ex. A. The main defence is one of limitation. Prima facie, the suit being on the mortgage of 1903, it is certainly barred by limitation. But Mr. Rajah Ayyar contends that the date of dispossession gave him a new cause of action. In support of this he relies on a recent decision of this Court in 59 Mad 312.[1] In that case Ramesam and Stone, JJ. held that where a prior mortgagee institutes a suit on his mortgage without impleading the puisne mortgagee or a purchaser of a portion of the equity of redemption and the property is sold and purchased either by the prior mortgagee or by a stranger, there are two courses open to the prior mortgagee or the purchaser in execution of the decree : (1) to sue on the mortgage, in which case the suit has to be brought within 12 years from the time when the mortgage amount becomes due and payable, or (2) to proceed on the cause of action derived from his title as auction-purchaser, in which case the date of the execution of sale or the date of resistance to delivery of possession in pursuance of the sale might furnish the starting point for limitation. Madhavan Nair, J. in A I R 1935 Mad 680[2] would seem to suggest that the starting point for limitation must be computed only from the date of the sale certificate. But it is unnecessary to go into this question because the suit is specifically based on the mortgage and could only be based on the mortgage in view of Ex. D. The action would therefore be barred unless there is an acknowledgment of liability or payment of interest to save limitation. What is relied on is that between 1903, the date of taking delivery of possession by Narayanasami Ayyar in execution of his mortgage decree, upto the date of the dispossession by defendant 4, the plaintiff and his predecessor-in-title were in possession of the property and in receipt of rents and profits thereon and therefore the perception of such rents and profits would save limitation by virtue of S. 20, Cl. 2, Limitation Act, which runs thus :

> Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-s. (1).

The learned District Judge in the Court below overruled the contention on the ground that the property having been sold and purchased by Narayanasami Ayyar before the new Code of Civil Procedure, all rights as mortgagee became extinguished and Narayanasami Ayyar and his assignees must be deemed to have been in possession of the property only as purchasers and not as mortgagees and therefore S. 20, Cl. 2, Limitation Act, is not applicable to the case. It is no doubt true under the law as it previously stood before the enactment of the Civil Procedure Code of 1908, on the passing of a decree for sale on foot of the mortgage, all rights to the mortgage security are extinguished and the only right thereafter is a right to a sale of the property conferred by the decree. But in the suit instituted by defendant 4 there was a final decree of a competent Court in and by which the suit property was directed to be sold subject to the mortgage in favour of Narayanasami Ayyar. Whether this decision is right or wrong, defendant 4 acquiesced in the judgment and it would not be open to him to contend now that under the said decree no rights were conferred on the plaintiff : *vide* 43 All 469.[3] The result of the decree obtained by defendant 4 is that the mortgage of Narayanasami Ayyar must be deemed to subsist and that the plaintiff must be deemed to be an assignee of Narayanasami Ayyar's mortgage and also of the ultimate equity of redemption, that is, the assignee of the rights of the mortgagor in the property. For the applicability of of S. 20, Cl. 2, Lim. Act, the perception of

1. Sambasiva Iyer v. Subramania Pillai, A I R 1936 Mad 70=59 Mad 312.
2. Gopalan Nair v. Moideen Nadar, A I R 1935 Mad 680=157 I C 1050.
3. Mt. Sukhi v. Ghulam Safdar Khan, A I R 1922 P C 11=65 I C 151=48 I A 465=43 All 469 (P C).

rents and profits must be by a person in the capacity of a mortgagee. Where a person was also the owner of the property, as the present plaintiff was, the perception of rents and profits by him cannot be said to have been only in the capacity of a mortgagee. Mr. Rajah Ayyar relied on a decision of the Calcutta High Court, viz. 64 I C 903.[4] In that case, after the preliminary mortgage decree for sale, the mortgagor entered into an agreement to transfer the equity of redemption to the mortgagee in satisfaction of the decree. In pursuance of the agreement, the mortgagee entered into possession but no transfer was effected and the mortgagor sold the property to a third party who dispossessed the mortgagee. On an application for a final decree, the question arose whether the perception of rents and profits by the mortgagee while he was in possession would not prevent the application from being barred by virtue of S. 20, Cl. 2, Lim. Act. The learned Judges held it would. In that case the learned Judges observed :

> Section 20, Cl. 2, may well be construed to apply wherever mortgaged land is, in fact, in the possession of the mortgagee.

This observation must be deemed to have been made with reference to the facts of that case. The contract for sale was not legally carried into effect and the mortgagee never obtained a title to the equity of redemption, so as to become full owner of the property and he could have been in possession only as a mortgagee. But in this case, so far as the mortgagor was concerned there was a valid transfer of the equity of redemption in favour of Narayanasami Ayyar. Another case relied on by Mr. Rajah Ayyar was 48 All 443.[5] It would be seen from the facts of that case that a sale deed executed in pursuance of a decree of Court in a suit for specific performance against the kartha of a joint family was set aside at the instance of junior members. Part of consideration went in discharge of a simple mortgage which was admittedly binding on the family. To adjust equities between the parties by reason of the fact that the sale must be treated as not binding on the plaintiffs in that case, their Lordships of the Judicial Committee held that one of the terms on which the sale should be set aside should be that the vendee should have the full benefit of the mortgage which has been discharged and the possession of the property, although unwarranted, as a purchaser should not be treated as that of a mortgagee in possession with all the burdens of such a possession. In this view the vendee was not held accountable for profits, nor would he be entitled to any interest. This case therefore proceeds on the footing that the sale being invalid the vendee must be treated as a mortgagee in possession and does not help Mr. Rajah Ayyar. The plaintiff's suit is therefore barred by limitation. In the result, the second appeal fails and is dismissed with costs. Leave refused.

C.R.K./S.C. *Appeal dismissed.*

4. Bama Charan v. Kishore Mohan Roy, A I R 1922 Cal 114=64 I C 903=35 C L J 58.
5. Ram Charan v. Bhagwan Das, A I R 1926 P C 68=95 I C 898=53 All 142=48 All 443 (P C).

A. I. R. 1937 Madras 644

BEASLEY, C. J.

Ramath Kappalli Kelu Kurup — Petitioner.

v.

Eacharambath Madathil Subramania Ayyar and *another*—Opposite Parties.

Civil Revn. Petn. No. 287 of 1936, Decided on 5th April 1937, from decree of Dist. Munsif, Badagara, D/- 31st October 1935.

Revision—Interference—High Court—Trial Court having no jurisdiction to try suit — High Court is not bound to interfere in revision if decree of trial Court is correct.

The High Court is not bound to interfere in revision when the trial Court had no jurisdiction to try the suit, i. e., where the trial Court has wrongly tried an original suit on the Small Cause Side or conversely has tried a Small Cause suit on the Original Side if the High Court is satisfied that the decree of the trial Court is correct. [P 644 C 2 P 645 C 1]

K. K. Sridharan — for Petitioner.

C. K. Viswanatha Iyer — for Opposite Parties.

Order. — The point that is constantly being agitated in the High Court is again before me, i. e., the question whether the High Court is bound to interfere in revision when the trial Court had no jurisdiction to try the suit, i. e., where the District Munsif has wrongly tried an original suit on the Small Cause Side or conversely has tried a Small Cause suit on the Original Side. This point as to

jurisdiction is constantly taken for the first time in the High Court and I am satisfied from the cases which have been put before me that the majority opinion in this High Court is that the High Court is not bound to allow the point under such circumstances to be taken or if it is allowed to be taken the High Court is not bound to interfere in revision if it is satisfied that the lower Court's decree was correct. This latter point put in the following way I think seems in justice and reason to be capable of only one answer. If the District Munsif sitting on the wrong side of his Court, passes a decree which is correct in the opinion of the High Court, to whom a civil revision petition is presented, must the High Court set that decree aside merely because he has passed it on the wrong side of the Court though the High Court would have upheld it had it been passed on the right side of the Court ? The answer to this question seems to me to be clearly in the negative, namely that the High Court is not bound under such circumstances to interfere in revision. In the present case, the point was taken in the lower Court and even if the District Munsif in holding that the suit was one of a Small Cause nature may have been wrong, a point upon which I express no opinion, I see no reason for holding that the decree passed was incorrect or unjust. Under these circumstances this civil revision petition must be dismissed with costs.

C.R.K./W.D. *Petition dismissed.*

A. I. R. 1937 Madras 645

GENTLE, J.

V. Lalithambal Ammal — Petitioner.

v.

Guardian of India Insurance Co., Ltd. and *others* — Opposite Parties.

Original Petn. No. 223 of 1936, Decided on 16th October 1936.

Married Women's Property Act (1874 as amended by Act. 13 of 1923), S. 6—Insurance policy—Benefit to go to assured or to his wife if he predeceased her—No trust in favour of wife is created until death of assured—Assured therefore could assign during his life time benefits under policy to another.

S effected a policy of insurance upon his own life and under the heading " for whose benefit and to whom payable " were the words " the assured or his wife if he predeceases her ". During his life time *S*, by an endorsement on the back of the policy assigned to a Bank all the benefits under the policy for valuable consideration. *S* having predeceased his wife, she claimed that upon effecting of the policy, a trust immediately came into existence in her favour, and that the deceased could not assign the benefits to the bank:

Held : that the benefit was to accrue to the deceased *S* in the first instance and on the contingency of his dying before, it was to go to his wife. Hence no trust in favour of the wife could be created until *S* had died, and *S* therefore during his life time could assign the benefits to the Bank being unfettered by any trust in favour of his wife : *In re Ioakimidis' Policy Trusts*; *Ioakimidis* v. *Hartcup*, (*1925*) *1 Ch 403*, *Rel. on*; *Cousins* v. *Sun Life Assurance Society*, (*1933*) *1 Ch 126* and *In re Fleetwood's Policy*, (*1926*) *1 Ch 48*, *Disting.* [P 647 C 1]

A. V. Seshayya — for Petitioner.

Dr. V. K. John for *C. M. Kuruvilla* and *N. Nagarajan* — for Opposite Parties.

Judgment. — On 11th May 1935, one V. Sundaresayya effected a policy of insurance, No. 1113, with the Guardian of India Insurance Company, upon his life and the schedule to that policy provides that the amount payable upon his death is Rs. 2,000. Under the heading "For whose benefit and to whom payable" are the words "the assured or his wife Mrs. V. Lalithambal if he predeceases her." The assured died on 7th March 1936, during the currency of the policy. It is conceded that in fact only Rs. 1,000 is payable under this policy. During his lifetime, namely, two days after effecting the policy the assured by an endorsement on the back of the policy assigned to the Travancore National Bank all the benefits under the policy for valuable consideration. The widow, the petitioner in this petition, claims that upon the effecting of this policy a trust immediately came into existence in her favour and that by the assignment of the benefit of the policy to the Travancore Bank the deceased was trying to do what in fact he had no power to undertake and she claims that the money, the Rs. 1,000, should be paid to the Official Trustee to hold on her behalf and should not be paid to the Travancore Bank. The Insurance Company are defendants with the Travancore Bank so that any order which may be made regarding payment can be effectively carried out. The matter is the subject of S. 6, Married Women's Property Act, 1874 as amended by the Act 13 of 1923. S. 6 of the Act provides :

A policy of insurance effected by any married man on his own behalf and expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them shall enure and

be deemed to be a trust for the benefit of his wife or of his wife and children or any of them according to the interest so expressed and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors or form part of his estate.

When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Presidency.

This section, save in regard to the appointment of special trustees or of the Official Trustee of the Presidency, is similar in effect, although not identically worded, to S. 10, Married Women's Property Act, 1820, as amended by S. 11 of the English Married Women's Property Act of 1882. It is important to remember that under this policy it is expressed to be for the benefit of and to be payable to the assured or his wife, that is to say, the petitioner here, if the assured predeceases the wife. It is contended on behalf of the petitioner that immediately upon the policy coming into existence a trust arose in her favour and that trust subsists right through all the relevant period. On the other hand Dr. John on behalf of the Bank contends that a trust never arose but if such a trust arose it arose only upon the happening of the event which would give rise to it, namely, the death of the assured and until his death there was no trust in being. I have been referred to several decisions of the English Courts, namely, (1925) 1 Ch 403,[1] (1926) 1 Ch 48[2] and (1933) 1 Ch 126,[3] decisions upon the Married Women's Property Act, 1882. In (1933) 1 Ch 126,[3] the policy was effected by the husband upon his own life expressed to be for the benefit of his wife named in the policy and the decision of the Court was that in the policy effected in that way the wife took an immediate vested interest. Romer, L. J. does visualise the position of a policy being effected upon the life of a husband for the benefit of his wife, the wife can obtain an interest only subject to the happening of an event. At p. 139 he says:

> Looking at the two policies in this case, I find that they are expressed to be for the benefit of the testator's wife Lilian Cousins. That being so, there is a trust created in favour of Lilian Cousins. I can see nothing in the Act that would warrant us coming to the conclusion that the husband cannot, by means of this section, provide a vested interest for his wife and his children during his own lifetime but can only provide interests for them contingent on their surviving him. In the policies themselves I cannot find the remotest indication that the husband intended the wife's interest to be contingent on her surviving him. If he had so wished nothing was easier than for him to have said so in the policies themselves. In my opinion, therefore, there was a trust created in favour of the named wife, Lilian Cousins.

As I said that policy was effected on his life for the benefit of his wife and for no other person's benefit save that, if the wife died, it may be that it would have accrued to the benefit of her estate. In (1926) 1 Ch 48,[2] the insurance was payable to the wife of the assured or in the event of her prior death to the assured's executors. Here again this policy of insurance was for the benefit of the wife and the provision of the payment to the husband's executors in the event of the wife's predeceasing him was a provision which one would expect to find upon the failure of the real object of the insurance. In the third English case of *Ioakimidis' Policy Trusts*[1] a husband effected a policy upon his own life for a 20 years' endowment period and it was expressed to be for the benefit of his wife if the assured died within the 20 years leaving her surviving. Otherwise it was for the benefit of himself or his estate. Astbury, J. at p. 406 says this:

> In the present case the benefit expressed for the wife was operative only in a specified event, namely, in the event of the husband dying before 28th May 1938, leaving her surviving. That in my opinion was a policy effected by the husband on his own life and expressed to be for the benefit of the wife in the event mentioned. It created a statutory trust for the wife in that event only, namely, if the husband died before 28th May 1938, leaving her surviving.

His view undoubtedly is that when the wife's interest arises only upon the happening of an event there is no vesting of that interest until the event anticipated in fact does arise. Here the payment is in the first instance to the assured and the contingency of his predeceasing his wife is the second provision in the relevant schedule of the policy. I have been referred to 58 Bom 513,[4] by learned counsel on behalf of the Travancore Bank.

1. *In re* Ioakimidis' Policy Trusts; Ioakimidis v. Hartcup, (1925) 1 Ch 403=95 L J Ch 24=133 L T 796=41 T L R 486=69 S J 662.
2. *In re* Fleetwood's Policy, (1926) 1 Ch 48=95 L J Ch 195=1926 W C & Ins Rep 1=135 L T 374.
3. Cousins v. Sun Life Assurance Society, (1933) 1 Ch 126=102 L J Ch 114=1933 W C & Ins Rep 164=148 L T 101=49 T L R 12.
4. Dinbai Hormasji v. Bamansha Jamasji Shet, A I R 1934 Bom 296=152 I C 168=58 Bom 513=36 Bom L R 609.

To my mind that case is entirely irrelevant to the point before me, because there the policy had been expressed to be for the benefit of the wife and it would appear that when the judgment of Divatia, J. at p. 519 was pointed out to Dr. John he accepted the position that that case did not assist him. For the reasons which I have given, in my judgment there was no vested interest of the petitioner in the subject matter of this policy until the happening of the event which, the policy contemplates, must happen before she has the interest, namely, the death of the husband. It follows therefore that during his lifetime he was not fettered by any trust as a trust would only arise upon his death. Therefore when he executed the assignment to the bank he was entitled so to do and that being so, it is of full effect and the petitioner is not entitled to payment by the insurance company of Rs. 1,000 which is the amount agreed under the policy to be payable to the person entitled. In my judgment the Travancore Bank are the persons to whom the money is payable and they are entitled to be paid the amount under the provisions of the policy and the effect of the assignment of 13th May 1935. It is however admitted by the learned counsel on behalf of the Travancore Bank that although the wording of the assignment is of an absolute nature, nevertheless the Bank desires to be paid only the sum which the deceased was indebted to them during his lifetime and if this indebtedness is less than Rs. 1,000, the petitioner is entitled to any balance that there may be found after taking an account. The result therefore is that this petition is dismissed with costs of respondents 1 and 2.

C.R.K./B.D. *Petition dismissed.*

A. I. R. 1937 Madras 647

CORNISH, J.

Parimi Chakrapani Naidu —

Appellant.

v.

Mathapalli Venkataraju —

Respondent.

Second Appeal No. 261 of 1933, Decided on 26th February 1937, against decree of Sub-Judge, Cocanada, in A. S. No. 117 of 1930.

Damages—Cause of action — Dispute over plaintiff's right to build bund — Defendant removing plaintiff's bund and giving information under S. 145, Criminal P. C.—Magistrate directing plaintiff not to build bund till order of competent Court obtained—Plaintiff's subsequent suit resulting in his right to build bund being upheld—Plaintiff's fields remaining uncultivated, plaintiff suing defendant for damages—No malice attributed to defendant — Magistrate's order held broke chain of causation—Damage suffered thereby being too remote defendant held was not responsible for damages.

Where there comes in chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of this decision are too remote from the original wrong which gave him a chance of deciding. And no suit lies against a person for procuring an erroneous order from a Magistrate. [P 648 C 2]

In a dispute between the plaintiff and the defendant over a right to bund a channel, the defendant removed the bund put up by the plaintiff and laid information under S. 145, Criminal P. C., on which the Magistrate ordered the plaintiff not to raise the bund until the decree of a competent Court was obtained. On a subsequent suit by plaintiff resulting in his right to build the bund being upheld, the plaintiff brought a suit for damages against defendant for the loss of cultivation of his fields, alleging the defendant's interference as the primary cause of damage suffered by him, the order of the Magistrate made upon the initiative of the defendant being only a secondary cause, which could not relieve the defendant of his initial wrongful act. There was no malice alleged on the part of the defendant :

Held : that the Magistrate's order was a *novus actus interveniens* sufficient to break the chain of causation between the defendant's wrongful act in removing the plaintiff's bund and the injury suffered by the plaintiff in consequence. The order of the Magistrate being an independent act in the course of his official duty, the defendant could not be held responsible for it or for the damage suffered in consequence : *Harnett* v. *Bond*, *(1925) A C 669* and *Lock* v. *Ashton*, *(1848) 12 Q B 871*, *Rel. on.* [P 648 C 1, 2]

P. V. Rajamannar and *K. Subba Rao* — for Appellant.

Ch. Raghava Rao and *S. Rajaraman* — for Respondent.

Judgment.—The defendant is the appellant. He has been held liable by the lower appellate Court to damages for the loss to the plaintiff of three years cultivation of his fields on the ground that this loss was caused initially by the defendant's wrongful obstruction to plaintiff's right to bund a water channel. The facts are that plaintiff and defendant had a dispute over the former's right to bund this channel. The plaintiff put up a bund and the defendant removed it. The defendant then laid an information under S. 145, Criminal P. C. On that information the Magistrate, after taking statements from both parties made an order that the plaintiff should not raise a bund

or divert the water from the channel until he had obtained a decree or order of a competent Court adjudging him to be entitled to raise such bund. A subsequent suit by the plaintiff resulted in his right to bund the channel being upheld. The Magistrate's order was made on 21st November 1924, and plaintiff's claim for damages is in respect of the loss of cultivation of his fields for the years 1925, 1926, 1927. The allegation in the plaint in para. 4 is:

The defendant afterwards instituted proceedings under S. 145, Criminal P. C., and got an order restraining the plaintiff from raising a cross-bund; consequently the plaintiff's lands were obliged to be kept fallow.

But in para. 8, the cause of action is laid generally on the loss caused to the plaintiff by the defendant's obstruction to the plaintiff's right to bund the channel. The plaint leaves it somewhat obscure what directly the plaintiff's cause of action is. But his learned counsel has argued the case that the defendant's wrongful interference with the plaintiff's bund being the primary cause of the damage suffered by the plaintiff, the order of the Magistrate made upon the initiative of the defendant was only a secondary cause which cannot relieve the defendant of his liability for his initial wrongful act.

think that this position is unsustainable. There can be no doubt that the immediate and proximate cause of the plaintiff being deprived of his right to bund the channel was the order of the Magistrate. Indirectly it was due to the defendant's act in interfering with the plaintiff's bund and to his initiating proceedings in anticipation of a possible breach of the peace. But the direct cause of the plaintiff's deprivation of the right to take water was the Magistrate's order. There is no allegation in the plaint that the defendant in taking these proceedings was actuated by malice. If he had acted maliciously his position might have been different. It must however be assumed that he acted from proper motives. The order of the Magistrate being an independent act in the course of his official duties, the defendant cannot be held responsible for it or for the damage suffered by the plaintiff in consequence of it. The Magistrate's order was, to use Lord Cave's expression in (1925) A C 669,[1] a "*novus actus interveniens* sufficient to break the chain of causation," between the defendant's wrongful act in removing plaintiff's bund and the injury suffered by the plaintiff in consequence. The House of Lords affirmed the judgment of the Court of Appeal in the above case reported in (1924) 2 K B 517[2] where Scrutton, L. J. said:

There is no doubt that the action of a third party does not necessarily break the chain of causation and make subsequent damages too remote . . . . But it appears to me that where there comes in the chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance of deciding. It was on this principle that in *Lock* v. *Ashton*[3] it was decided that a defendant who had wrongfully taken a person into custody and brought him before a Magistrate was not liable for the subsequent remand by the Magistrate, which was a judicial act.

No suit will lie against a person for procuring an erroneous order from a Magistrate: 3 I C 12.[4] I am therefore of opinion that the lower Court's judgment was wrong. The decree of the lower Court is set aside and this appeal is allowed with costs.

C.R.K./V.B.B. *Appeal allowed.*

1. Harnett v. Bond, (1925) A C 669=94 L J K B 569=133 L T 432=89 J P 182=41 T L R 509.
2. Harnett v. Bond, (1924) 2 K B 517=93 L J K B 946=131 L T 782=40 T L R 653=68 S J 770.
3. (1848) 12 Q B 871=18 L J Q B 76=13 Jur 167.
4. Mina Kumari Bibi v. Surendra Narain Chakravarti, (1909) 14 C W N 96=12 C L J 226=3 I C 12.

A. I. R. 1937 Madras 648

PANDRANG ROW, J.

Ganesh Naidu and *others* — Appellants.

v.

C. Mallaram Singh — Respondent.

City Civil Court Appeal No. 35 of 1935, Decided on 17th April 1936, against decree of City Civil Judge, Madras, in O. S. No. 783 of 1934.

(a) Res judicata — Prior decision — Suit for ejectment of defendant-tenant on purchase by plaintiff of superstructure erected by defendant—Finding in suit that such purchase did not make plaintiff purchaser of lease-hold rights of defendant — No appeal against decision—Suit by plaintiff again for ejectment against defendant on purchase of land leased to him — Finding in prior suit held res judicata.

On the purchase by the plaintiff of the superstructure erected by the defendant-tenant on the land leased to him, the plaintiff brought a suit to eject him from the land. It was decided in the

suit that by the purchase of the superstructure, the plaintiff did not become the purchaser of the lease-hold rights of the defendant. No appeal was filed against this decision. Subsequently the plaintiff purchased the land also and then brought a suit for ejectment against the same defendant :

Held : that the decision in the prior suit that by the purchase of the superstructure the plaintiff did not become purchaser of the lease-hold rights of the defendant and thus the defendant continued to be a tenant even after such sale, was res judicata in the suit for ejectment subsequently brought by the plaintiff. [P 649 C 2]

(b) Madras City Tenants' Protection Act (3 of 1922), S. 11 — Tenancy under Act cannot be changed except under provisions of Act— Provisions of S. 11 are in favour of tenant and not landlord — Tenant under Act is entitled to benefit of S. 11 even if he cannot claim other benefits under Act — Defendant, a tenant under Act—Superstructure erected on land by him put to sale at Court-auction and purchased by plaintiff — Plaintiff subsequently purchasing land also — Sale of superstructure cannot change nature of tenancy — Suit by plaintiff for ejectment without notice under S. 11 to defendant is not maintainable.

The Madras City Tenants' Protection Act nowhere contemplates any change in a tenancy to which it applies being brought about except in accordance with the provisions of the Act. The provisions of S. 11 are certainly provisions in favour of the tenant and not in favour of the landlord and tenants under the Act cannot be deprived of the benefit or the protection given by S. 11 simply because they are not entitled to other benefits given by the Act. Whether the right to get compensation or to purchase the land exists or not, the tenancy under the Act remains, at least so far as S. 11 of the Act is concerned, which gives him the benefit of three months' notice instead of notice for a shorter time under the ordinary law. [P 650 C 1, 2]

Where the defendant was the tenant of certain land within the meaning of the Act and the superstructure erected by him was put to sale in court-auction and purchased by the plaintiff and subsequent to such purchase the plaintiff purchased the land also, and then brought a suit against the defendant for ejectment without giving him the three months' notice as required under S. 11 of the Act :

Held : that the defendant being the tenant of the land within the meaning of the Act before the superstructure was put to sale, the fact that it was put to auction at Court sale and was purchased by the plaintiff could not have the effect of changing the nature of the tenancy under the Act into an ordinary tenancy. The sale could not therefore terminate the tenancy under the Act. The defendant therefore being entitled to three months' notice before a suit for ejectment was filed, the plaintiff's suit was not maintainable as no such notice was given to the defendant. [P 650 C 1, 2]

C. Sarangarajan — for Appellants.

K. Gopalaswami — for Respondent.

Judgment.—This is an appeal from the decree of the City Civil Judge, Madras, dated 2nd February 1935, in O. S. No. 783 of 1934, a suit for ejecting the defendants and for recovery of possession of the plaint property. According to the plaintiff the site on which the plaint superstructure stands belonged to one Abdul Huq and the defendants were the tenants of the site who had put up the suit superstructure thereon and were paying a rent of Re. 1.13.0 per month. The plaintiff purchased the site from Abdul Huq on 15th October 1934. Some months earlier in execution of a decree of the Small Cause Court the superstructure belonging to the defendants had been sold and purchased by the plaintiff himself on 5th May 1934. The plaintiff therefore claimed to be the owner of the house as well as the site and on the strength of this title to the house and the site he claimed to recover possession of both. The superstructure was purchased by the plaintiff on 5th May 1934 and immediately thereafter, on the strength of this purchase, in Court auction, of the superstructure, he instituted a suit for ejecting the defendants, namely, O. S. No. 346 of 1934. In that suit the lower Court held that the plaintiff had not become, by reason of the purchase of the superstructure, the purchaser of the leasehold right of the defendants and that his only right was to pull down the superstructure and take away the material. That finding is res judicata as no appeal was filed from the judgment of the lower Court in that suit, and it may be mentioned here that it was only a few days before the judgment in that suit was pronounced that the site itself was purchased by the plaintiff on 15th October 1934. It is clear therefore that the plaintiff is not entitled by reason of his purchase of the superstructure in court-auction in execution of a Small Cause Court decree, to eject the defendants and his claim to eject the defendants must therefore be rested on the rights which he acquired by reason of the purchase of the land itself from the owner, Abdul Huq.

This is indeed clear from a consideration of S. 28, Presidency Small Cause Courts Act. In any case the matter is now res judicata by reason of the decision of the lower Court in O. S. No. 346 of 1934. A number of issues were framed by the lower Court in the present suit and the suit was decreed, all the issues being found against the defendants and in favour of the plaintiff. In the present

appeal by the defendants it is sufficient to consider only one question, namely the question covered by issue 2 in the Court below which runs as follows: "Is the suit not maintainable for want of proper notice?" In order to determine this question it is necessary to decide whether the defendants are tenants as defined by the Madras City Tenants' Protection Act 3 of 1922, because it is only under S. 11 of that Act that three months' notice is required to be given before a suit for ejectment can be instituted against the tenant as defined in the Act. The word 'tenant' is defined in that Act as follows:

'Tenant' means tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy.

There can be no doubt that the defendants are 'tenants' as defined above, and this cannot be seriously questioned. They are tenants of land and the fact that the superstructure put up by them was sold in court-auction does not terminate their tenancy. It cannot be pretended that because the superstructure is sold or burnt down the tenancy ceases to exist, or that the tenancy under the Act becomes an ordinary tenancy. By virtue of the decision in the former suit O. S. No. 346 of 1934, it must be held as established between the parties that the lease-hold right of the defendants still inheres in the defendants in spite of the sale of the superstructure. In other words it is clear that the defendants continued to be tenants even after the sale of the superstructure. This is res judicata. They were tenants within the meaning of the Act before the sale, and I do not see how it can be contended seriously that the sale of the superstructure has the effect in law of changing the nature of the tenancy from a tenancy under the Act into an ordinary tenancy to which the Act does not apply.

The Act nowhere contemplates any change in a tenancy to which it applies being brought about except in accordance with the provisions of the Act. The learned City Civil Judge appears to think that a tenant under the Act cannot be regarded as being really a tenant under the Act if he is not entitled to get compensation under Ss. 3, 4 and 5 of the Act, or is not entitled under S. 9 to compel the landlord to sell the land to him; and he concludes that where a tenant has no building of his own on the land, he is not a tenant within the meaning of the Act. This view is in my opinion clearly wrong. It is obvious that where a tenant has no improvements or building of his own, no compensation can be due to him or if he does not want to purchase the land, the question of compelling the landlord to sell the land does not arise. Whether the right to get compensation or to purchase the land exists or not, the tenancy under the Act remains, at least so far as S. 11 of the Act is concerned, which gives him the benefit of three months' notice instead of notice for a shorter time under the ordinary law. The learned City Civil Judge's view, that the spirit of the Act shows that where the tenant has no improvements he cannot claim that three months' notice should be given to him under S. 11 of the Act, is in my opinion, not supported by any reason and certainly not supported by any authority. The provisions of S. 11 are certainly provisions in favour of the tenant and not in favour of the landlord, and to that extent it is one of the benefits conferred on the tenant by the Act, and if the defendants are tenants under the Act they cannot be deprived of the benefit or the protection given by S. 11 simply because they are not entitled to other benefits given by the Act. Even if by reason of certain circumstances the other benefits conferred by the Act may not be available to them, there is no reason to deny such benefits as are available to the tenant under the Act.

I have therefore no doubt that this question namely, whether the defendants are tenants within the meaning of the Act, must be answered in the affirmative. S. 11 of the Act provides that no suit in ejectment shall be instituted until after the expiration of three months after notice in writing has been given requiring the tenant to surrender possession. That such notice has not been given in the present case is admitted and therefore this suit for ejectment is not maintainable, and on this ground alone the appeal has to be allowed. It is therefore unnecessary to consider the question whether if the suit were maintainable the defendants would be entitled to proceed under S. 9 of the Act. The decree appealed from is set aside and the suit is dismissed with costs in this Court and in the Court below.

C.R.K./W.D. *Appeal allowed.*

A. I. R. 1937 Madras 651

VENKATARAMANA RAO, J.

Venkatachariar — Appellant.

v.

South Indian Bank and *another* — Respondents.

Second Appeal No. 873 of 1931, Decided on 24th November 1936, against decree of Sub-Judge, Tinnevelly, in A. S. No. 112 of 1926.

Res judicata — Prior decision — Suit by father against son for declaration that certain property was his self-acquisition and son had no right thereto—Pending suit attachment of same property by decree-holder in execution of decree against son—On decree in his favour father instituting suit against attaching decree-holder and son for declaration that property attached was not liable to attachment and sale in execution of decree against son—Attaching decree-holder, held, precluded from impeaching father's title to property.

Although attachment does not amount to a specific charge in favour of the decree-holder or by itself give him in strictness a title thereto, it is nevertheless the basis of all the judgment creditor's right to assert his debtor's interest in the particular property in question : *A I R 1924 Cal 744, Rel. on.* [P 652 C 1]

In execution of a decree against the son, the decree-holder attached certain property with respect to which the father had instituted a suit for a declaration that it was his self-acquired property and that his son had no manner of right thereto and that the alienations made by him of a portion thereof were not binding on him. The father obtained a decree in the suit and then filed a suit against the attaching decree-holder and the son for a declaration that the property with respect to which he had obtained a declaration against his son in a prior suit was not liable to attachment and sale in execution of a decree against the son. It was contended by the plaintiff that the attaching decree-holder was precluded by the rule of res judicata from impeaching his title by reason of the decision in the prior suit. The lower Court refused to frame an issue on the point on the ground that the attaching decree-holder was not a party to the prior suit. It was however found that the decree obtained by the father against his son in prior suit was not one obtained by fraud or collusion :

Held : that so far as the prior suit was concerned the son did represent all interests in the property in the litigation and so far as the subsequent suit was concerned the attaching decree-holder must be deemed to claim under the son litigating under the same title. Inasmuch as the son was barred by the decision in prior suit from impeaching his father's title to the attached property, the attaching creditor who claimed through him, was equally precluded from asserting the title of the son to the property attached by him as against the father : *Case law referred.* [P 652 C 1, 2]

C. S. Venkatachariar and *D. Ramaswami Iyengar* — for Appellant.

S. Muthiah Mudaliar — for Respondents.

Judgment.—The main question in this second appeal is whether the lower Court ought to have raised an issue whether the defendant is precluded from impeaching the title of the plaintiff to the suit property by reason of the decision in O. S. No. 24 of 1921 on the file of the Sub-Court of Tinnevelly. The facts necessary for its disposal may be shortly stated. The plaintiff is the father and defendant 2 is his son. Defendant 1 is a creditor of defendant 2. In execution of a decree obtained against the latter in O. S. No. 640 of 1920 on the file of the District Munsif's Court of Tenkasi he attached the suit property on 12th April 1922. The plaintiff filed the present suit, O. S. No. 12 of 1923, for a declaration that the suit property is his self-acquired property, that defendant 2 has no right therein, that defendant 1 is not entitled to attach the same as the property of defendant 2 and for an injunction restraining him from bringing the said property to sale. Before the attachment by defendant 1 the plaintiff had instituted a suit, O. S. No. 24 of 1921, on the file of the Sub-Court, Tinnevelly, against defendant 2 and the others for a declaration that the property described in the plaint thereto is his self-acquisition, that defendant 2 has no manner of right thereto and that several alienations made by him of some of the properties in the said suit are not binding on him. On 20th March 1923, the plaintiff obtained a decree in his favour in the said O. S. No. 24 of 1921. It is alleged that the suit property formed the subject matter of the said suit and decision therein.

Before the present suit was taken up for trial, the plaintiff sought to amend the plaint and raise an issue that by reason of the judgment in the said suit, defendant 1 is precluded from contesting his claim by the operation of the rule of res judicata. The judgment was marked as Ex. F in the case but the learned District Munsif refused to raise an issue on the ground that defendant 1 was not a party thereto. On appeal, though Ex. F was relied upon at the hearing the questions relating to res judicata and the correctness of the order of the District Munsif were not raised but after the hearing was closed, an

application was put in to raise the same and when the application was taken up the appellant's vakil absented himself and the application was dismissed. The learned Subordinate Judge refused to act on Ex. F on the ground that it was inadmissible because defendant 1 was not a party to it. On behalf of the appellant Mr. Ramaswami Iyengar urges that the lower Courts should have raised the issue, but it is contended in answer that having regard to the conduct of the plaintiff he should not be permitted to raise the question in second appeal, that Ex. F did not relate to the suit property and that it was the result of collusion between father and son. Before considering the question whether the plaintiff should be given an opportunity to raise this issue, it is necessary to decide whether assuming the facts were as alleged by the plaintiff and the judgment in the prior suit was honestly obtained, it would be res judicata between the plaintiff and defendant 1. There is no doubt that the issue in both the suits is identical, viz., whether the suit properties are the self-acquisition of the plaintiff and defendant 2 has any interest therein. There can also be no doubt that the decision in the prior suit is res judicata between the plaintiff and defendant 2. The question therefore is, what is the position of defendant 1? Does he claim through defendant 2 or to put the matter in another way, did defendant 2 in the former suit represent the interest of defendant 1? If so, he is barred, otherwise not. By virtue of the attachment there is no transfer of the interest of defendant 2 to defendant 1 and the ownership in the property continued in defendant 2. The effect of the attachment is thus stated by Rankin, C. J. in 51 Cal 548[1] at p. 555 :

> Until attachment a judgment-creditor cannot litigate *in his debtor's place* (the italics are mine) to assert his debtor's rights; while the attachment lasts, no new interest can be created to defeat it; and, although in this country, owing partly to the rule as to rateable distribution, attachment does not amount to a specific charge in favour of the decree-holder or by itself give him, in strictness, a title thereto, it is nevertheless the basis of all the judgment creditor's right to assert his debtor's interest in the particular property in question.

Therefore so far as O. S. No. 24 of 1921 is concerned, defendant 2 did represent all interests in the property in the litigation and so far as the present suit is concerned defendant 1 must be deemed to claim under defendant 2 litigating under the same title: *vide* A I R 1934 Rang 206.[2] Defendant 1 himself has no right or title to the property. He has to rely on the title of defendant 2 and stand or fall with him. In 25 Cal 179,[3] the Privy Council held that an attachment by a judgment-creditor of a property alleged to be the judgment-debtor's is of no avail when there has been a subsequent adjudication in a suit between a third party and the judgment-debtor negativing the latter's right and a transfer in pursuance of the attachment subsequent to the adjudication is inoperative as against the party in whose favour the adjudication has been made. The reason of the rule is that what the judgment creditor can attach and sell is only the right, title and interest of the judgment-debtor and if it is found he has none, the attachment operates on nothing and the execution sale confers nothing: *vide also* 6 Bom 567[4] at pp. 569 and 570. In my opinion, the rule of law applicable in cases of jus tertii may well be applied here, viz.

> Whatever would estop or bar the person whose title is set up must also bar the person pleading jus tertii whether the estoppel is by record, deed or *in pais*: *vide* 44 Mad 778[5] at p. 801.

Thus if defendant 2 is barred, defendant 1 who is setting up his title is equally barred, I am therefore of opinion that defendant 1 would be precluded from asserting the title of defendant 2 by reason of the decision in O. S. No. 24 of 1921 on the file of the Sub-Court, Tinnevelly. I think the lower Court ought to have raised the issue. In view of the contentions raised by Mr. Muthiah Mudaliar, before finally deciding this second appeal, it is necessary to raise the following issues and have findings on them. (1) Whether the prior suit (O. S. No. 24 of 1921 on the file of the Sub-Court, Tinnevelly) related to the suit property and there was an adjudication regarding thereto. (2) Whether the judgment in that suit was the result of collusion between the plaintiff and the present defendant 2. I therefore

1. Najimunissa Bibi v. Nacharuddin Sardar, A I R 1924 Cal 744=83 I C 233= 51 Cal 548 =39 C L J 418.
2. U Tha Lu v. Devanarain, A I R 1934 Rang 206=151 I C 417.
3. Moti Lal v. Karrabuld in, (1898) 25 Cal 179= 24 I A 170=1 C W N 639=7 Sar 222 (P C).
4. Parvati v. Kisan Singh, (1881) 6 Bom 567.
5. Secretary of State v. Ahmad Badsha Sahib, A I R 1921 Mad 248=67 I C 971=41 M L J 223=44 Mad 778 (F B).

direct the lower appellate Court to submit the findings on the said issues within two months from the date of the receipt of this order after taking evidence adduced by both parties who are given leave to tender the necessary evidence. Time for objections, 10 days. Having regard to the conduct of the plaintiff, I direct the plaintiff to pay the costs of defendant 1 incurred up to date including the hearing of the second appeal, viz., costs incurred in the District Munsif's Court, costs incurred before the Sub-Judge after remand by the High Court and the costs of hearing of this appeal. Costs of further enquiry in the lower Court and further hearing in this second appeal will abide the result. (On receipt of the finding that the judgment in the prior suit was not obtained by fraud or collusion, his Lordship reversed the decree of the Subordinate Judge.)

C.R.K./W.D. *Decree reversed.*

A. I. R. 1937 Madras 653

VARADACHARIAR, J.

Marudamuthu Poosari and *another*—Petitioners.

v.

Hindu Religious Endowments Board, Madras and *others*—Opposite Parties.

Civil Revn. Petn. No. 1710 of 1934, Decided on 19th March 1937, from order of Dist. Court, West Tanjore, D/- 10th July 1934.

Madras Hindu Religious Endowments Act (2 of 1927), S. 84 — When Act allows suits or applications to be filed in civil Court, they are governed by procedure in Civil P. C.

When Madras Religious Endowments Act allows suits or applications to be filed in a civil Court, in relation to matters arising under the Act, the principle that the Act is self-contained is irrelevant to the question of the procedure to be followed by the civil Court in dealing with such applications or suits. Once a matter comes before a regular civil Court, its further course will be governed by the provisions of the Civil Procedure Code. Hence Order 9 of the Code applies to an application made for setting aside the dismissal of a petition made under S. 84 of the Act : *A I R 1933 Mad 689, Rel. on; A I R 1919 Mad 244, Disting.; A I R 1934 Mad 103, Ref.* [P 653 C 2]

K. S. Desikan — for Petitioners.

K. Subba Rao—for Opposite Parties.

Order.—This revision petition arises out of an application made to the lower Court to set aside the dismissal of a petition which had been presented to it under S. 84, Religious Endowments Act. The learned District Judge was evidently prepared, so far as the merits of the application went, to hold that there was sufficient cause for restoring the O. P.; but he felt constrained to dismiss the I. A., because he was of opinion that Order 9, Civil P. C., did not apply to the case before him. I think that this view of the learned Judge rests upon a misapprehension.

It is in a sense right to say the Religious Endowments Act is self-contained, i. e., that the provisions of the Civil Procedure Code will not by their own force apply to every enquiry to be conducted by the authorities appointed or constituted under that Act. But when that Act allows suits or applications to be filed in a civil Court, in relation to matters arising under the Act, the principle that the Act is self-contained is irrelevant to the question of the procedure to be followed by the civil Court in dealing with such applications or suits. This will be clearly realized when one bears in mind that there are several sections in the Endowments Act relating to suits to be brought in the civil Court. I do not suppose anybody will contend that such suits will not be governed by the provisions of the Code in the absence of a special provision to that effect in the Endowments Act. On the other hand, it seems to me illogical to expect in the Endowments Act a provision to the effect that a suit brought in a civil Court will be governed by the Civil Procedure Code. I do not see how applications to the civil Court will stand on a different footing. All that can be said is that in dealing with suits, the Court will follow the procedure applicable to suits and in dealing with applications, the Court will follow the procedure applicable to applications. It is on the principle that once a matter comes before a regular civil Court its further course will be governed by the provisions of the Code, that second appeals have been permitted from the decisions of the District Courts in cases under the Rent Recovery Act and in appeals under the Forest Act. Much the same principle was recognized by a Division Bench of this Court in 65 M L J 315,[1] though other reasons were also given in support of the decision.

The learned counsel for the respondent invited my attention to the decision in

1. Narayana Iyengar v. Desikachariar, A I R 1933 Mad 689=145 I C 335=65 M L J 315=57 Mad 35.

37 M L J 162.[2] The basis of that judgment is not that the Civil Procedure Code cannot be made applicable at all but it is only the provisions relating to the procedure to be followed by the Court that will apply in such cases but not the provisions relating to appeal, review and so on. It is not necessary for me to say whether this distinction between one part of the Code and another part of the Code is justifiable or not; but that distinction does not affect the decision of the present case. It must also be remembered that that case related to proceedings under S. 10 of the old Religious Endowments Act 20, of 1863. Though it has been held that even when exercising the powers under that section, the District Court was acting as a Court and not as a *persona designata*, there can be very little doubt that a proceeding of that kind is substantially different from applications and suits which are provided for in the present Religious Endowments Act. The Full Bench judgment in 57 Mad 271[3] proceeded on the footing that the provisions of the Code are applicable to these suits and applications, though the right of appeal was negatived in respect of applications under S. 84, on the footing that an order on such an application was not a decree within the meaning of the Civil Procedure Code. The order of the learned District Judge is set aside and he is directed to restore the O. P. to file and proceed to dispose of it on the merits. Costs to abide.

C.R.K./W.D. *Revision allowed.*

2. Anantharaju Shetty v. Appu Hegade, A I R 1919 Mad 244=53 I C 56=37 M L J 162.
3. Rajagopala Chettiar v. Madras Religious Endowments Board, A I R 1934 Mad 103=147 I C 614=57 Mad 271=66 M L J 43 (F B).

A. I. R. 1937 Madras 654

KING, J.

Endapalle Ella Reddi—Petitioner.

v.

Emperor.

Criminal Revn. Case No. 772 and Petn. No. 721 of 1936, Decided on 11th February 1937, against order of Dist. Magistrate, Chittoor, in Criminal Revn. Petn. No. 39 of 1936.

Criminal Trial — Duty of Court — Sub-Magistrate—Duty of Sub-Magistrate to weigh evidence of witnesses — Cases triable exclusively by Court of Session and those which he can dispose of finally—Standard of proof for prosecution in former is not as high as in latter — In case of reasonable doubt he should commit accused and leave Sessions Court to appreciate evidence — It is his duty to discharge accused, if he finds prosecution case false.

It is the clear duty of the Sub-Magistrate to weigh the evidence of the witnesses who appear before him. If he does not, his proceedings are farcical and cross-examination or the examination of defence witnesses might as well be forbidden. He should not of course require in cases triable exclusively by the Court of Session, the same high standard of proof for the prosecution which he would require in cases which he can himself finally dispose of. If there merely exists in his mind a reasonable doubt as to the truth or otherwise of the evidence before him, he should commit the accused for trial and leave the Sessions Court to appreciate the evidence for itself. But this is not to say that he is precluded from finding that the prosecution case is false. If that is the only conclusion to which the evidence leads him, he would be failing in his manifest duty if he does not record his finding and discharge the accused. It is an important part of the duty of committing Courts to prevent false cases and frivolous cases from occupying the time of the Court of Session both in the interests of the accused himself and in the interests of the Court of Session. [P 655 C 2; P 656 C 1]

V. L. Ethiraj and *G. R. Damodara Rao*—for Petitioner.

Public Prosecutor — for the Crown.

Order.—This revision arises out of the order of the District Magistrate of Chittoor setting aside an order of discharge passed by the Sub-Magistrate of Piler in a case under S. 307, Penal Code (attempt to murder). It appears that the case was first reported by the Village Magistrate to the police and was found by the police to be false. Subsequently at the instance of the complainant himself who was injured, the preliminary enquiry went on. The story for the prosecution was that the accused shot at the complainant from a distance of 15 or 16 yards with a breach-loading gun and injured him in the left thigh. The defence was that P. W. 1 had attempted to kill himself with his uncle's gun which was a muzzle loader and in doing so, bungled and injured himself in the thigh instead of in any vital part of the body. P. W. 8, the Village Magistrate, taking advantage of this circumstance foisted a false case against the accused.

The Sub-Magistrate of Piler took the whole of the evidence both for the prosecution and for the defence, wrote a long and considered judgment in which he pointed out that in his opinion the eye-witness, P. W. 2, and the other important prosecution witnesses who say that they

saw the accused at the scene of offence were not present there; that the Village Magistrate had taken a very unusual interest in the case and though at first he denied having done so, when questioned about it in cross-examination, was afterwards compelled to admit it; that blood was found at the spot where P. W. 1 is stated by the defence to have attempted to commit suicide; and that the nature of the wound and the position of the wound are inconsistent with the case for the prosecution, that the shot was fired from a distance of 15 or 16 yards in front of P. W. 1. On these conclusions, the Sub-Magistrate found that the case was utterly false and accordingly discharged the accused under S. 209, Criminal P. C. The complainant thereupon moved the learned District Magistrate in revision and the learned District Magistrate set aside the order of discharge in a very brief order which reads as follows :

> On perusing the records and hearing the parties I find that the order of the Stationary Sub-Magistrate cannot be allowed to stand, on the face of the medical evidence against the theory of the self-infliction of the injury. The Subordinate Magistrate should not have weighed the evidence of the medical witness in the preliminary enquiry as he did—that should have been left to the Court of Session.

It must be pointed out that this is a very unsatisfactory order. The learned District Magistrate should at least in setting aside an order of this kind passed by the Sub-Magistrate after a lengthy consideration of the whole evidence have indicated in some greater detail how the order was wrong. It appears that the learned District Magistrate was of the opinion that the medical evidence conclusively proved the falsity of the defence. It is extraordinary to me how that conclusion could be reached by the learned District Magistrate, for I find that the doctor in cross-examination says this :

> I adhere to my opinion that the injury of P. W. 1 could not be self-inflicted one. Because the injury of P. W. 1 was not on his head, mouth and chest, I have expressed that it cannot be self-inflicted.

Now of course as a matter of physical possibility, this opinion is absurd. A man can injure himself in any part of the body which he can reach with his gun. The whole case for the defence was, that though P. W. 1 intended to kill himself, he bungled his arrangements and accidentally shot himself in the leg. The learned District Magistrate does not attempt to discuss the finding that the Sub-Magistrate came to that the condition of the wound is inconsistent with the prosecution case, and I do not find in the evidence of the doctor himself any statement supporting the prosecution case that the injury could have been caused from a distance of 15 or 16 yards. On the contrary he says that the muzzle end of the gun might have been at about 2 yards distance from the injury. It is therefore impossible to regard this case as one in which the medical evidence presents great difficulties or proves that the prosecution case must be true on the ground that the defence case must be false. Indeed another portion of the doctor's evidence was brought to my attention at the hearing which is a strong indication in favour of the defence. The doctor says :

> The presence of burnt rags in a gun shot wound will indicate that the gun used was an old-fashioned muzzle loader.

As already mentioned it is the prosecution case that a breach loader was used and the defence case that a muzzle loader was used. Apart however from these important passages in the medical evidence which are quite at variance with the case for the prosecution, I must point out that the learned District Magistrate was not justified in stating without any qualification that the Sub-Magistrate should not have weighed the evidence as he did. It is the clear duty of the Sub-Magistrate to weigh the evidence of the witnesses who appear before him. If he does not, his proceedings are farcical and cross-examination or the examination of defence witnesses might as well be forbidden. He should not of course require in cases triable exclusively by the Court of Session the same high standard of proof for the prosecution which he would require in cases which he can himself finally dispose of. If there merely exists in his mind a reasonable doubt as to the truth or otherwise of the evidence before him, he should commit the accused for trial and leave the Sessions Court to appreciate the evidence for itself. But this is not to say that he is precluded from finding that the prosecution case is false. If that is the only conclusion to which the evidence leads him, he would be failing in his manifest duty if he did not record his finding and discharge the accused. It is an important part of the duty of committing Courts to prevent false cases and frivolous cases

from occupying the time of the Court of Session both in the interest of the accused himself and in the interests of the Court of Session. In my opinion, the Sub-Magistrate in this case has clearly done his duty in discharging the accused. There has been no criticism by the District Magistrate except on the one matter which I have referred to, of the findings as such, and the learned Public Prosecutor is unable to say that any of his findings is not justified by the evidence. For these reasons I set aside the order of the learned District Magistrate and restore the order of the Sub-Magistrate discharging the petitioner.

C.R.K./V.B.B. *Petition allowed.*

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* A. I. R. 1937 Madras 656

PANDRANG ROW, J.

Udaya Pratapa Singh and *others* — Appellants.

v.

Gourachendra Dyano Sumanto and *others* — Respondents.

Second Appeals Nos. 1172, 1173 and 1174 of 1932, Decided on 19th October 1936, against decree of Sub-Judge, Berhampore, in A. S. Nos. 74, 77 and 122 of 1929.

(a) Lease—Registration — Lease for three years of right to collect rents due by zamindari tenants—Registration is necessary.

A lease for a period of three years of the right to collect the rents due by the zamindari tenants or ryots to the zamindar must be registered as the rent is certainly a benefit to arise in future out of land and it is an interest in land: *34 Mad 64* and *A I R 1936 P C 230*, *Rel. on.* [P 657 C 2]

*** (b) Landlord and Tenant—Damages for use and occupation—Premises consisting of incorporeal immoveable property such as right to collect rent due by tenants to zamindar—Enjoyment by way of actual collection of rent is use and occupation—Amount actually collected by lessee is measure of damages.**

There is nothing in law to exclude altogether a right to recover damages for use and occupation even in respect of immoveable property which is not capable of physical occupation like land or houses. Where the premises consist of incorporeal immoveable property such as right to collect the rent due in respect of tenant's holdings in a zamindari village, the enjoyment by way of actual collection of rent from the tenants should be regarded as use and occupation. It is only where the rent has been actually collected and to the extent the rent has been collected that the lessee can be said to have had enjoyment, or use and occupation of the immoveable property. In other words the amount collected actually by the lessee is the measure of damages. [P 659 C 2]

K. Kuttikrishna Menon and *K. Narayana Marar* — for Appellants.

B. Jagannadha Doss and *Y. Suryanarayana* — for Respondents.

Judgment.—These are appeals from the decrees of the Subordinate Judge of Berhampore dated 21st December 1931 in A. S. Nos. 74, 77 and 122 of 1929. These decrees in effect dismissed two of the three suits instituted by the Zamindar of Sherugada and in the third suit the Subordinate Judge's decree allowed only a very small portion of the claim and dismissed the rest of it. The trial Court had passed decrees in all the three suits in favour of the plaintiff. It may be mentioned in this connexion that the original plaintiff died before the appeals were preferred to the Subordinate Judge and his legal representatives were brought on record in the lower appellate Court. The suits were in substance for recovery of rent reserved under certain leases or in the alternative for recovery of damages for use and occupation. The leases were of the kind described as mustajari leases and the amount of rent due thereunder is referred to as the mustajari Gutta.

According to the practice followed in the zamindari, the right to recover the rent due to the Zamindar by the ryots, namely rajabhagam, was sold by auction and it is stated that the defendants are the persons whose bids at such auctions were accepted. The bidding at such auction and the acceptance of the bids are alleged to constitute the mustajari leases in question. The trial Court was of opinion that the alleged plaint leases are not really leases but only ordinary contracts and did not therefore require registration. It found however that the contracts were really for three years and that the defendants were dispossessed after one year even in the absence of any reservation of the power to revoke. That Court therefore found that the plaintiff himself having backed out of the contract had no right to expect performance from the other side, and that the plaintiff in filing the suit for recovery of damages is blowing hot and cold in the same breath. It found accordingly that the plaintiff had forfeited his right to recover damages, but, curiously enough, awarded damages, the reason given being that the defendants were also equally repudiating the contract and pleading that the contract had never been given

effect to. In the result, instead of disallowing the plaintiff's claim to damages it reduced it by a comparatively small amount. The decree passed in O. S. No. 137 of 1928 was for Rs. 1,900, the decree passed in O. S. No. 138 of 1928 was for over Rs. 2,100 and the decree passed in the third suit was for a little over Rupees 1,000. In appeal however the learned Subordinate Judge found that the leases alleged in the plaint are leases but that they are not valid or enforceable because the law required them to be registered, the subject of the lease being immoveable property.

As regards the alternative claim to damages for use and occupation, he was of opinion that one of the conditions which must be fulfilled before a claim for damages for use and occupation could be permitted was that the defendant must have been in possession intending to occupy it as a tenant and that in the absence of a registered lease, the lessee could have had no right to recover the rent payable by the occupancy tenants, and it was impossible to say that a lessee in the case of a mustajari lease is even in constructive possession of the holdings. A further argument based on the doctrine of part performance was also dismissed as untenable. Another alternative argument based on the plaintiff's right to sue for accounts on the basis of an agency was also dismissed on the ground that the suits had not been framed on that basis and there had been no trial on those lines and that no application had been made for amendment of the plaint on that footing. The result was, as stated above, the decrees in two of the suits were set aside altogether and the decree amount in the third suit was reduced considerably, only that portion of the claim being allowed which was covered by a registered lease from the predecessor of the plaintiff.

In the present appeals, which were argued together, it has not been contended that what was leased was not immoveable property or that the leases did not require registration, though the finding of the lower appellate Court on these points is attacked in the grounds of appeal. In view of this, it is not necessary to deal with these points at any length. The authorities on the point as to what is immoveable property are collected on pp. 15 and 17 of Mulla's Transfer of Property Act, Edn. 2. What was leased was the right to collect the rents due by the zamindari tenants or ryots to the zamindar. That rent is certainly a benefit to arise in future out of land and it is an interest in land. It is sufficient to refer to 34 Mad 64[1] and in particular to the statement of law on the subject at p. 66 which has been approved by their Lordships of the Judicial Committee in a very recent case, namely, in 14 Rang 400[2] at p. 413. It is clear that if what was leased was immoveable property and the lease was for three years, it must be registered before it can be regarded as valid. The subject of the lease is not land itself and the object of it is not agricultural. The lease is therefore not agricultural. There can be no doubt therefore that the leases relied upon by the plaintiff in these suits are not valid or enforceable because they have not been created by an instrument in writing registered as required by law. So far as this part of the case is concerned, there is no dispute.

The argument on behalf of the appellant has been therefore concentrated on the alternative claim for damages for use and occupation. In this connexion it is desirable to notice what the plaint allegations are. The allegations are that the villages were given on lease to the defendants and that the defendants obtained possession of the villages, and even the claim to damages for use and occupation is based on the ground that the villages have been kept by the defendants in their use and occupation and enjoyment. There is however a statement in the plaint to the effect that the defendants have been collecting rajabagam, etc., from the ryots of the said villages and have been enjoying the same. It is in my opinion only this allegation in the plaint which can afford any basis for the claim to damages for use and occupation, for it has been found by both the Courts below—and the point has not been disputed here—that as a matter of fact the defendants did not get possession of the villages themselves or of the holdings therein. The only possession which the defendants are said to have obtained is by way of enjoyment of the right to collect rent which was given to

1. Mangalaswami v. Subbiah Pillai, (1911) 34 Mad 64=6 I C 504=20 M L J 966.
2. M. E. Moolla & Sons Ltd. v. Official Assignee of Rangoon, A I R 1936 P C 230=163 I C 418=63 I A 340=14 Rang 400 (P C).

them. This alleged enjoyment of the right to collect rent was denied by the defendants who contended that they did not collect anything from the ryots. Unfortunately, no separate issue was framed on this question as to whether any rent had been collected from the ryots by the defendants in pursuance of the so-called leases granted to them by the zamindar, if so, what the amount of such collections was. Issue 2, namely, whether the defendants enjoyed the suit village in the suit year, has not been considered in this aspect and the finding of the trial Court simply was that the lease was really a contract and that the plaintiff acted upon it for one year in pursuance of the contract. In any case, there is no clear finding on the question of actual collection of rents by the defendants and no attempt was made to ascertain the amount of such collections.

In these second appeals what has been argued is that the lower appellate Court's view that no damages for use and occupation can be claimed in cases like the present because in the absence of a registered lease the mustajari lessee can have no right to recover the rent payable by the tenants, is wrong and that enjoyment by way of actual collection of rents should have been deemed to be equivalent to use and occupation of the property that was leased. On the other hand, it is contended that a claim to damages for use and occupation will lie only where the premises or the subject matter of lease is in the nature of land which is capable of actual physical use and occupation and cannot apply where the property is of an incorporeal nature like the right to collect rent. This is a question which seems to be devoid of authority; in any case no Indian authority has been brought to my notice which deals with this point except the solitary reference to a Digest which is found in the lower appellate Court's judgment. No report of the case which is relied upon in the Digest is available and it is therefore impossible to say what the authority is for the statement in the Digest. The case is said to have been reported in 5 O C 222,[3] but that report is not available. As regards the English authorities, the actual authorities have not been brought to my notice but only passages from recognized text books to the effect that the right to recover compensation for use and occupation is not confined to land or houses or the like but will extend to hereditaments, corporeal or incorporeal, such for example, as the right of shooting, hunting, mining with liberty to dig, tithes, etc.

It is possible to find some rule or principle justifying the grant of damages for use and occupation even in cases of incorporeal property where some physical right with respect to land also goes with the incorporeal right assigned or leased, such for instance as in the case of a right of shooting or fishing, the grant of which also implies the physical right to go on the land and be upon it. The present case is however not one of that kind because the right to collect rent does not necessarily involve a right even to enter upon the holdings in respect of which the rent is due. It is not clear whether the right to collect rent which was given, included the right to distrain for rent. No doubt if the right to distrain had been given, there would have been a right to enter upon land. It is impossible to say in these suits what other right besides the right to collect rent was impliedly conveyed to the person to whom that right was granted. As a matter of fact, the claim to damages rests not on any grant but on the mere relationship of landlord and tenant and actual use and occupation of property, in this case the property being the right to collect rent. It may be that cases relating to tithes would have shed more light on the subject but no reference has been made to such cases. The right to recover damages for use and occupation is derived or based on the English law.

There is no case brought to my notice in which a claim to damages for use and occupation in respect of incorporeal property was recognized before the Act of 1737 (2 George II, Ch. 19) which specifically refers not merely to land but also to tenements and hereditaments held or occupied by the defendant. It cannot be said that this particular statute also applies to this country because the common law has certainly been held applicable. The rent was, according to common law originally, regarded as something attached to and issuing out of the land and as a tenement, and rent could only be recovered by real action at first. It was only in modern times that rent was recognized or regarded

3. Jang Bahadur Singh v. Eshan Ali, (1902) 5 O C 222.

as a payment due in virtue of a contract to pay for the use of land, and indeed an action for debt did not lie in respect of rent reserved on a freehold estate, till Queen Anne's time, that is to say, till about 1709. The action for damages for use and occupation which assumed the form of an action of *assumpsit* was itself a development of the action of trespass on the case, and partook originally of its delictual character. So far as incorporeal property was concerned, it was the settled rule of Common law, and it is still a rule of English law, that rent could not be reserved out of an incorporeal thing. The rule was laid down so long ago as in *Butt's case (1600)* to the effect that a contract cannot charge such a thing with rent which is not chargeable by the law; neither can rent be granted or reserved of any estate of freehold out of any other hereditament which is not manurable, either in possession, reversion, or by possibility, but is *heretamentum incorporeum*. In an assize they cannot be put in view, nor can distress be taken in them.'

Of course it does not mean that because no rent could issue from incorporeal things they could not be let. That rule could be and was evaded by the process of making a contract to pay for the use and occupation of incorporeal things, and this contract was enforceable by an action of debt, and later on by an action of assumpsit. Nevertheless, this action did not lie unless there was actual delivery of possession, or, to employ the word then in use, unless there was seisin. Though the rule was that incorporeal things did not lie in livery but in grant, nevertheless seisin, in the shape of attornment by the tenant, was regarded as necessary to complete the grant in the case of, for instance, a transfer of rent: *See* Coke in *Brediman's case (1607)*. The grantee of a rent to complete his title must get seisin; for,' then he was protected by the assize of novel disseisin or the *quod permittat*. Indeed there can be no doubt that the basis of the rule which allowed an action of assumpsit in the case of a claim to damages for use and occupation was actual entry on the premises. In the absence of such entry no such claim could be allowed. This point is in my opinion not open to doubt, viz., that, whatever the reason for the rule may be, historical or otherwise, the rule has always been that there can be no claim to damages for use and occupation unless there has been use and occupation made possible by entry on the premises.

The question therefore is whether in a case where the premises consists of incorporeal immoveable property such as right to collect the rent due in respect of tenants' holdings in a Zamindari village there can never be use and occupation. I do not see why enjoyment by way of actual collection of rent from the tenants should not be regarded as use and occupation. That is the only kind of possession that the immoveable property in question is capable of, and if such possession has been enjoyed or taken, that is to say, where the rents have been actually collected, there is no reason why the person who collected them should not be deemed to have been in use and occupation of the immoveable property in question.

It is no doubt a case of first impression but I think there is nothing in law to exclude altogether a right to recover damages for use and occupation even in respect of immoveable property which is not capable of physical occupation like land or houses. It must at the same time be remembered that where owing to the nature of the immoveable property, there can be no possession except by way of actual enjoyment and to the extent of the enjoyment the occupation and user must be limited only to the actual enjoyment; in other words, it is only where the rent has been actually collected and to the extent the rent has been collected that the defendants can be said to have had enjoyment, or use and occupation of the immoveable property. The case is somewhat similar to a case in which a person who has been granted an invalid lease of several items of property gets actual possession only of some of them; in such a case the claim to damages for use and occupation would be confined to those items of which he actually got possession and could not possibly include items of which he did not get possession. So also in the present case the plaintiff's claim on the ground that defendants have actually collected rents from the ryots must be limited to the amounts actually so collected from the defendants and the damages, which are due to him for use and occupation, must be limited to the actual amounts so collected by the defendants from the ryots. In other words, the amount collected actually by the defendants is the measure of damages in this case.

It follows therefore that the view of the learned Subordinate Judge that no claim

to damages for use and occupation can be maintained in cases like the present is wrong, and that he was not right in dismissing the claim to damages for use and occupation entirely without going into the question of the extent of such user and occupation and the quantum of damages. It is possible and indeed it is very probable that the lower appellate Court will not be in a position to determine this question in the state of the evidence in this case. It does not appear as if the parties knew exactly what they had to prove and it does not appear that there is enough evidence in the suits on which it would be possible to base a finding as to the actual amount collected by the defendants in the suits as rent from the ryots. For this state of affairs the plaintiff is largely to blame, because the burden lay upon him to prove both user and occupation and the quantum of damages, viewing his claim as being one to damages for use and occupation. The other basis of the claim, viz., the mustajari lease, has been found to be invalid, and it is possible, that the paucity of evidence on his side to support the alternative claim to damages for use and occupation is due to the fact that he relied mainly on the lease.

In these circumstances, I am of opinion that the only feasible course to adopt with due regard to justice is to set aside the decrees of both the Courts below in all the three suits and to direct the trial Court to try the suits afresh after raising proper issues in the suits in the light of the observations contained in this judgment and giving reasonable opportunity to both parties to adduce additional evidence. In the circumstances of the case I direct that the parties do bear their own costs in this Court and in the Court below and that the costs incurred in the trial Court up to date by the defendants be paid by the plaintiff irrespective of the result of the suits. Future costs in the trial Court should be provided for in the revised decree of the trial Court. The court-fees paid in the memoranda of these appeals should be refunded to the appellants. Leave to appeal is granted to the respondents.

C.R.K./S.C. *Order accordingly.*

*** A. I. R. 1937 Madras 660**

MOCKETT AND LAKSHMANA RAO, JJ.

B. S. Moorthy — Petitioner.

v.

Eli Vadapalli and *others* — Opposite Parties.

Civil Misc. Petition No. 453 of 1937, Decided on 17th February 1937, to issue a writ of certiorari and quash order of Dist. Magistrate, East Godavari, D/- 23rd December 1936.

*** (a) Government of India Act (1935), Sch. 5, Para. 20 — Rules under — Madras Legislative Assembly Electoral (Election and Election Petitions) Rules (1936), R. 29 Proviso and R. 103 — Candidate elected under R. 29 Proviso — District Magistrate has no power to declare his election void under R. 103 — Person whose election is so declared void is prima facie entitled to writ of certiorari from High Court quashing that order.**

When once a person has attained the status of a member of the Legislative Assembly, he cannot be deprived of it by means of a formal election petition and that procedure which is so carefully elaborated in the Rules contained in the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order (1936) have application to a member of the scheduled caste elected according to Madras Legislative Assembly Electoral Rules (1936) as much as to any one else. [P 663 C 2; P 664 C 1]

Hence, where a candidate is once declared elected under Proviso to R. 29, Madras Legislative Assembly Electoral Rules, to the seat reserved for the scheduled caste in the Legislative Assembly, the District Magistrate has no power under R. 103 to declare such an election void. And the candidate, whose election is so declared void by a tribunal having no jurisdiction to do so, is prima facie entitled to a writ of certiorari quashing that order. [P 664 C 1]

*** (b) Government of India Act (1935), Sch. 5, Para. 20 and Rules under — Madras Legislative Assembly Electoral (Election and Election Petitions) Rules (1936), R. 7 — Certiorari can be taken away only by express words — R. 7 neither expressly nor by implication removes such right of High Court — Intention and meaning of Rules stated — Subject deprived of right by tribunal acting wholly without jurisdiction — R. 7 does not prevent High Court from issuing writ of certiorari to quash order.**

Certiorari can be taken away only by express negative words. The provisions contained in the Madras Legislative Assembly Electoral (Election and Election Petitions) Rules (1936) do not, expressly or by implication, remove the rights of the High Court with regard to writs of certiorari. The intention and meaning of the rules is that all decisions of the tribunals set up shall be final with regard to all matters which they are competent to decide. It matters not whether those decisions are right or whether they are wrong, but it is only in the case of a decision on a matter which such tribunals were never empowered to

decide that the orders of the High Court can be invoked. Hence R. 7 does not prevent the High Court from issuing a writ of certiorari to quash the order in a case where a subject has been deprived of a right by one of the tribunals acting wholly without jurisdiction : *Case law discussed.* [P 664 C 2, P 665 C 1,2]

B. Jagannadha Das for *S. Suryaprakasam* — for Petitioner.

Ch. Raghavarao and *K. S. Krishnaswami Ayyangar* — for Opposite Parties.

Mockett, J. — This is a petition for the issue of a writ of certiorari praying that the order of the District Magistrate of East Godavari dated 23rd December 1936 declaring the petitioner's primary election void and the order of the Revenue Divisional Officer of Cocanada dated 31st December 1936 should be quashed. The determination of this matter turns very largely on the construction of the rules framed by the Governor of Madras in Council and it raises a point of some importance relating to the powers of the High Court. Para. 20, Sch. 5, Government of India Act, 1935, reads as follows :

In so far as provision with respect to any matter is not made by this Act or by His Majesty in Council, the Governor, exercising his individual judgment, may make rules for carrying into effect the foregoing provisions of this schedule and the provisions of Sch. 6 and securing the due constitution of the Provincial Legislature and in particular, but without prejudice to the generality of the foregoing words, with respect to: (1) the notification of vacancies, including casual vacancies, and the proceedings to be taken for filling vacancies ; (2) the nomination of candidates; (3) the conduct of elections . . . . ; (4) the expenses of candidates at elections; (5) corrupt practices and other offences at or in connection with elections; (6) the decision of doubts and disputes arising out of or in connection with elections; and (7) the manner in which the rules are to be carried into effect.

His Majesty in Council has passed an Order entitled "The Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936." R. 2, Part 3 of that order is as follows :

No election shall be called in question except by an election petition presented in accordance with the provisions of this part of this Order.

And by R. 3 (1), an election petition against any returned candidate may be presented to the Governor (a) by any candidate or elector on any ground ; and by R. 4 (1) unless the Governor, exercising his individual judgment, dismisses a petition for non-compliance with the prescribed requirements, he shall, exercising his individual judgment, appoint as Commissioners for the trial of the petition three persons who are, or have been, or are eligible to be appointed, Judges of a High Court, and shall appoint one of them to be the President. Under R. 7 the election of a returned candidate shall be void if in the opinion the Commissioners (c) the result of the election has been materially affected by the improper acceptance or rejection of any nomination . . . . R. 3 (2), Part 1, Introductory of the above Order, is important. It states :

The provisions of Parts. 2 and 3 of this Order shall, in relation to constituencies in which seats are reserved for candidates of any particular class, or in which the final voting is by members of an electoral college previously constituted for that purpose, have effect with such exceptions and subject to such adaptations and modifications as may be prescribed, but subject as aforesaid, any primary election for the purpose of electing candidates for reserved seats, or of constituting any such electoral college, shall be deemed to be part of the election of persons to fill the seats to be filled in the constituency.

The Governor of Madras in Council, exercising the powers conferred by Para. 20, Sch. 5 to the Government of India Act, above mentioned, has formulated rules for the conduct of elections for the constituencies of the Madras Legislative Assembly called: "The Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936." Two sets of rules are provided. Rr. 12 to 31 deal with primary elections. Rr. 32, *et seq* deal with elections other than primary elections. In certain constituencies a seat is reserved for the scheduled castes. The primary elections deal with the election of candidates for the reserved seat. The scheme of the rules is that in the first place a panel of candidates should be prepared and in order to be elected to the Legislative Assembly a person must first be elected to the panel, i. e., he must first be nominated as a candidate for the panel; secondly, elected to the panel and thirdly, in order to reach the Assembly, elected from the panel to the Assembly. It is enough to say that the rules are elaborate and provide for the manner and time of the nomination by the electors of candidates for the primary election to the panel. The proposers and seconders for the nominations must be qualified voters in the constituency (R. 13). The nomination paper delivered by or on behalf of a candidate for a seat in a constituency in which he is not entitled to vote shall be accompanied by a "certified copy" [as

defined in R. 2 (3)] of the entry containing his name in the electoral roll for the constituency in which he is entitled to vote : R. 14 (2).

Any nomination paper which is not received before 3 o'clock in the afternoon on the date appointed by the Governor for the nomination of candidates shall be rejected (R. 17). On or before the date appointed for the nomination of candidates, each candidate shall deposit or cause to be deposited with the returning officer the sum of Rs. 50 in cash ; and no candidate shall be deemed to be duly nominated unless such deposit has been made (R. 22). Rr. 28 and 29 are important. They provide for election to the panel. R. 29 (1) : If the number of candidates . . . exceeds four, a poll shall be taken. R. 29 (2) : If the number of such candidates is four, all such candidates shall be declared to be elected to the panel. R. 29 (3) : If the number of such candidates is less than four, all such candidates shall be declared to be elected to the panel. And then there is a proviso with which we are much concerned :

> Provided that if the number of candidates nominated is one, such canditate shall at once be declared to be duly elected to fill the reserved seat in the constituency.

It must be remembered that, as pointed out, a tribunal set up by the Governor in Council has to decide the validity of elections to the Assembly. But R. 103 makes special provision for the decisions of doubts and disputes as to the validity of primary elections but (and this cannot be over emphasized) as regards the election of candidates to the panel, the Governor in Council appears to have taken the view that that matter can be decided adequately and conveniently by the local officer and in a summary form, for it provides that an election petition against any candidate elected at a primary election, which we understand to mean elected to the panel, shall be presented in the City of Madras to the Collector and elsewhere in the Presidency to the District Magistrate. Those officers or even an officer deputed by them

> shall after due notice to the respondents hold a summary inquiry at such time and place as he may fix, record evidence in the manner provided for summary trials in the Code of Criminal Procedure, 1898, and pass orders on the petition as quickly as possible on the lines of Paras. 7 to 10, of Part. 3 of the said order.

There is a striking contrast in the two procedures : the summary determination of matters relating to election to the panel compared to the formal procedure associated with election petitions. A single example will suffice. Under Para. 5 of the Order of His Majesty in Council dated 3rd July 1936 the Election Commissioners may order the Advocate-General of Madras to attend the hearing.

The above are the relevant provisions of law at this stage. The facts are as follows. In the Cocanada Rural General Constitutency with which we are concerned, a seat is reserved for the schedule castes. The petitioner was a candidate for the panel and so was Mr. Eli Vadapalli, the first respondent in this petition. Nominal nomination papers were filed by five persons, the petitioner, Mr. Eli Vadapalli, and three others. The nomination papers of all the candidates except that of the petitioner were rejected. Consequently under the Proviso to R. 29 the petitioner was at once declared elected to the reserved seat in the Legislative Assembly. He was not, it must be noted, elected to the panel because that was, according to the spirit of the rules unnecessary, there being only one candidate for one seat. He was, as stated above, declared elected to the Legislative Assembly. No question arises with regard to the nominations of the three other candidates but it is well to mention the grounds on which the nomination of respondent 1 was rejected. The grounds are two fold : (1) that his nomination paper was received after 3 o'clock and (2) that in any case there was a non-compliance with R. 14 (2) mentioned above in that his nomination paper, even if in time, was not accompanied by a certified copy of the entry containing his name in the electoral roll for the constituency in which he was entitled to vote, he not being a voter in this constituency. With regard to the merits of these contentions I am of course not concerned, especially in view of the considerations on which I arrive at my decision, but it will be later necessary to say a few words in view of the contention by respondent 1 that in any view of the case the merits are such that this Court should not interfere. We are more concerned with the course of events in the two lower tribunals. The Returning Officer decided against respondent 1 on both the points above mentioned and declared the petitioner elected to the Madras Legislative Assembly. On this respondent 1 filed a petition to the District

Magistrate purporting to do so under R. 103 (b). The form of the prayer to this petition deserves notice. It is as follows :

> The petitioner therefore prays that this Honourable Court may be pleased to declare that the election of the respondent is void and set it aside and order the respondent to pay the costs of this petition to the petitioner.

It must be observed that it is directed and only directed to obtaining a declaration that the election of the respondent (present petitioner) to the Legislative Assembly is void. It does not even refer to the panel. Objection to the jurisdiction of the District Magistrate was at once taken by the petitioner. He argued what he has argued before us, viz., that the District Magistrate had no jurisdiction in the matter in that R. 103 related to the elections to the panel and that he had been finally elected to the Madras Legislative Assembly. This objection was overruled by the District Magistrate who after considering the lower tribunal's order passed the following order:

> The Revenue Divisional Officer was not therefore justified in refusing the second nomination paper filed on behalf of the petitioner. Under the circumstances I hold that the result of the primary election has been materially affected by the improper refusal of this nomination paper filed in time on behalf of the petitioner. Under R. 103 (b) of the Rules, the election of the respondent at the primary election for the reserved seat of the Cocanada Rural Constituency held in pursuance of the Notification dated 24th November 1936 is declared void.

In pursuance of that order the Returning Officer passed the following order dated 31st December 1936 :

> In modification of the Notification published in this office on 11th December 1936, I do hereby declare that (1) M. R. Ry. Eli Vadapalli Garu and (2) M. R. Ry. B. S. Murthy Garu have been duly elected to the panel for contesting the scheduled classes reserved seat in the Rural General Constituency, Cocanada.

The petitioner argues that these orders are bad for lack of jurisdiction and that he having been duly elected to the Legislative Assembly, his election can only be declared void by the Governor in Council or a tribunal set up by him. The argument before us by the Government Pleader amounts virtually to this : Although it is conceded that elections to the Legislative Assembly can only be declared void by an order of the Governor in Council or a tribunal and although the District Magistrate is only given jurisdiction to decide questions relating to elections to the panel, yet, in the case of a member of the scheduled caste elected to the Assembly under the proviso to R. 29, it must be inferred that the Legislature intended that in that case and in that case only even the election to the Legislative Assembly could be set aside by the order of the District Magistrate. In other words, that under R. 103 (a) an election petition against any candidate elected at a primary election should be understood to mean either to the panel or under the Proviso to R. 29 to the Legislative Assembly. I should have thought that, if it was intended to take away such a valuable right of election to the Assembly by means of summary procedure prescribed in R. 103, it would have been expressed in the clearest possible terms and I am most reluctant to draw any inference in favour of such a conclusion unless such inferences are inevitable from the wording of the rules.

That the position now before us has escaped the notice of the draftsman of these rules is evident but the rules have got to be construed as they stand. The language of Rr. 12 to 32 makes it quite clear that one position and one position alone is contemplated—the nomination and election of candidates to the panel in order to enable them to stand for final election to the Assembly. Those rules are headed "Primary Elections" and they deal with candidates for election to the panel and not to the Assembly. That is a later stage. R. 29 adumbrates the words "elected to the panel." R. 103 is at the outset qualified by the words that it relates to primary elections held "for the purpose of electing candidates for a seat" and the orders contemplated by R. 103 (c) clearly relate to orders passed in relation to such candidate. But at the time of the hearing before the District Magistrate the seat had been filled by the election of the petitioner. The order above mentioned dated 31st December of the Returning Officer merely declares that respondent 1 and the petitioner had been duly elected to the panel but the order of the District Magistrate admittedly declares the election of the petitioner to the Assembly void. The short question therefore is, has the District Magistrate power to declare the election to the Assembly void, and I am unhesitatingly of the opinion that he has not. I am not even satisfied that the Legislature intended that he should have such powers. There is nothing remarkable to my mind that when once a person has attained the status of a member of the Legislative Assembly,

he should only be deprived of it by means of a formal election petition and I see no reason to suppose that that procedure which is so carefully elaborated in the rules should not have application to a member of the scheduled caste elected in this manner as much as to any one else. At any rate in the absence of any clear provision to the contrary I am far from disposed to infer the opposite.

As a result of the above conclusions I hold that the petitioner's election to the Legislative Assembly has been declared to be void by a tribunal which had no jurisdiction to do so and that he is, having been deprived without jurisdiction of a right and one may add a valuable right—prima facie entitled to the issue of a writ of certiorari quashing that order. But the Crown has raised the point that this Court is not entitled to interfere by means of certiorari and relies in support of that proposition on R. 7 of the Rules for the conduct of elections for the constituencies of the Madras Legislative Council. It reads as follows :

> Every act done, proceedings taken or decision given under or with reference to the rules shall, subject to the provisions thereof and those of the Government of India (Provincial Elections, Corrupt Practices and Election Petitions) Order 1936 be final and no such act, proceeding or decision shall be called in question by means of a suit or otherwise in a Court of law.

Now that Rule purports to be made in accordance with the powers given to the Governor by para. 20, Sch. 5, Government of India Act, 1935. A perusal of para. 20 shows that the rules which the Governor may make are specified as being

> for carrying into effect the foregoing provisions of this schedule and the provisions of Sch. 6 and securing the due constitution of the Provincial Legislature and in particular but without prejudice to the generality of the foregoing words with respect to (vi) the decision of doubts and disputes arising out of or in connexion with elections.

It is quite obvious from a perusal of the rules that the machinery set up for the purpose of the elections is intended to be final. No appeal lies from the decisions of the District Magistrate with regard to the scheduled caste panels or the tribunals appointed by His Excellency to hear election petitions. The decision of all these matters is left to him. Neither of these tribunals is a Court subject to the machinery of the Code of Civil Procedure and neither can be said to represent a Court for the purpose of invoking the provisions of S. 115 of the Code. This position is fully dealt with by a Full Bench of this Court in 51 M L J 738.[1] It would appear then that R. 7 very largely states what is the accepted law. The Government Pleader's argument therefore amounts to this that a combination of para. 20, Sch. 5 and R. 7, Madras Legislative Council Rules, takes away also the powers of the High Court with regard to the issue of writs of certiorari, and to extend that argument to its logical conclusion it must follow that an elected member of the Madras Legislative Assembly whose election has been declared void by a tribunal having no jurisdiction to do so has no remedy in the High Court. Incidentally I might add it does not appear he has any remedy at all if this argument is correct. Under S. 223, Government of India Act, 1935, the powers of the High Court are the same as before the passing of this Act. But S. 223 is subject to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act. The point for decision therefore would seem to be, have the powers of this High Court with regard to writs of certiorari been removed? It is I think axiomatic that certiorari can only be taken away by express negative words: *vide* Halsbury's Vol. 9, p. 861, para. 1455. So long ago as 1760 it was held in 2 Burr 1040[2] at p. 1042 that :

> The jurisdiction of this Court is not taken away unless there be express words to take it away; this is a point settled.

In that case those who resisted the writ pleaded that the relevant statute enacted that

> no other Court whatsoever shall intermeddle with any cause or causes of appeal from this Act but they shall be finally determined in the Quarter Sessions only.

The argument addressed to the Court was that

> the above words meant no more than that the facts should not be re-examined but the legality may; or a want of jurisdiction may be taken advantage of,

and this argument appears to have found favour with the Court. In 3 Q B D 509,[3] Mellor, J. observed :

> It is well established that the provision taking away the certiorari does not apply where there

1. Lakshmanan Chettiar v. Kannappar, A I R 1927 Mad 93=99 I C 148=50 Mad 121=51 M L J 738 (F B).
2. Rex v. Moreley, (1760) 2 Burr 1040=97 E R 696.
3. *Ex parte* Bradlaugh, (1878) 3 Q B D 509=47 L J M C 105=38 L T 680=26 W R 758.

was absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan Magistrate could make any order he pleases without question.

Those observations seem singularly applicable to this case. 3 Q B D 509[3] above cited is referred to by Ramesam, J. in 60 M L J 260[4] at p. 261 and the observations of the learned Judge are material in every aspect of the topic now under discussion :

Where it is laid down in statutes or bye-laws made under the statutes that proceedings under them shall not be removed by the writ of certiorari, then certiorari is said to be taken away by such statutes; that is it is taken away only by express negative words and not merely by words which direct that certain matters should be finally determined. But even in cases where certiorari is taken away, a writ may be issued if the authority acted without jurisdiction.

In 5 P C 417[5] the Judicial Committee declared the law as follows at p. 442 :

There are numerous cases in the books which establish that notwithstanding the privative clause in a statute, the Court of Queen's Bench Division will grant a certiorari, but some of those authorities establish, and none are inconsistent with the proposition that in any such case the Court will not quash or remove, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.

In this matter however I am prepared to found my decision on the fact that it does not appear that the provisions upon which the Government relies, expressly removed the rights of the High Court with regard to writs of certiorari. Nor indeed do I think even by implication it can be so argued. I think the intention and meaning of the rules is that all decisions of the tribunals set up shall be final with regard to all matters which they are competent to decide. It matters not whether those decisions are right or whether they are wrong but it is only in the case of a decision on a matter which such tribunals were never empowered to decide that the orders of this Court can be invoked. The Government of India Act, 1919, S. 106 (2), is a clear example of a provision of a statute directly negativing the power of the High Courts to issue a writ of certiorari or to exercise any jurisdiction in a certain specified matter, i. e., "in any matter concerning the revenue".

In connexion with this section Venkataramana Rao, J. has considered the powers of this High Court relating to certiorari and the history of those powers is fully set out in 70 M L J 343.[6] Supposing the Collector of Madras on the hearing of a petition against an election to the panel conceived it his duty for the furtherance of the elections to imprison a candidate, can it be doubted that an application for a writ of habeas corpus would lie to this Court? For the above reasons, I am satisfied that R. 7 above referred to does not prevent this High Court from issuing a writ of certiorari in a case where a subject has been deprived of a right by one of the tribunals acting wholly without jurisdiction. In this respect this case differs from the cases cited to us of which a recent unreported case of this High Court, *Appeal Against Order No. 99 of 1934*[7] (Varadachariar and Stodart, JJ.), is an example. That, sustainable petitions such as this should be very rare is obvious from these most comprehensive rules and if the rules are carried out, they should not occur at all. This application is tenable owing to the wording of the relevant rules above cited. The matter can be easily clarified by further rules. Two further points remain. It has been contended that there has been a submission to the jurisdiction in this matter by the petitioner taking his chance of getting a decision on the merits. That can be dealt with shortly. In the first place, it must be observed that he at once objected to the jurisdiction and there is nothing on the record to show that he took his chance on the merits at all. The whole matter was disposed of in one argument. No evidence was called. As a counsel of perfection perhaps the petitioner might have been well advised to withdraw from the proceedings after making his submissions as to jurisdiction. But there is nothing in his conduct to preclude him from claiming this right. The English cases cited in 50 Mad 130[8] do not support the Government Pleader's contention. In none of those cases was objection to the

4. Venkatanarasimha Rao v. Muncipal Council of Narasaraopet, A I R 1931 Mad 122=130 I C 509=60 M L J 260.
5. Colonial Bank of Australasia v. Willan, (1874) 5 P C 417=43 L J P C 39=30 L T 237=22 W R 516.
6. Thayagaraja Chettiar v. Collector of Madras, A I R 1936 Mad 399=163 I C 60=59 Mad 702=70 M L J 343.
7. Secretary of State v. Moyappa Chettiar, Since reported in A I R 1937 Mad 241=I L R 1937 Mad 211.
8. Latchmanan Chettiar v. Corporation of Madras, A I R 1927 Mad 120=99 I C 152=50 Mad 130=51 M L J 742 (F B).

jurisdiction taken at all. The test which is clear from the authorities is whether there was anything in the conduct of the petitioner on which the writ should be refused—and I am quite unable to find any evidence of any such conduct.

Finally it is suggested that on the merits in the lower tribunals this Court should not interfere. It is stated that an election petition may be presented to the Governor-in-Council and I would have preferred to avoid any discussion on the merits but a few words about them are unavoidable in view of the above submission. Suffice it to say that even in the order of the District Magistrate it is clear that the certified copy of the entry containing the candidate's name in the electoral roll for the constituency referred to in R. 14 (2), R. 2 (3), did not accompany the nomination paper but another document accompanied it which the Revenue Divisional Officer regarded with suspicion. I am most reluctant at this early stage in the new regime to give any sanction to the suggestion that condition precedent need not be carried out and that substitutes therefor should be admitted apparently according to the discretion of any individual District Magistrate. As a result of the above conclusions an order will issue quashing the proceedings of the lower tribunals. The result will be that the petitioner has been duly declared elected to the Legislative Assembly. It is of course open to respondent 1 to impugn the validity of the election by an election petition in accordance with the provisions of Part 3 of the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936. The petitioner will have the costs of this petition, Rs. 100.

Lakshmana Rao, J. — I agree and would emphasize that R. 103 of "the Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules 1936" provides for decision of doubts and disputes as to the validity of primary elections for electing candidates for a reserved seat and not the election of a candidate to a reserved seat as defined in R. 3, Part 1 of "the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order 1936," which cannot be questioned except by an election petition presented in accordance with the provisions of Part 3 of that Order. There was in this case an election of a candidate to the reserved seat by virtue of the declaration under the Proviso to R. 19 of "the Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules" and the petition to the District Magistrate was to declare void and set aside the election of the petitioner to the reserved seat. The petition was not to set aside the election of the petitioner as a candidate for the reserved seat nor is it suggested that there are any grounds therefor. That being so, the District Magistrate had no jurisdiction to entertain the petition, and R. 7 of the Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules does not validate or legalise such proceedings. The order of the District Magistrate and the consequential order of the Returning Officer are therefore unsustainable, and certiorari can only be taken away by express negative words. R. 7 does not, as pointed out by my learned brother, take it away expressly or impliedly and it is unnecessary to decide whether certiorari can be taken away by rules framed under Para. 20, Sch. 5, Government of India Act, 1935 and, even if it can be and is so taken away, certiorari may not be granted where the tribunal has acted without or in excess of jurisdiction.

V.B.B./A.L. *Petition allowed.*

A. I. R. 1937 Madras 666

BEASLEY, C. J.

S. Soomar Sait & Sons — Petitioners.

v.

P. V. Cherian — Opposite Party.

Civil Revn. Petn. No. 209 of 1936, Decided on 26th February 1937.

Partnership Act (1932), Ss. 5 and 69 — Cutchi-Memon family carrying on business cannot be included in latter part of S. 5—It is therefore governed by S. 69.

Cutchi-Memons do not stand in an analogous position to Hindu undivided families carrying on their family business. They are governed by Hindu law only as regards succession and inheritance and the principles of Hindu law cannot be applied to their property. Therefore a Cutchi-Memon family carrying on business is governed by S. 69, Partnership Act, and is not included in the latter part of S. 5, Partnership Act.[P 667 C 1]

V. G. Row — for Petitioners.

T. Krishnaswami Iyengar and *S. R. Narasimhachari*—for Opposite Party.

Order. — The lower Court's decision is correct. The plaintiffs are Cutchi-Memons carrying on business as motor dealers. They are members of the same family carrying on the business of their father's before he died. They sued in the lower Court for the price of a second hand motor car sold by them to the defendant. One defence raised was that by reason of S. 69, Partnership Act, the plaintiffs being an unregistered partnership were not entitled to sue and that contention the lower Court upheld and dismissed the suit on that as well as on other grounds. The argument there was that Cutchi-Memons are to be included in the latter part of S. 5, Partnership Act, which reads:

> The relation of partnership arises from contract and not from status: and in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddist husband and wife carrying on business as such are not partners in such business.

It is argued here by Mr. V. G. Row that this is a partnership which arises from status and not from contract because it should be held that Cutchi-Memons stand in an analogous position to Hindu undivided families carrying on their family business. The lower Court held that there was no substance in such a contention, and that Cutchi-Memons are only governed by the Hindu law as regards succession and inheritance and that the principles of Hindu law cannot be applied to their property. I am quite satisfied that the Cutchi-Memons bear no resemblance to Hindu undivided families; and therefore the lower Court's decision upon this point was perfectly correct and the petition must be dismissed with costs.

C.R.K./P.R. *Petition dismissed.*

✻ A. I. R. 1937 Madras 667

BEASLEY, C. J. AND VENKATARAMANA RAO, J.

Davood Mohideen Rowther—Petitioner.

v.

Sahabdeen Sahib — Opposite Party.

Civil Revn. Petn. Nos. 1295 of 1935 and 1167 of 1936, Decided on 11th February 1937, from decree of Sub-Judge, Tanjore, in S. C. S. No. 219 of 1934.

✻ **Provincial Insolvency Act (1920), Ss. 28 (2) and 29 – S. 28 (2) is mandatory — Leave of Court is condition precedent to right of action — Subsequent leave cannot validate suit—Suit filed after order of adjudication without leave — Leave to continue such suit cannot be granted under S. 29.**

The provisions of S. 28 (2), Prov. Insol. Act, are mandatory and after an order of adjudication is made, no suit or other proceeding can be instituted against the insolvent or his property without the leave of the insolvency Court and such leave is a condition precedent to the right of action. The want of previous sanction is a defect fatal to the suit and subsequent leave cannot validate it. Leave to continue a suit filed after order of adjudication without the leave of the insolvency Court cannot be granted subsequently under S. 29 of the Act, as it applies to suits which are already pending when the order of adjudication is made and as the granting of such leave would render the provisions of S. 28 (2) nugatory : *Case law discussed.* [P 669 C 1,2 ; P 671 C 2]

(b) Interpretation of Statutes—Language—Question of hardship is immaterial when language of statute is plain.

When the words of the statute are plain, a Court of law cannot refuse to give them their natural meaning because of a possibility of hardship or injustice. [P 670 C 1]

T. R. Srinivasan and *R. Viswanathan* — for Petitioner.

S. R. Ahmed Meeran — for Opposite Party.

Order of Reference

Venkataramana Rao, J.—This case raises a question of some importance relating to the construction of S. 29, Prov. Insol. Act. A few facts may be necessary for the appreciation of the exact point involved in the case. On 11th March 1924 the defendant in this case executed an usufructuary mortgage in favour of one Haidersa Rowther. On the said date the property was subject to a simple mortgage. The simple mortgagee sued to enforce the security, obtained a decree, and, in execution thereof, purchased the property and dispossessed Haidersa on 25th July 1928. In the meantime the mortgagor applied to the insolvency Court for adjudicating him an insolvent and the order of adjudication was passed on 8th August 1928. The insolvency has not terminated as the insolvent has not obtained his final discharge.

It appears that Haidersa was adjudicated insolvent and the Official Receiver sold all the outstandings due to the estate of Haidersa, and at the auction sale the plaintiff in this suit purchased the claim of Haidersa against the defendant in pursuance of the usufructuary mortgage executed in his favour. That claim was to recover money due under the mortgage under S. 68, T. P. Act, by reason of the

dispossession on 25th July 1928. The plaintiff instituted this suit on 18th April 1934 to recover the money due under the mortgage by reason of his purchase. He did not obtain leave of the insolvency Court as required by S. 28 (2) of the Act. The defendant did not plead the bar of S. 28 (2) in his original written statement but later filed an additional written statement raising this plea. In answer to this the plaintiff filed an application under S. 29 for leave to continue the proceedings, and the leave was granted. The question, therefore, is whether it is open to the Court to grant such leave under S. 29.

Under S. 28 (2) on the making of an order of adjudication, except as provided by the Act, no creditor to whom the insolvent is indebted in respect of any debt provable under the Act shall commence any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose. The section in my opinion imposes a condition precedent to the right of action. It has been construed to be so by a Bench of this Court in 51 Mad 833[1] and it has also been held that it was not open to the insolvency Court to grant leave subsequently and cure the initial defect. Wallace, J. observes in A I R 1929 Mad 480[2] that the absence of leave is not only a bar to the original institution of the suit, but that a suit commenced without leave cannot be continued by obtaining leave at any subsequent stage thereto. But in 51 Mad 833,[1] Odgers, J. made an observation to the following effect, that even where a suit has been instituted without the leave of the insolvency Court it would be open to the plaintiff to apply to the Court before whom the suit was instituted for leave and that such leave could be granted.

It was on the strength of that observation that the learned Judge in this case allowed the plaintiff to continue the suit. Taking Ss. 28 and 29 together it seems to me that S. 29 contemplates proceedings pending on the date of the adjudication and not suits instituted subsequent to the order of adjudication. Else it seems to me that the condition precedent imposed by S. 28 (2) will become nugatory. But a different view seems to have been taken in Bombay on the corresponding S. 18 (3), Presidency Towns Insolvency Act, where the language is similar. In 41 Bom 312,[3] the learned Judges say that even though leave has not been obtained under S. 17, Presidency Towns Insolvency Act, it is open to the Court before whom a suit is instituted to grant leave, and pending the suit the proceedings under S. 18 (3), Presidency Towns Insolvency Act, may be stayed. In doing so Sir Basil Scott, C. J. purported to follow the decision of the English Court reported in 58 L T 85.[4] That case was decided on the construction of Ss. 9 and 10 of the English Bankruptcy Act, 46 & 47 Vict., Ch. 52. In S. 9 we find a similar clause corresponding to S. 28 (2), Prov. Insol. Act, where a creditor cannot commence an action without leave of the insolvency Court. The language of S. 10 of the said English Bankruptcy Act is similar to S. 29 of the Indian Act. It says that any Court in which proceedings are pending against a debtor may on proof that a bankruptcy petition has been presented by or against the debtor either stay the proceedings or allow them to continue on such terms as it may think just. In that case the Master and the learned Judge before whom the original case came up allowed the suit to be continued. On appeal, Wills, J. stayed the action. In doing so he made the following observations :

> The intention of the Legislature in the Bankruptcy Act was, that on the bankruptcy of a man no more litigation between the bankrupt and his creditors should be permitted except in special circumstances, such as where a case was at the time of the bankruptcy ripe for trial in which the amount of the proof against the bankrupt's estate would not be seriously affected. But there must be such circumstance; in the present case there is nothing exceptional. Mr. Rose Innes says that the jurisdiction of the Court is limited to actions commenced before the bankruptcy proceedings are initiated; but I do not think so, for the words are perfectly general.

These observations seem to indicate that even though leave has not been obtained in the first instance it is open to the Court before whom the suit is pending to stay the action or continue it. As the provisions of the Indian law are more or less based upon the English Bankruptcy Act, the decision of Wills, J. is of some impor-

1. Ghouse Khan v. Balasubba Rowther, A I R 1927 Mad 925=105 I C 109 = 51 Mad 833 = 53 M L J 412.
2. Ponnusami v. Kaliaperumal, A I R 1929 Mad 480=113 I C 550.
3. Mahomed Haji Essack v. Abdul Rahiman, A I R 1916 Bom 180 = 33 I C 694 = 41 Bom 312=18 Bom L R 198.
4. Brownscombe v. Fair, (1888) 58 L T 85.

tance in the construction of the Indian Act. But I must say that the Lahore High Court has taken a different view, namely, the view which I have already indicated that taking Ss. 28 and 29 together, what is contemplated is proceedings pending on the date of the adjudication and not proceedings instituted after the order of adjudication. It is therefore desirable that this matter should be considered by a Bench as the question is one of frequent recurrence. I therefore refer this matter to a Bench.

Order of Division Bench

Venkataramana Rao. J. — The facts sufficient for the disposal of this revision petition are fully stated in the order of reference and it is unnecessary to repeat them. On those facts the question arises whether, after a person is adjudged an insolvent, a suit filed by a creditor for the recovery of a debt provable in insolvency without the leave of the Insolvency Court is maintainable and can the Court in which the suit is instituted give leave to continue it? The sections of the Provincial Insolvency Act relevant to this question are Ss. 28 and 29. S. 28, Cl. 2 runs thus:

> On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of this debt, or commence any suit or other legal proceedings, except with the leave of the Court and on such terms as the Court may impose.

Section 29 runs thus:

> Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceeding, or allow it to continue on such terms as such Court may impose.

Unhampered by authority, reading both sections together and giving the words their plain and natural meaning, the following propositions are clearly deducible: (1) S. 28 (2) is mandatory and after an order of adjudication is made, no suit or other proceedings can be instituted against the insolvent or his property without the leave of the Insolvency Court and such leave is a condition precedent to the right of action; and (2) where any suit or other proceeding is pending on the date of the adjudication in any civil Court, such Court on being apprised of the order of adjudication can in its discretion either stay the suit or proceeding or give leave to continue the same.

It will be seen that S. 27 which deals with the power of Insolvency Court to make an order of adjudication is the first of the sections enacted under the heading "order of adjudication." The succeeding sections deal with the legal consequences which follow from the order of adjudication. Thus the point of time in relation to which both Ss. 28 and 29 speak is the date of the order of adjudication. S. 28 deals with proceedings not pending on the date of the order of adjudication and S. 29 deals with proceedings then pending. The term "pending" literally means "begun but not yet carried out or finished." Therefore when S. 29 speaks of a suit pending, it refers to a suit already begun but not finished when the order of adjudication is made, *see* 56 M L J 489[5] at pp. 492 and 493. In the view that under S. 28 leave of the Court is a condition precedent to the right of action, no other interpretation of S. 29 is possible. If leave is a condition precedent, the want of it is a defect fatal to the suit and subsequent leave cannot validate it. If it be held that leave can be given under S. 29 to continue a suit commenced without the leave of the Insolvency Court, it would be rendering S. 28 nugatory. To illustrate, suppose a District Court before which proceedings in insolvency are pending refuses to grant leave to a creditor to institute a suit against an insolvent; after such refusal the creditor files a suit in the District Munsif's Court and it can grant leave to continue the suit; this means the District Munsif will be sitting as it were in judgment against the order of the District Judge, a state of affairs which could never have been in the contemplation of the Legislature in enacting the Provincial Insolvency Act, whatever may be the English law or the law of the insolvency which governs the Presidency Towns about which we shall presently deal.

An argument based on hardship to the creditor results from this interpretation was addressed to us relying on certain decisions: *vide* 56 M L J 489[5] and 57 Bom

5. Subramanyam v. Narasimham, A I R 1929 Mad 323=119 I C 46=56 M L J 489.

623.[6] It is this : a creditor for no fault of his in ignorance of the adjudication files a suit; it would be unjust to dismiss the suit for want of leave and it may be at the time of dismissal his claim may be barred and he will be practically remedyless. When the words of the statute are plain, a Court of law cannot refuse to give them their natural meaning because of a possibility of hardship or injustice; moreover, as pointed out by Wallace, J. in A I R 1929 Mad 480,[2] there is really no such hardship. As observed by him at p. 481 :

> The gazette notification of insolvency is presumed to be notice to all the creditors and they cannot be heard to plead want of notice or ignorance. On the other hand, unless this strict reading of the section is adopted there will be great embarrassment both to the insolvent and the insolvency Court.

There is preponderance of Indian authority in support of the view we are taking. In 51 Mad 833,[1] Odgers and Curgenven, JJ. held that leave of the insolvency Court is a condition precedent to the institution of a suit and failure to obtain such leave is a defect which cannot be cured and leave subsequent to the institution of the suit cannot be given. They followed the decision in 40 Bom 235[7] given on an analogous provision in the Presidency Towns Insolvency Act (S. 17). In A I R 1929 Mad 480,[2] Wallace, J. held that even subsequent annulment of insolvency would not cure the initial defect. It must be noticed that Wallace, J. was inclined to take a different view in cases of ignorance of the creditor of the insolvency : *see* 56 M L J 489[5] at p. 497. In 34 Bom L R 649,[8] Blackwell, J. following 40 Bom 235,[7] dismissed a suit instituted without such a leave : *see also* 8 Lah 593[9] and 2 Rang 643.[10] We may point out that in 51 Mad 833,[1] 40 Bom 235[7] and 8 Lah 593,[9] the creditor filed the suit in ignorance of the order of adjudication and yet this circumstance did not affect the decision in those cases. We shall now deal with the argument in support of the contrary view based mainly on an English decision in 58 L T 85[4] and 41 Bom 312,[3] which followed it. It is contended that the words in S. 29 are general and wide enough to cover suits instituted before and after the date of the order of adjudication and such a construction was adopted in construing S. 10 (2), English Bankruptcy Act of 1883, where the language was similar. Ss. 9 and 10, English Bankruptcy Act of 1883, so far as they are relevant for the present discussion are in these terms :

> *S. 9 (1).* On the making of a receiving order an Official Receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose.
>
> *S. 10 (2).* The Court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.

It does not appear from the report in 58 L T 85,[4] whether the order was passed under the first portion of S. 10 (2) or under the later portion thereof. But from the arguments of Mr. Read and Mr. Rose Innes it may be taken that the order was made under the later portion of S. 10 (2) which is similar in language to S. 29, Provincial Insolvency Act and S. 18 (3), Presidency Towns Insolvency Act. The following observations of Willes, J. in that case do lend countenance to the argument at the Bar :

> Mr. Rose Innes says that the jurisdiction of the Court is limited to actions commenced before the bankruptcy proceedings are initiated but I do not think so for the words are perfectly general.

With due respect, we may point out that the plain language of the section does not warrant this interpretation. S. 9 deals with proceedings not pending on the date of the receiving order and S. 10 with proceedings so pending. That this is the correct view seems to be borne out by the observations of Stirling, J. in (1896) 1 Ch 939[11] at p. 946 :

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6. Bhimaji Bhibhutmal v. Chunilal Javer Chand, A I R 1932 Bom 344=138 I C 824=57 Bom 623=34 Bom L R 683.
7. *In re* Dwarakadas Tejbhandas Narsoomal Gokaldas, A I R 1915 Bom 134=31 I C 948=40 Bom 235=17 Bom L R 925.
8. Maya Ookeda v. Kuverji Kurpal, A I R 1932 Bom 338=138 I C 788=34 Bom L R 649.
9. Panna Lal Tassaduq Hussain v. Hira Nand Jivan Ram, A I R 1928 Lah 20=102 I C 37=8 Lah 593=28 P L R 634.
10. Rowe & Co., Ltd., v. Tan Theon Taik, A I R 1925 Rang 105=84 I C 909=2 Rang 643.
11. *In re* Berry; Duffield v. Williams, (1896) 1 Ch 939=65 L J Ch 245=74 L T 306=44 W R 346=3 Manson 11.

Section 9 prohibits the 'commencing' of actions or proceedings, except with the leave of the Court; and I agree with the opinion expressed by North, J. in 36 Ch D 138,[12] at p. 143 that it has no reference to proceedings actually pending against the debtor at the date of the receiving order. Such receiving proceedings are dealt with by S. 10, sub-s. 1 of which applies to the interval between the presentation of a bankruptcy petition and the making of a receiving order; while sub-s. 2 applies to any time after the presentation of a bankruptcy petition. The scheme appears to be that actions and other proceedings are to go on against the debtors unless either the Court of bankruptcy or the Court in which the proceedings are pending sees fit to interfere in the exercise of the discretion vested in it.

It may be noted that in Halsbury's Laws of England, Vol. 2 at p. 63, *Brownscombe* v. *Fair*[4] is cited as an authority for the proposition that actions which are commenced after the receiving order without the leave of the Court may be stayed but in the footnote it is added: "They are stayed under the Bankruptcy Act, 1883, S. 9": *see also* Vol. 2, Hailsham Edition p. 90; Similarly in Williams Bankruptcy Practice (Edn. 14, 1932) at p. 70, the same case is given as an authority for the said proposition under S. 7, English Bankruptcy Act, 1914, corresponding to S. 9, of the Act of 1883, which is the same as S. 28, Provincial Insolvency Act, and S. 17, Presidency Towns Insolvency Act. Thus it will be seen that *Brownscombe* v. *Fair*[4] is not treated as an authority for the exercise of such a power under S. 10 (2). It is therefore not safe to construe S. 29 in the light of the decision of *Brownscombe* v. *Fair*.[4] The decision in 41 Bom 312[3] is a decision under S. 18, Cl. 3, Presidency Towns Insolvency Act and Ss. 17 and 18 are a reproduction of Ss. 9 and 10, English Bankruptcy Act, 1883. Sir Basil Scott, C. J. follows *Brownscombe* v. *Fair*[4] without any discussion and the decision cannot be relied on as an authority on S. 29, Provincial Insolvency Act. Two other cases of the Bombay High Court were cited, namely, the decision of Fawcett, J. in 31 Bom L R 981[13] and the decision of Tyabji, J. in 57 Bom 623.[6] Both the learned Judges followed 41 Bom 312,[3] but Fawcett, J. observed that if the matter were res integra, a different view might be open and he referred to 8 Lah 593,[9] in support of that view. The decision in 56 M L J 489[5] is distinguishable. There the question was whether a decree passed in a suit instituted without leave in the absence of any objection being taken on that score is a nullity. It is unnecessary to deal with the correctness of that decision but we must express our dissent from the observations contained in the judgment in regard to the interpretation of Ss. 28 and 29, Provincial Insolvency Act, in so far as they purport to be based on the theory of ignorance of the creditor of the proceedings in insolvency. Thiruvenkatachariar, J. in that case observed that the word 'commenced' must be construed as 'knowingly commenced'. Wallace, J. seems inclined to this view though he says that having regard to the preponderance of authority he would not dissent from the view he took in A I R 1929 Mad 480.[2] It seems to us that there is no warrant for importing into the section words which are not there. In 51 Mad 833,[1] there is no doubt an observation of Odgers, J. at p. 839, to the effect that leave may be obtained under S. 29, though the suit might have been instituted without the leave of the insolvency Court but it is an obiter dictum which was not necessary for the case. Further the observation is irreconcilable with the view taken by him in regard to S. 28 of the Act that want of leave is fatal to the suit.

We are therefore of opinion on a proper construction of Ss. 28 and 29, Provincial Insolvency Act, that leave of the insolvency Court not having been obtained prior to its institution, the present suit is not maintainable and the learned Subordinate Judge had no power to grant leave to continue the suit. We therefore reverse the decision of the lower Court and dismiss the suit but in the circumstances we direct each party to bear his own costs.

C. R. P. No. 1167 of 1936.

This civil revision petition arises out of an application for the execution of a decree obtained by the respondent against the petitioner in Small Cause Suit No. 219 of 1934 on the file of the Sub-Court, Tanjore. In the judgment delivered today in C. R. P. No. 1295 of 1935, we decided that the said suit was not maintainable, set aside the decree and dismissed the suit. This civil revision petition must therefore be allowed and the execution petition dismissed, but in the circumstances we direct each party to bear his

12. *In re* Wray, (1889) 36 Ch D 138=56 L J C H 1106=57 L T 605=36 W R 67.
13. Bheraji Samrathji & Co., v. Vasanta Rao, A I R 1929 Bom 398=120 I C 840=31 Bom L R 981.

own costs both here and in the Court below.

C.R.K./K.B. *Petitions allowed.*

A. I. R. 1937 Madras 672

KING, J.

In re *L., A First Grade Pleader, Rajam* — Petitioner.

Civil Misc. Petn. No. 1228 of 1937, Decided on 18th March 1937, to vacate the ex parte order of the High Court, D/- 18th January 1937.

(a) Legal Practitioners' Act (1879), S. 15—Applicability.

Section 15, Legal Practitioners' Act, applies to proceedings in which an adjudication has already been made by a subordinate judicial officer and the High Court is of opinion, after calling for the record and studying the papers, that that adjudication is prima facie wrong. [P 673 C 1]

(b) Legal Practitioners' Act (1879), S. 14—Scope—District Judge cannot suspend pleader uutil he records his finding that such pleader ought to be suspended or dismissed.

The District Judge cannot under S. 14, Legal Practitioners' Act, suspend any pleader from practice until he has recorded his finding that he ought to be suspended or dismissed. The suspension of a pleader from practice pending an investigation which has not yet been begun is in fact to impose upon him a punishment, before there is even a prima facie case of his guilt and it cannot possibly have been the intention of the Legislature that any such injustice should be committed. [P 673 C 2; P 674 C 1]

(c) Legal Practitioners' Act (1879), Rules framed under, R. 14—Words 'pending final decision on charge of professional misconduct' in R. 14 are not wide enough to cover case in which enquiry has not begun—High Court while directing inquiry into complaint against legal practitioner, in its administrative capacity, cannot order deferring renewal of his sanad.

The words 'pending a final decision on a charge of professional misconduct' in R. 14 of Rules framed under Legal Practitioners' Act are not wide enough to cover a case in which the enquiry has not yet begun. R. 14 must refer only to a final decision by the High Court upon materials already enquired into and adjudicated upon by some subordinate judicial authority, and it must apply only to a case in which prima facie there is reason to believe the pleader concerned to be guilty of professional misconduct. [P 674 C 1]

Where therefore the High Court directs in its administrative capacity an inquiry into a complaint made against a legal practitioner, and passes an order deferring the renewal of his sanad, the High Court cannot pass such an order as it is incompetent for the High Court under R. 14 until a case was ready to be actually set down for hearing by a Bench, to pass any order deferring renewal of the certificate of the person against whom complaint was made. [P 673 C 2]

B. Jagannadha Das — for Petitioner.

Advocate-General — for the Crown.

Order.—This is a petition filed on behalf of Mr. L., a first grade pleader who has hitherto been practising in the Court of the District Munsif of Rajam. In accordance with the usual custom, his sanad has been sent to the High Court for renewal for the year 1937, and the High Court on 18th January last passed an order in its administrative capacity under R. 14 of the rules framed under the Legal Practitioners Act, 17 of 1879, deferring the renewal of his sanad. On receipt of this order, the District Munsif naturally refused to allow Mr. L., to continue to practice in his Court until his sanad was renewed. The easons for the issue of the order are as follows: It appears that in February 1936, a client of Mr. L., filed a complaint against him accusing him of professional misconduct in connexion with an execution petition which the client wished him to conduct on his behalf. That complaint was to the District Munsif of Rajam who in June 1936 without having examined any witnesses or made any detailed enquiry into the complaint, omitted to take any further steps on the ground that the complainant himself did not appear and the pleader whom he had engaged for the purpose reported no instructions. The District Munsif appears to have reported these facts to the District Judge who then asked the High Court whether he should enquire into the subject matter of the petition or not. The High Court ordered that the District Judge should direct the District Munsif, Rajam, to fix an early date for the enquiry into the subject matter of the petition, record his finding and report it to the High Court through the District Judge with his finding thereon, and in connexion with this order, the High Court also, as I have already said, deferred the renewal of the certificate. The question for my decision is whether this order deferring the renewal of the certificate has been rightly passed under the powers contained in R. 14 of the rules framed under the Legal Practitioners' Act. The important part of R. 14 reads as follows:

In every case in which a report is received under S. 14, Legal Practitioners Act' or the High Court, after perusal of the records, considers that the proceedings of a subordinate Court shall be revised under S. 15 of the Act, the Registrar shall

set the case down for hearing by a Bench of three Judges, and shall give reasonable notice to the pleader and to the person (if any) on whose complaint proceedings were instituted, of the day on which the report or order will be considered, and such pleader and complainant may appear in person or by counsel or vakil to show cause against or support the report or order. Pending a final decision on a charge of professional misconduct against a pleader, the High Court may defer renewal of his certificate.

It is therefore necessary to consider the relevant sections in the Legal Practitioners' Act. S. 14 contemplates a case in which a subordinate judicial officer has enquired into a charge of professional misconduct, has found the charge established and has considered that the pleader should be suspended or dismissed in consequence. The section then goes on to say :

If that is his opinion, he shall record his finding, and the ground thereof, and shall report the same to the High Court.

Obviously, this is not a case in which such a report has been sent under S. 14. The only report, as I have already said, from the District Judge was one asking for instructions as to what he should do. S. 15 says :

The High Court, in any case in which a pleader or mukhtar has been acquitted under S. 14 otherwise than by an order of the High Court, may call for the record and pass such order thereon as it thinks fit.

It seems to me that the High Court here has purported to take action under S. 15, and this is a case in which in the opinion of the Court the proceedings should not have been dropped merely because the complainant who initiated them was not diligent enough to pursue them. But this is not the usual type of case which falls under S. 15. That section obviously applies in most cases to proceedings in which an adjudication has already been made by a subordinate judicial officer, and the High Court is of opinion after calling for the record and studying the papers that that adjudication is prima facie wrong. Taking it however that it is by virtue of S. 15 that the High Court has seen fit to call for further enquiry in this matter, we must now go back to R. 14 and we find therein that even if proceedings of a subordinate Court are to be revised under S. 15 of the Act, the next step is for the Registrar to set the case down for hearing by a Bench of three Judges and to give a reasonable notice to the pleader and to the complainant of the day on which the report will be considered. It is only after that portion of the rule that we get the final clause that the High Court may defer renewal of the certificate. It seems to me obvious that the second portion of R. 14 can apply only to a case in which the material is already on record for the Bench of three Judges to come to some conclusion.

In the present case of course, there has been no posting of the enquiry before any Bench of three Judges. There is no material upon which the Bench could adjudicate. All that the High Court has done is to call upon the District Munsif to enquire into the facts and to supply in due course, through the District Judge, the material upon which the High Court can finally adjudicate. It is therefore to my mind incompetent for the High Court, until a case is ready to be actually set down for hearing by a Bench, to pass any order deferring renewal of the certificate of the person against whom complaint is made. That interpretation of the rule is, I think, in obvious accord with the general intention of the Legislature in passing the Act. S. 7 of the Act shows that when any pleader submits his sanad for renewal, he has a right to expect that that sanad shall be renewed. The words of the section are :

At the expiration of such period, the holder of the certificate, if he desires to continue to practice, shall, subject to any rules consistent with this Act which may, from time to time, be made by the High Court in this behalf, be entitled to have his certificate renewed by the Judge of the District Court within the local limits of whose jurisdiction he then ordinarily practises, or by such officer as the High Court from time to time appoints in this behalf.

Section 14 permits a District Judge to suspend from practice any pleader or mukhtar charged before him under that section. But that is only pending the investigation and the order of the High Court, and the section specifically provides that it is not unless the District Judge finds the charge established and considers that the pleader should be suspended or dismissed that he is under any obligation to submit any report to the High Court. It seems to me clear therefore that the District Judge cannot under S. 14 suspend any pleader from practice until he has recorded his finding that he ought to be suspended or dismissed. The suspension of a pleader from practice pending an investigation which has not yet been begun is in fact to impose upon him a punishment, before there is even a prima facie

case of his guilt and it cannot possibly have been the intention of the Legislature that any such injustice should be committed. I am accordingly of opinion that the order of the High Court passed administratively under R. 14 is one which the High Court was not empowered under the provisions of that rule itself to pass. The words 'pending a final decision on a charge of professional misconduct' are not wide enough to cover a case in which the enquiry has not yet begun. It must refer only to a final decision by the High Court upon materials already enquired into and adjudicated upon by some subordinate judicial authority, and it must apply only to a case in which prima facie there is reason to believe the pleader concerned to be guilty of professional misconduct. I accordingly set aside the order of the High Court passed on 18th January 1937 and in consequence, the order of the District Munsif of Rajam, so far as it relates to the present petitioner.

C.R.K./W.D. *Petition allowed.*

A. I. R. 1937 Madras 674

VENKATASUBBA RAO, J.

Kuppireddigari Lingareddi— Petitioner.

v.

Panduru Guru Singh—Opposite Party.

Civil Revn. Petn. No. 1173 of 1935, Decided on 26th February 1937, from order of Special Deputy Collector, Chandragiri, D/. 30th March 1935.

Civil P. C. (1908), O. 17, R. 2 and O. 9 — Defendant, being absent, Judge declaring him to be ex parte and reserving judgment — Defendant immediately appearing and wrongly believing that ex parte decree was made applying for setting it aside — Judge dismissing petition on ground that as no ex parte decree was made application setting it aside did not lie—Held, as defendant was declared ex parte, provisions of O. 17, R. 2 applied and hence Judge was wrong in saying that no petition lay for setting aside ex parte decree.

On an adjourned date the defendant being absent the Judge declared him ex parte and reserved judgment. Immediately the defendant appeared and made an application for setting aside the ex parte decree wrongly believing that such decree was passed. After some days the Judge delivered judgment. The Judge treated the application of the defendant as an application for setting aside the decree and made an order "as the suit was not decided ex parte, no petition lies for restoration" :

Held : that the application of the defendant could be treated as one for setting aside the ex parte decree. The Court having held defendant ex parte, the provisions of O. 17, R. 2, Civil P. C., became applicable and hence the Judge was wrong in saying that no petition lay for setting aside the ex parte decree. [P 674 C 2 ; P 675 C 1]

P. Srikantan—for Petitioner.

Order. — It is unfortunate that the respondent does not appear, but on the material before me I must hold that the lower Court's order is wrong. After some witnesses had been examined, the case was adjourned to 26th February 1935. On that day, as the order paper shows, the defendant did not appear and his pleader reported that he had no instructions, the Special Deputy Collector made a note to the effect that judgment was reserved. Immediately the defendant came to Court and filed a petition supported by an affidavit, praying that the ex parte decree passed against him should be set aside. In his affidavit he says that he had gone to Tirupathi in order to fetch his vakil and by the time he could attend Court along with his witnesses, an ex parte decree had been passed. It is obvious that the defendant filed this petition under the mistaken belief that a decree had already been passed.

In fact, judgment was delivered on a subsequent day, namely, 15th March 1935, and it recites that the defendant had been declared ex parte on 26th February. It is difficult to understand what happened subsequently, but the defendant apparently filed no petition after the date of the decree for setting it aside. His previous petition dated 26th February 1935 seems to have been treated as an application made to set aside the decree and the lower Court made the following order upon it on 30th March 1935 : "As the suit was not decided ex parte, no petition lies for restoration. Petition dismissed". There can be no doubt, that in the circumstances I should regard, as the lower Court has done, the petition of 26th February, as one filed for the setting aside of the ex parte decree. The defendant was declared ex parte as the judgment itself shows and O. 17, R. 2, Civil P. C., becomes applicable. The effect of that provision is to apply the procedure laid down in Order 9 to cases where there is default of appearance at an adjourned hearing. The lower Court therefore, having declared the defendant ex parte, is wrong in saying that no petition lies for the setting aside of the ex parte decree. I am satisfied that the

defendant had sufficient grounds for not appearing. The lower Court's order is reversed and the civil revision petition is allowed, but I make no order as to costs. The ex parte decree is set aside and the lower Court is directed to try the suit and dispose of it on its merits.

C.R.K./P.R. *Petition allowed.*

A. I. R. 1937 Madras 675

VENKATARAMANA RAO, J.

Ganesam Pattabhirama Reddy and *others* — Appellants.

v.

Bathena Subbarami Reddi — Respondent.

Second Appeals Nos. 1750 and 1751 of 1931 and 12 and 13 of 1932, Decided on 14th October 1936, against decree of Dist. Court, Nellore, in A. S. Nos. 174, 181, 204 and 277 of 1928, respectively.

Trusts Act (1882), S. 23 (a) and (f)—Applicability—S. 23 (f) applies only when there is clear proof of trust property being employed in trade or business—Guardian mixing his ward's moneys with his own and spending it for family purposes and money lending business—S. 23 (a) applies and not Cl. (f)—Guardian is liable to account for interest actually received.

Before S. 23 (f), Trusts Act, can be made applicable, there must be clear proof that the trust property or the proceeds thereof was employed in the trade or business, when profits attributable to such employment can be given. [P 676 C 2]

Where therefore a guardian debits his ward's account with the moneys as and when received and credits them in his family account treating the sums so credited practically as loans advanced by the minor to his family and after so crediting and mixing the said moneys with his moneys, he spends the joint funds both for his common family expenses and also for money lending business, and a large extent of those moneys is utilized by him in the money lending business but it is not possible to predicate which portion of the money and how much was lent out in the course of the said business, it cannot be said that the moneys of the minor were invested in the money lending business within the meaning of Cl. (f), S. 23 of the Act. Under such circumstances the guardian is liable only to account for interest actually received by him : *Case law referred.* [P 676 C 1, 2]

M. Patanjali Sastri — for Appellants.

B. Sommayya — for Respondent.

Judgment.— These four connected second appeals arise out of two suits instituted by the plaintiff for an account of the management of his properties by the family of defendants 1 and 2 as guardian of his property. S. A. Nos. 1750 of 1931 and 13 of 1932 arise out of O. S. No. 80 of 1927 on the file of the Sub-Court, Nellore, and S. A. Nos. 1751 of 1931 and 12 of 1932 arise out of O. S. No. 61 of 1927 also on the file of the Sub-Court, Nellore. The case for the plaintiff is that his parents died when he was very young and defendant 1 and his undivided brother, late Narayana Reddy, who were very closely related to him, took possession of his property and were in management of the same. On 9th February 1914 Narayana Reddi, defendant 1's brother, was appointed guardian of the property of the plaintiff. He died in August 1917 and defendant 1 was appointed guardian on 5th February 1919, and he managed the property till he was discharged by an order of Court on 28th August 1924. O. S. No. 61 of 1927 relates to the period during which the late Narayana Reddi managed his property and O. S. No. 80 of 1927 relates to the period from 1917 to 1924 when defendant 1 was in management. The main question in S. A. Nos. 1750 and 1751 of 1931 is as regards the rate of interest which the plaintiff is entitled to get in respect of the moneys which the late Narayana Reddi and defendant 1 were held liable to account. The learned District Munsif awarded interest at 12 per cent. and the learned Subordinate Judge confirmed it. The view of the learned Subordinate Judge was that S. 23, Trusts Act, will not apply to the case of a guardian. But he found that the moneys of the plaintiff were mixed up with the moneys of the defendants' family and lent out by them at considerably high rates of interest, and following the decision in 50 M L J 273[1] he held the plaintiff should be given 12 per cent. simple interest. Mr. Patanjali Sastri on behalf of the defendants contends that this view of the learned Subordinate Judge is wrong. It seems to me his contention is right. As Sir James Bacon, V. C. in (1872) 13 Eq 36[2] at p. 42, observes :

> If a person appointed guardian, in that character possesses himself of any of his ward's property, of that property he becomes a trustee, although he is only a trustee by construction, and not appointed by name.

Under S. 95, Trusts Act, a constructive trustee must perform the same duties and

1. Hari Krishna Chettiar v. Govindarajulu Naicker, A I R 1926 Mad 478=98 I C 332=50 M L J 273.
2. Sleeman v. Wilson, (1872) 13 Eq 36=25 L T 408=20 W R 109.

is subject to the same liabilities so far as may be as a trustee under the Act. Further, S. 37, Guardians and Wards Act, makes it clear that the liability of a guardian is that of a trustee. In 34 I C 900,[3] which is a case of a guardian and ward, Sir John Wallis, C. J. applied S. 23, Trusts Act. The decision in 50 M L J 273[1] is not an authority for the contrary view. Venkatasubba Rao, J. who was a party to the said decision applied S. 23 of the Act to a case of Mahomedan brothers where the elder brother acted as guardian of the younger: *vide* 67 M L J 563.[4] I am therefore of opinion that S. 23, Trusts Act, will apply to the case. Mr. Patanjali Sastri contends that the clause of the section which is applicable to the case would be Cl. (f) and the lower Court had no jurisdiction to award more than 6 per cent. compound interest with half yearly rests on the findings arrived at. Before examining the soundness of this contention it will be necessary to state a few facts. Defendant 1 and his late brother Narayana Reddi were members of an undivided Hindu family who owned considerable immoveable property and they were also money lenders by profession. Their primary occupations were therefore both agricultural and money lending. During the lifetime of the plaintiff's father, he had dealings with the family of defendant 1 which consisted in advances of moneys to them at 7½ per cent. simple interest. What defendant 1 and his late brother Narayana Reddi did was practically to continue that course of dealings. They debited their ward's account with the moneys as and when received and credited them in their family account treating the sums so credited practically as loans advanced by the minor to their family. After so crediting and mixing the said moneys with their moneys, they spent the joint funds both for their common family expenses and also for money lending. It appears that a large extent of those moneys was utilized in the money lending business but it is not possible to predicate which portion of the money and how much was lent out in the course of the said business. No separate accounts were kept and it was not possible to earmark the profit derived from the investment of the minor's money.

The view taken by the lower appellate Court was, though the moneys were allowed to be mixed up with those of defendant 1 and his deceased brother and lent out in their names along with their moneys, it cannot be said that every pie of the plaintiff's money was lent out for interest and at sometime or other the defendants might not have been able to invest the plaintiff's money and the plaintiff can only be entitled to a reasonable rate of interest and having regard to the rate of interest obtained by the defendants in their money lending transactions, 12 per cent. simple interest would be the proper rate. What Mr. Patanjali Sastri contends is that, as the defendants have mixed up the moneys of the minor in their money lending business, and as the plaintiff has not claimed the net profits of the business, the only alternative is to grant 6 per cent. compound interest as laid down in S. 23 (f) and he relies very strongly on the decision in 34 I C 900.[3] But before S. 23, Cl. (f), Trusts Act, can be made applicable, there must be clear proof that the trust property or the proceeds thereof was employed in the trade or business, when profits attributable to such employment can be given. But as I have already indicated the state of the accounts did not show that the moneys of the minor were employed as such in the money lending business. There was first a loan by the family and then a mixture of those moneys borrowed with their own moneys and indiscriminately utilized by the family. Under such circumstances it cannot be said that moneys of the minor were invested in the business within the meaning of that clause. Therefore in my opinion the said clause will not apply. Then the question is, what is the rate of interest which the plaintiff would be entitled to? Under S. 23 a trustee committing a breach of trust is liable to account for interest actually received or to account for simple interest at the rate of 6 per cent. per annum in cases where he may be fairly presumed to have received interest but it is open to the Court to award a higher rate of interest. The equitable principle on which this section is based is explained by James, L. J. in 8 Ch A 309[5] at p. 333 :

3. Viswanathan v. Brahmanadhan, A I R 1917 Mad 455=34 I C 900.

4. Peer Mohideen Rowther v. Asia Bivi, A I R 1934 Mad 686=152 I C 739=67 M L J 563.

5. Vyse v. Foster, (1873) 8 Ch A 309=42 L J Ch 245=27 L T 774=21 W R 207.

This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon.

Major portion of the minor's money aforesaid must have been utilized in money lending business and there is evidence that considerable portions of the money utilized by the defendant's family in the money lending business were lent out at rates of 7½ per cent., 9 per cent. and 10 per cent. and in most cases they were realized with triennial rests. There are cases where they have received interest ranging from 12 to 36 per cent. but it has been pointed out in the Commissioner's report that not much gain would have been made by them in those transactions as they were merely accommodation loans borrowed from the merchants and lent out to customers and as soon as the money was received from the customers they were repaid to the persons from whom such sums were borrowed. Therefore the rates of interest which can be reasonably taken into consideration will be 7½ per cent. to 12 per cent. As aforesaid the question is, what is the gain which the trustee could have made and what portion of the gain can be attributable to the plaintiff's money. If an account of the net profits were taken, the loss sustained, the expenses incurred and other outgoings discharged in the business would have been taken into account including bad debts. These considerations also should not be overlooked in the consideration of the question what interest could fairly be presumed to have been received by the trustee. I am on the whole of opinion that 10 per cent. simple interest would be the proper rate to award. The decree of the lower Court would be modified by substitution of 10 per cent. simple interest instead of 12 per cent. simple interest. This disposes of S. A. Nos. 1750 and 1751 of 1931.

S. A. Nos. 12 and 13 of 1932 are by the plaintiff. The main point urged by Mr. Sommayya in these second appeals is that the lower Court did not make a distinction in regard to the period of accounting. He stated that the period of Narayana Reddi should be treated as separate from that of defendant 1 and the amount which was available at the time of Narayana Reddi's death should be taken as capital and interest should have been separately calculated thereon. But as pointed out by the learned Subordinate Judge, though Narayana Reddi was the appointed guardian it was the family that assumed the management of the guardianship, defendant 1 was again appointed guardian and there was no break of continuity in the management. I think the order of the lower Court in this respect appears to me to be equitable and correct. There was another point raised by Mr. Somayya that interest at 6 per cent. was awarded from 28th August 1924, the date of discharge, whereas interest at the rate of 12 per cent. should have been awarded up to the date of plaint and thereafter 6 per cent. should have been awarded. Sufficient reasons having been given by the learned Judge in para. 11 of his judgment for giving interest only at six per cent. from 28th August 1924, I see no reasons to differ from his view. These second appeals are therefore dismissed. In all these second appeals I direct each party to bear his or their own costs. Leave refused in all appeals. (The rest of the judgment is not necessary for the purpose of this report.)

C.R.K./K.B. *Appeals dismissed.*

A. I. R. 1937 Madras 677

BEASLEY, C. J.

Srinivasulu Naidu — Petitioner.

v.

Sundaresa Iyer — Opposite Party.

Civil Revn. Petn. No. 1633 of 1935, Decided on 28th January 1937, from decree of Dist. Munsif, Tanjore, in S. C. S. No. 347 of 1935.

Provincial Insolvency Act (1920), S. 44 (1) (b) —Person borrowing money on pro-note without disclosing to creditor that he had previously filed application for being adjudged insolvent — Person adjudged insolvent and subsequently discharged — Debt being incurred fraudulently, discharge of insolvent held did not release him from liability to pay debt.

The fact that a person conceals an important circumstance but for which concealment another person would not have acted as he did and does so with the intention of causing him so to act is equally a fraud. It constitutes the offence of cheating as much as an actual untrue representation would. [P 679 C 2]

An insolvent incurred a debt on a promissory note on 9th December 1931. Before that date on 11th October 1931, he had filed his own petition

to be adjudicated as an insolvent. The said petition was prosecuted and on 21st November 1932, he was adjudicated. He was given one year's time to apply for discharge and at the end of that time he did apply for discharge and an order of discharge conditional on payment by him of one anna in the rupee was granted. The payee of the promissory note filed a suit subsequently and the discharged insolvent pleaded his insolvency and subsequent discharge in defence :

Held : that the act of the insolvent in executing a promissory note after he filed a petition for adjudication without disclosing that he had done so was not only dishonest but it also amounted to a fraud within the meaning of S. 44 (1) (b), Provincial Insolvency Act, and therefore the insolvent was not by reason of his discharge in the insolvency discharged from his liability to pay the debt. [P 679 C 2]

T. R. Srinivasan — for Petitioner.

T. R. Venkataraman — for Opposite Party.

Order. — The petitioner filed a suit against the respondent on a promissory note. That suit was dismissed by the lower Court. Certain facts must be stated. The suit debt was incurred on 9th December 1931. Before that, on 11th October 1931, the respondent had filed his own petition to be adjudicated as an insolvent and he prosecuted that petition and on 21st November 1932 was adjudicated. He was given one year's time to apply for discharge and at the end of that time applied for discharge and an order of discharge was granted conditional on payment by him of one anna in the rupee. This condition he satisfied. Thereafter, the petitioner filed this suit against him. In his written statement the defendant stated that the plaint was false and vexatious and had not been properly presented and that the plaintiff had fraudulently, with knowledge of the insolvency, presented the plaint with a deficient stamp and was proposing terms to which the debtor did not consent. He then pleaded his insolvency and that he had obtained an order of discharge on 30th June 1934 and had also complied with the condition imposed in that order, and that as the debt was one provable in the insolvency he had been released in respect of his liability to it by reason of his discharge. The question here is whether the suit debt was incurred by means of fraud. If it was, then by reason of S. 44 (1) (b) of the Act, the order of discharge did not release the insolvent from liability in respect of it. The petitioner's case was that on the date of the promissory note when he advanced the money to the defendant, the defendant concealed from him the fact that he had presented an insolvency petition praying for his own adjudication ; and whether it was definitely pleaded or not, it is perfectly clear that no reasonable man—and I assume the plaintiff to be such—would have advanced the loan, had he been aware of the presentation previously of the insolvency petition ; and the lower Court's judgment proceeds upon the basis that the plaintiff did not know anything of the insolvency proceedings.

The question here is whether this was a debt which was incurred by fraud. It seems to me to be quite clear that there was a fraud for the reason that the plaintiff parted with his money not having been told of a very material circumstance. The question is whether the concealment of that material fact by the defendant was with an intention of so defrauding the plaintiff. It is impossible to look into the mind of any one and gather from it what his intention was. That has to be found from his own conduct at the time and before and after. In the present case, at the risk of repeating myself, I remark that the petition for adjudication was the debtor's own petition. Although the petition is not before me, I must take it that the requirements laid down in S. 13 of the Act as regards the form of such petitions were complied with and the first particular to be set out in the insolvency petition is of importance. S. 13 (1) says :

> Every insolvency petition presented by a debtor shall contain the following particulars, namely : (a) a statement that the debtor is unable to pay his debts ; . . . .

I take it that the petition contained that statement and that if it had not, it would have been returned to the respondent in order that the necessary particulars should be set out ; and in fact it has not been argued here by the respondent that that allegation was omitted from the petition. Therefore, less than two months before this loan was got by the defendant from the plaintiff, he had stated that he was unable to pay his debts. The fact that he had presented a petition was concealed from the lender and it follows that the fact that borrower was unable to pay his debts was also concealed from the lender. What is it reasonable to assume was in the defendant's mind when he presented his petition ? It is that he wanted the protection of the insolvency Court,

because he was in insolvent circumstances and was unable to pay his debts. What did he do afterwards? He prosecuted his petition. Therefore not only at the time when he presented his petition did he think that he was unable to pay his debts but also all the time throughout the pendency of his petition he must be taken to have thought the same. His prosecution of the petition was successful and in fact he was adjudicated an insolvent on the allegations made in his own petition. He got his discharge within the specified time and what throws a very full light upon his financial circumstances is that it was made conditional upon his payment of only one anna in the rupee. Viewing the whole transaction from beginning to the end, it appears to me that at the time when the loan was taken from the plaintiff, the borrower, the defendant, was in hopelessly insolvent circumstances unable to pay, as later history shows, more than one anna in the rupee. That he contracted the debt is beyond dispute. How is his subsequent conduct to be viewed as throwing a light upon what his intention was when he contracted it? He had contracted a debt admittedly. What does he do when the suit is filed against him? He deliberately accuses the plaintiff of fraud in the filing of the suit and, although he had contracted this debt admittedly and he does not allege any fraud so far as I can see on plaintiff's part in lending the money, he raises the defence that by reason of his discharge he is free from his liability to pay the debt. Reviewing the whole of the circumstances here and the history relating to the matter right from the presentation of the petition to the discharge and the filing of the written statement, it seems to me that there is a prima facie case that the loan was obtained by fraud. It was open to the defendant at the trial to go into the witness-box, and show to the Court that at the time when he contracted the debt, notwithstanding the fact that he had only a few weeks before in his insolvency petition stated that he was unable to pay his debts, he had a reasonable hope nevertheless of doing so and to explain how it was that he went on under the circumstances with his petition. He kept out of the witness-box and I think it is quite clear that he did so of his own volition because I see that in the Judge's notes of evidence it is stated "the defendant adduces no evidence."

The learned trial Judge is of opinion that the mere fact that a debtor executes a promissory note after he files a petition for adjudication without disclosing that he had done so, may be said to be a dishonest act but cannot amount to a fraud within the meaning of S. 44 (1), Provincial Insolvency Act. The learned District Munsif therefore looks upon that as a dishonest act. It is very difficult to see how in view of that opinion he did not also hold that it was a fraud within the meaning of S. 44 (1), Provincial Insolvency Act. The fact that a person conceals an important circumstance but for which concealment another person would not have acted as he did and does so with the intention of causing him so to act is equally a fraud. It constitutes the offence of cheating as much as an actual untrue representation would. For these reasons, I am satisfied that this is a debt to which S. 44 (1) (b) of the Act applies and that the debtor, the defendant, in consequence was not by reason of his discharge in the insolvency discharged from his liability to pay it. It follows, therefore, that the suit against him was well founded and, there having been no attempt to prove any defence by evidence, the plaintiff-petitioner must be given a decree. The lower Court's order dismissing the suit is therefore set aside and a decree is passed in favour of the plaintiff for the amount claimed with costs. This C. R. P. is allowed with costs.

C.R K./S.C. *Revision allowed.*

A. I. R. 1937 Madras 679

VENKATARAMANA RAO, J.

Sowcar Lodd Govindoss and *another* — Appellants.

v.

Arumuga Mudali and *others* — Respondents.

Second Appeal No. 918 of 1932, Decided on 11th February 1937, against decree of Sub-Judge, Vellore, in A. S. No. 89 of 1931.

Malicious Prosecution—Burden of proof—Plaintiff must allege and prove facts which are inconsistent with existence of reasonable and probable cause for instituting complaint—Defendant acting on information by another—Reasonable belief in and credibility of information must be proved.

In a suit for damages for malicious prosecution, it lies on the plaintiff to allege and prove affirmatively that the defendant had no reasonable and probable cause in having the complaint instituted.

He must establish facts which are inconsistent with the existence of such reasonable and probable cause. And where the defendant acts on the information of another, the question is, did he believe in the information ? Was the information credible and would a prudent man have acted on such information ? And were there reasonable grounds for believing in such information ? The question whether or not a reasonable man would or would not act upon the information must depend in a great degree upon the opinion to be formed of the position and circumstances of the informant, and of the amount of credit which may be due under those circumstances to the person who thus conveyed the information: *Lister* v. *Perrymen*, (*1871*) *4 H L 521*, *Rel. on.*

[P 681 C 1]

Srinivasaraghavan and *Thyagarajan* — for Appellants.

A. K. Muthuswami Iyer — for Respondents.

Judgment.—This second appeal arises from a suit for damages for malicious prosecution. The case for the plaintiff is that defendant 1 owned certain lands attached to Novelock Bhagayet near Thengal village, that defendant 1 authorized defendant 2 to institute a criminal complaint and defendant 2 filed the complaint, C. C. No. 548 of 1926, on the file of the Wallajah Sub-Magistrate's Court against the plaintiff and others charging them with offences under Ss. 147 and 430, I. P. C., alleging that on or about 11th November 1926 forty people, including the plaintiff (who was at that time supposed to be acting on behalf of Kalyani Ammal), ryots of Thengal village, gathered together and prevented the men of defendant 1 from taking water in the Thengal Kasam which they are entitled to do, by removing or attempting to remove a dam which was put up by the men of defendant 1, that that complaint was thrown out as false, that defendant 1 was the real prosecutor in the case, and defendant 2 filed the complaint only on behalf of defendant 1, that the complaint was a malicious one and that therefore the plaintiff is entitled to damages for malicious prosecution. The main defence on behalf of defendant 1 is that he was entitled to take water from the Thengal Kasam, that he acted on the information given by defendant 2 as his agent which he had no reason to disbelieve, that there was in fact an unlawful obstruction by the plaintiff and other ryots, and therefore he had reasonable and probable cause in instituting the complaint, that he was therefore not actuated by malice, and that there is no cause of action against him. The case for defendant 2 is that the plaintiff's men did really cause obstruction which was unlawful. The learned District Munsif of Ranipet dismissed the plaintiff's suit on the ground that there was reasonable and probable cause in instituting the complaint, that there was an unlawful obstruction by the plaintiff and other ryots, and that, in any event, defendant 1, acted on the information of defendant 2 whom he believed. The learned Subordinate Judge reversed this decision on the ground that defendant 1 was not entitled to take Thengal Kasam water for his lands in Novelock Bhagayet. He further found that many of the statements made by defendant 2 in his deposition regarding the plaintiff were false, and that his object in instigating defendant 1 to file the criminal complaint was to satisfy his spite towards the plaintiff, that in any event defendant 1 cannot take shelter under the action of defendant 2, that he should have made proper enquiries before instituting the complaint, and therefore he must be held to have had no reasonable or probable cause in launching the prosecution. Having heard the learned counsel on both sides, I am not inclined to disturb the finding against defendant 2; but it seems to me that the decision so far as defendant 1 is concerned cannot be sustained. The facts in this case which have been found to be undisputed are these : that forty people of Thengal village including the plaintiff assembled on 11th November 1926, and that obstruction was caused to the taking of water by those people, and the water was being taken to Novelock Bhagayet for a long time before the attempted obstruction. I may also observe that after the criminal complaint defendant 1 did institute a civil suit to have his right established in consequence of the objection raised by the villagers of Thengal village, and that in that civil suit there has been a final adjudication that defendant 1 is entitled to take water from the Thengal Kasam for his lands in Novelock village.

Mr. Thiagaraja Iyer has asked me to admit the judgment in the civil suit in evidence because the question of title has been raised by the plaintiff and the learned Subordinate Judge found that defendant 1 had no right to take water and therefore he could not have had any reasonable belief in his own right and therefore there can be no reasonable or

probable cause in authorizing defendant 2 to launch the prosecution. Mr. A. K. Muthuswami Iyer contends that I ought not to admit the judgment in second appeal. The plaintiff had disputed the title of defendant 1 and stated that the title was in the villagers of Thengal village and Kalaniammal whom he represented at the time of the criminal complaint. Therefore, the plaintiff, as a part of his case, has to prove that defendant 1 at no time had any right to take the water. There having been now a final adjudication in regard to title, the said judgments are admissible in evidence in proof of the title of the villagers of Thengal which the plaintiff has made as part of his case. It is not necessary to cite any authority for the position that such evidence can be admitted in a second appeal or in a civil revision petition. The main question therefore is: has defendant 1 no reasonable and probable cause in instituting this complaint? It lies upon the plaintiff to allege and prove affirmatively that defendant 1 had no reasonable and probable cause in having the complaint instituted. He must establish facts which are inconsistent with the existence of such reasonable and probable cause. And where a person acts on the information of another, the question is: did he believe in the information? Was the information credible and would a prudent man have acted on such information? And were there reasonable grounds for believing in such information? In 4 H L 521,[1] at p. 531, Lord Chancellor Hatherly observed thus :

> What is now to be decided is this, how far this gentleman, having this information conveyed to him, may be said to have reasonably and discreetly trusted his informant. Because I apprehend that you are to have regard to every shade of difference between the amount of credit to be given to one person and to another, according to the character of the informant. Information, given by one person of whom the party knows nothing, would be regarded very differently from information given by one whom he knows to be a sensible and trustworthy person. And the question whether or not a reasonable man would or would not act upon the information must depend in a great degree upon the opinion to be formed of the position and circumstances of the informant, and of the amount of credit which may be due under those circumstances to the person who thus conveyed the information.

Applying this principle to this case, the person who gave the information was defendant 2, the admitted agent of defendant 1 who was managing his affairs at Novelock. It has not been proved that there were no materials on which it could be said that defendant 1 was not justified in acting on that information or that defendant 2 was not a credible informant. What was the information given by him? It was that forty people gathered together and attempted to remove a dam and thus caused obstruction. These facts have been found to be true by both the lower Courts. Under such circumstances could it be said that no credible information was given to defendant 1 on which defendant 1 could not have acted? It must therefore be taken that the plaintiff had failed to prove want of reasonable and probable cause. I therefore set aside the findings against defendant 1 and dismiss the suit as against him, but in the circumstances, I direct that so far as defendant 1 is concerned each party will bear his own costs throughout. So far as defendant 2 is concerned the second appeal is dismissed with costs.

C.K.K./K.B. *Appeal dismissed.*

1. Lister v. Perrymen, (1871) 4 H L 521=39 L J Ex 177=23 L T 269=19 W R 9.

A. I. R. 1937 Madras 681

VENKATARAMANA RAO, J.

Kuri Venkoba Char — Appellant.

v.

Kuri Sanjivappa — Respondent.

Second Appeal No. 1057 of 1934, Decided on 25th January 1937, against decree of Dist. Judge, Bellary, in A. S. No. 56 of 1933.

Vendor and Purchaser—Failure of contract — Penalty — Forfeiture of deposit— Rule of English law that vendor is entitled to retain deposit paid under contract of sale of land if default is made by purchaser applies to India — Such deposit must be deposit proper — Deposit must be proportionate to value of land — If disproportionate it is penalty and Court will not allow retention of whole of deposit.

It is a well understood principle of English law that where under a contract of sale of land a sum of money is paid as deposit, the vendor is entitled to retain the same if the contract goes off by default of the purchaser. This principle applies even to India. For the application of the rule in English law as to forfeiture of deposit, it must be unmistakably clear from the contract that the sum forfeited was paid or deposited as a deposit; "it must be a deposit proper". There may be cases where the Courts may find that the amount of the deposit or payment in advance is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere security for performance, but rather as a punish-

ment for non-performance of the contract and in those cases the Court may doubtless refuse to allow the retention of the whole of the deposit; but where there is no such disproportion and nothing unreasonable in regarding the deposit as security, then the defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default : *Howe* v. *Smith*, *(1884) 27 Ch D 89* and *A I R 1915 Mad 896 (F B)*, *Foll.* : *Case law discussed.* [P 683 C 1, 2 ; P 684 C 1]

A. C. Sampath Iyengar — for Appellant.

K. Srinivasa Rao — for Respondent.

Judgment.—The main question argued in this second appeal is whether the plaintiff is entitled to retain the sum of Rupees 1,500 paid by the defendant under a contract of sale. The said contract was entered into on 19th September 1930, in and by which certain lands of the plaintiff were agreed to be sold to the defendants for a sum of Rs. 3,000. The terms of the contract were embodied in a karar between the parties. Ex. A was executed by the defendant in favour of the plaintiff and Ex. I which is a counterpart was executed by the plaintiff in favour of the defendant. There is no difference in regard to the terms in both these documents. Ex. A runs thus :

In the presence of some mediators I havs settled the sale price of the land mentioned hereunder at Rs. 3,000 (Rupees three thousand). Out of the said amount, I have paid in cash this day a sum of Rs. 1,500 (Rupees fifteen hundred) as advance and I have taken possession of the said land from now. I shall pay the remaining entire amount of Rs. 1,500 (Rupees fifteen hundred) together with interest thereon from this day at Re. 1 (one Rupee) per cent. per mensem by 15th Vaisagha Suddha of the year Prajothpathi (2nd May 1931) and I shall get the deed of sale executed in respect of this land at my own expense. If I should fail to pay the said amount on the prescribed date, the amount of Rs. 1,500 paid as advance shall become forfeited and you shall be entitled to take possession of your land. I shall have no rights whatever to the said land.

In pursuance of the said agreement Rs. 1,500 was paid on the date of the contract and the lands were put in possession of the defendant. The defendant did not pay the balance of the purchase money Rs. 1,500 according to the plaintiff on 2nd May 1931, and therefore he sent a registered notice on or about 19th May 1931, in and by which he called upon the defendant to deliver possession of the land within eight days from the receipt of the notice. The defendant failed to deliver possession. Thereupon the plaintiff instituted the present suit, for recovery of possession of the lands and for damages for use and occupation for 1931-32 which was estimated at Rs. 50 and for damages till delivery of possession. The main defence of the defendant was that he did pay the balance of the purchase money by the execution of a mortgage of some of his lands to one Ramachar of Kosgi under an agreement with the said Ramachar that he should pay the said sum of Rs. 1,500 to the plaintiff within the time stipulated in the agreement, that the plaintiff obtained the transfer of the said mortgage and therefore he had fulfilled his part of the contract. A further plea was taken which is thus formulated in para. 9 of the written statement :

Without prejudice to the foregoing pleas, the defendant submits that the forfeiture clause in the said agreement is a penalty, and cannot therefore be enforced. The suit for the recovery of the land is therefore not maintainable.

The learned District Munsif who tried the suit came to the conclusion that the balance of the consideration was paid by the defendant as contended. Therefore he dismissed the plaintiff's suit. On appeal the learned District Judge did not give a definite finding as regards the transfer of the mortgage and was of the opinion that the transfer should not be held as equivalent to Rs. 1,500 payable in cash by the defendant. However, he held that the forfeiture clause was a penal one and that the amount forfeited was out of all proportion to the total consideration and therefore he gave a nominal compensation of Rs. 100 and gave a decree for possession of the lands subject to the payment by the plaintiff of Rs. 1,300 deducting the sum of Rs. 100 for compensation and Rs. 100 for mesne profits. When the matter came up for hearing before me on 10th March 1936, I called for a revised finding in regard to the transfer of the mortgage and the alleged payment of the balance of consideration as pleaded by the defendant. The learned District Judge has now returned a finding that the balance of consideration was not paid as contended by the defendant. This being a finding of fact it cannot be challenged in second appeal. But the question still remains whether the decree passed by the learned District Judge is correct. It is contended by Mr. Sampath Iyengar that the learned Judge ought not to have directed the return of the said sum of Rs. 1,500, as according to the terms of the contract it must be deemed to have been

forfeited. His argument is that the said sum of Rs. 1,500 is by way of deposit and as the defendant has committed default in the performance of the contract, the plaintiff is entitled to retain the same. It is a well understood principle of English law that where under a contract of sale of land a sum of money is paid as deposit the vendor is entitled to retain the same if the contract goes off by default of the purchaser.

This principle was laid down in (1884) 27 Ch D 89,[1] this being considered as a leading decision on this branch of law. The basis of the decision is that a sum paid as a deposit is a guarantee for the performance of the contract. As explained by Bowen, L. J.:

> A deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase.

As he again observes :

> The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract.

In principle it ought to be so, because of course persons may make exactly what bargain they please as to what is to be done with the money deposited. In 38 Mad 178,[2] the question arose whether this principle of English law should be applied to India. The majority of the Judges who composed the Full Bench, Sir Arnold White, C. J. and Miller, J. took the view that it would apply, but Sadasiva Iyer, J. took a different view. I am therefore bound by the decision of the majority. I may in passing observe that this principle was applied by Lord Shaw to a case which went up to the Privy Council from India : *Vide* 50 M L J 629.[3] In the said Full Bench decision which related to a contract for sale of lands a sum of Rupees 4,000 was paid as advance, the purchase price being Rs. 41,000 and one of the terms of the contract was that in default by the purchaser the deposit should be forfeited. When the matter came before a Bench, Wallis and Sankaran Nair, JJ. differed, Wallis, J. holding that the deposit is liable to be forfeited, Sankaran Nair, J. taking a different view. The Full Bench by a majority affirmed the decision of Wallis, J., following the principle of the decision in (1884) 27 Ch D 89.[1] But they also enunciated another principle. It is thus stated by Miller, J., at p. 187 :

> There may be cases where the Courts may find that the amount of the deposit or payment in advance is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere security for performance, but rather as a punishment for non-performance of the contract, and in those cases the Court may doubtless refuse to allow the retention of the whole of the deposit; but where there is no such disproportion and nothing unreasonable in regarding the deposit as security, then the defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default. This is the rule which was accepted in 29 Mad 118[4] as being in accordance with the English cases, and it is a rule which I am prepared to accept as being obviously calculated to do justice.

Arnold White, C. J. at p. 186 observes:

> In (1873) 8 Ch A 1022,[5] where it was held the vendor could not retain the deposit, the deposit was half the purchase money. There, as Wallis, J. points out, the amount was so large as to take it out of the ordinary class of deposits. There is certainly nothing extraordinary in a 10 per cent. deposit under an agreement for the sale of land.

The view of Wallis, J. is found stated in 33 Mad 375[6] at p. 380. Seshagiri Iyer, J. in 17 M L T 229=28 I C 318[7] understood the Full Bench decision as laying down the said principle. At p. 320 of 28 I C he observes thus :

> The reference to *In re Dagenham (Thames) Dock Co.; Ex Parte Hulse*[5] shows that the reasonableness of the amount is one of the factors in determining whether there was a deposit in reality, although it goes by that name in the contract. If the amount is very large, naturally the Courts would be unwilling to hold that it was by way of deposit that the money was originally paid.

This also accords with the rule of English law as stated in Leake on Contracts, Edn. 7 at pp. 70 and 71 :

> So long as the vendor is willing to complete and the purchaser is not entitled to rescind, the former may retain the deposit; or if the purchaser is in default, and the vendor rescinds on that ground or if by the terms of the contract it is forfeited by an event which puts an end to the contract. Where the sum liable to forfeiture bears an

1. Howe v. Smith, (1884) 27 Ch D 89=53 L J Ch 1055=50 L T 573=32 W R 802=48 J P 773.
2. Natesa Iyer v. Appavu Padayachi, A I R 1915 Mad 896=19 I C 462=38 Mad 178=24 M L J 488 (F B).
3. Chiranjit Singh v. Har Swarup, A I R 1926 P C 1=94 I C 782=50 M L J 629 (P C).
4. Manian Patter v. Madras Railway Co., (1906) 29 Mad 118=16 M L J 37.
5. *In re* Dagenham (Thames) Dock Co.; *Ex parte* Hulse, (1873) 8 Ch A 1022=43 L J Ch 261=21 W R 898.
6. Natesa Iyer v. Appavu Padayachi, (1910) 33 Mad 375=3 I C 941=20 M L J 230.
7. Orr v. Chitha Chinna Yegappa Chetti, A I R 1916 Mad 594=28 I C 318=17 M L T 229.

excessively high proportion to the total purchase money, the Court will treat it as a penalty and grant relief accordingly.

It is therefore thus clear that for the application of the rule of English law as to forfeiture of deposit, it must be unmistakably clear from the contract that the sum forfeited was paid or deposited as a deposit, "it must be a deposit proper" to use the language of Lord Dunedin in (1924) A C 980[8] at p. 986 where the learned Lord referring to (1884) 27 Ch D 89,[1] observes :

If the learned Judges had held that the deposit was only part payment and not a deposit proper, they would have ordered its return.

Therefore the question in this case is, was the sum of Rs. 1,500 paid as a deposit? No doubt the term used is 'advance' but that does not conclude the matter though it may go a long way in determining the intention of the parties. Still it has to be ascertained what the intention of the parties was. Dealing with reference to a contract for the sale of goods, Jackson, J. remarked on the use of the word in the contract before him thus, in 54 M L J 40[9] at p. 42 :

It would be indeed hazardous to infer that in the Kistna District where a vendor accepts what he calls 'advance' he is taking a deposit clothed will all the implications which that term has acquired in the West through the course of European civilization.

As observed by Seshagiri Iyer, J. in 28 I C 318,[7] in spite of the use of the term 'deposit' the Court can come to the conclusion that it was not given as deposit in the strict sense of the term. It will be seen from this contract that what was paid as advance was half the purchase money and the reference to the payment is prefaced by stating that this sum is paid out of the total sum of the purchase money, Rs. 3000, and the balance of Rs. 1,500 is referred to as the remaining entire amount. The said balance is payable with interest. Possession has been delivered under the terms of the contract and the penalty for non-payment of the balance of purchase money is surrender of possession and forfeiture of the said sum of Rs. 1,500. Therefore on a fair construction of the contract it seems to be clear that the parties cannot have intended that the sum of Rs. 1,500 was a mere security for performance of the contract but that they intended the forfeiture rather as punishment for non-performance of the contract. The case in 8 Ch A 1022,[5] is very analogous to the present save for the fact that the term 'advance' does not occur in the contract in that case. There was a contract of sale under which the Dagenham Dock Co. agreed to purchase certain properties from Hulse. Under the terms of the contract, £4000 was the sale price of which £2000 was to be paid on the execution of the agreement whereupon the company must be let into possession and the remaining £2000, with interest from the date of the agreement, was to be paid on 1st November 1865, when the purchase was to be completed. The agreement further contained a clause providing that on failure to pay on the due date the vendor has the right to re-enter and repossess the land without the obligation to return any portion of the £2000 paid or interest thereon which should be absolutely forfeited to the vendor. £2000 was paid on the execution of the agreement and the company was let into possession. The company committed default in the payment of the purchase money and the vendor sued for possession. James, L. J. was of the opinion that it was a clear case of a mere penalty for non-payment of the purchase money and Mellish, L. J. concurred in the said opinion and observed thus :

When you look at the last agreement, it provides that if the whole £2000 with interest, or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase money which they have paid. It appears to me that this is clearly in the nature of a penalty, from which the Court will relieve.

As in that case, there can be no doubt that the forfeiture clause in the contract Ex. A in this case is in the nature of a penalty, from which the defendant is entitled to be relieved. Mr. Sampath Iyengar relied on some cases to show that the amount of money deposited ought not to be taken into consideration in determining the question whether it is liable to be forfeited in default by the purchaser. I quite agree. But it is an element to be considered in determining whether under the contract the sum was paid as deposit. And if after such consideration it is unmistakably clear that the amount paid was paid only as a deposit with the intention that it should serve as security for the performance of the contract, the parties must be held to be bound to their bargain.

8. Mayson v. Clouet, (1924) A C 980=93 L J P C 237=131 L T 645=40 T L R 678.
9. Rattamma v. Krishnamurthy, A I R 1928 Mad 326=106 I C 482=54 M L J 40.

In (1909) A C 576,[10] one of the cases relied on by Mr. Sampath Iyengar, there was a deposit of £250,000 but it will be seen that the purchase price was 10 million pounds. Therefore there was no such disproportion to the purchase money and nothing unreasonable in regarding the deposit as security. Similarly in (1924) A C 980[8] the deposit was a sum of £25,000 and the price was £250,000. Thus the deposit was only 10 per cent. of the purchase money. In 19 All 489,[11] no doubt the sum deposited was more than half the purchase money. But the learned Judges construed the said amount as a deposit and not as a mere part payment. Mr. Sampath Iyengar has since brought to my notice a decision of Madhavan Nair and Stodart, JJ. in A. S. No. 489 of 1930 and 159 and 212 of 1931. It will be seen on a reference to the facts of the case that the amount was expressly deposited as security "for acting in all things under the karar" in that suit and it was expressly stipulated that "the whole of the deposit or the portion that may be necessary therefor be taken either as fine or loss". There was thus an express stipulation that the amount was mainly intended as security for the performance of the contract and it therefore came within the principle of *Howe* v. *Smith*.[1] It seems to me therefore that the decision of the learned District Judge is correct. In the result the second appeal fails but I make no order as to costs. As per the order of Burn, J. the sum of Rs. 800 or such sum as may be payable has to be paid with interest at 6 per cent. from 1st April 1934. Leave refused.

C.R.K./S.C. *Appeal dismissed.*

10. Sprague v. Booth, (1909) A C 576=78 L J P C 164=101 L T 211.
11. Bishenchand v. Radha Kishan, (1897) 19 All 489=1897 A W N 123.

A. I. R. 1937 Madras 685

VENKATARAMANA RAO, J.

Peravali Kottayya and *others* — Petitioners.

v.

Ponnappali Ramakrishnayya and *others* — Opposite Parties.

Civil Revn. Petns. Nos. 971 to 992 of 1934, Decided on 4th January 1937, from decrees of Dist. Court, Guntur, in C. M. A. Nos. 89, etc. of 1931.

(a) Madras Estates Land (Amendment) Act (18 of 1936), S. 3—Scope — S. 3 is retrospective and applies to pending litigation also.

Section 3, Amending Act 18 of 1936, which amends the Madras Estates Land Act is prima facie retrospective and there is no saving in regard to pending suits. If on 30th June 1934, the date of commencement of the Act, a tenant is in possession of land in an inam village which ceased to be part of the estate, he will get occupancy right by virtue of S. 6 (1): *36 Mad 439 (F B)*; *20 M L J 528*; *A I R 1918 P C 182* and *A I R 1936 P C 49*, *Rel. on.* [P 687 C 2]

(b) Jurisdiction — Civil and Revenue—S. 3 of Madras Estates Land (Amending) Act — Suit for arrears of rent against person in possession of ryoti land is cognizable by Revenue Courts and not by civil Courts.

The object of S. 3, Amending Act 18 of 1936, which amends the Madras Estates Land Act, is to confer occupancy rights on the tenant in possession of ryoti lands in the inam village on 30th June 1934, i. e., the date of the commencement of the Act. A suit therefore for arrears of rent against such person is cognizable by Revenue Courts and not by civil Courts. [P 688 C 1]

(c) Madras Estates Land (Amendment) Act (18 of 1936), Ss. 3 and 13 — Applicability of S. 3 is not controlled or governed by S. 13.

The applicability of S. 3, Madras Estates Land (Amendment) Act, is not controlled or governed by S. 13 of the Act as apart from S. 13, S. 3 will apply to cases. [P 688 C 1]

(d) Madras Estates Land (Amendment) Act (8 of 1934), S. 127 (2)—Expression "not being estate" in S. 127 (2) governs land and not only village—"Such land" in S. 127 (2) only means any land in inam village but not land in inam village qualified by expression "not being estate".

The expression 'not being an estate' in S. 127 (2), Madras Estates Land (Amendment) Act, must be held to govern the land and not only village. The words 'such land' in S. 127 (2) of the Act must only mean any land in an inam village and not any land in an inam village qualified by the expression 'not being an estate'. [P 688 C 2; P 689 C 1]

(e) Madras Estates Land Act (1 of 1908), S. 8—Evidence — Plaintiff relying on exception to S. 8 must prove that he acquired kudivaram in particular plot of land.

If the plaintiff wants to rely on the exception to S. 8 of the Act, it is incumbent on him to prove that in a particular plot of land he acquired the kudivaram. It will not therefore be permissible for the plaintiff to rely on any general evidence regarding the acts of ownership in regard to the whole village or in regard to the other plots in the same village: *A I R 1929 P C 115*; *A I R 1929 Mad 529* and *A I R 1918 Mad 569*, *Rel. on.* [P 689 C 2]

(f) Landlord and Tenant — Occupancy rights — Absence of proof of alienation of land in possession of tenant cannot negative occupancy right—Possession for considerable time ordinarily dispenses such proof.

The absence of proof of alienation of land in the possession of tenant cannot negative occupancy right in the tenant. Where land has been in the possession of a particular family for a con-

siderable period, say 30 or 40 years and if the said family was not in need to mortgage or sell a land, it is preposterous to expect any sale or mortgage in the said family. Possession for a considerable length of time should ordinarily be taken as dispensing with such a proof. [P 693 C 2]

P. Satyanarayanna Rao — for Petitioners.

B. Sommayya, G. Lakshmaa and *G. Chandrasekhara Sastri* — for Opposite Parties.

Order. — These civil revision petitions arise out of a batch of suits instituted by the agraharamdars of Arepalli taluk, Guntur District, against the tenants for recovery of rents or damages for use and occupation in respect of the holdings in their occupation. All the suits excepting one, namely, O. S. No. 153 of 1918, were filed in the District Munsif's Court of Repalli. The said O. S. No. 153 of 1918 was filed in the District Munsif's Court of Tenali.

The main question in these suits is whether the civil Court or the Revenue Court has jurisdiction to take cognizance of them. The allegations in the plaints are that the agraharamdars own both the melwaram and the kudiwaram by virtue of the original grant and that at no time the tenants had occupancy rights. The plea of the tenants is that Arepalli agraharam is an estate within the meaning of the Estates Land Act and their holding being comprised in the said estate, the Revenue Court only has got jurisdiction to determine the claims. All the suits which were filed in the Repalli District Munsif's Court were stayed pending the decision of the Privy Council relating to certain lands in the same agraharam wherein the same question was raised. The said O. S. No. 153 of 1918 reached the stage of second appeal and was pending in the High Court. The decision of the Privy Council was delivered on 14th February 1929 and is reported in 52 Mad 453.[1] On a consideration of the original grant, their Lordships of the Judicial Committee held that the Arepalli agraharam was an estate within the meaning of S. 3, Cl. 2 (d), Madras Estates Land Act. After the decision of the Privy Council the suits in the District Munsif's Court of Repalli were taken up for hearing and the plaints were directed to be returned for presentation to the proper Revenue Court.

1. Seethayya v. Subramanya Somayajulu, A I R 1929 P C 115=117 I C 507=52 Mad 453=56 I A 146 (P C).

There was an appeal to the District Court from this decision. The learned District Judge was of opinion that though on the question of the construction of the grant the Privy Council decision was conclusive of the rights of the parties, the plaintiffs will nevertheless be entitled to allege and prove that they had acquired the kudiwaram right in the said lands subsequent to the date of grant. He therefore permitted the said contention to be raised and remanded the suits for disposal in the light of the observations contained in his judgment. It may be noticed the same view was taken in S. A. No. 1088 of 1921 which was filed against the appellate decision in O. S. No. 153 of 1928 and the said suit was also remanded for a like purpose. The District Munsif on remand in a very careful and considered judgment came to the conclusion that the agraharamdars did not acquire kudiwaram interest subsequent to the grant and the Revenue Court alone had jurisdiction. But his decision was reversed by the learned District Judge. It is against his decision these revision petitions were preferred in 22 of the suits. Since the filing of these revision petitions it has been brought to my notice that 10 of them have been compromised, namely, the following C. R. P. Nos. 971, 973, 979, 980, 982, 988, 989, 990, 991 and 992 of 1934. Therefore the main question which falls to be decided is whether the agraharamdars own both the warams by reason of the subsequent acquisition of kudivaram and the civil Court has jurisdiction to try the suits. Mr. Satyanarayanna Rao who appeared for the petitioners urged that it is unnecessary to go into the merits of these cases on the ground that under the Madras Act 18 of 1936, which amended the Madras Estates Land Act they have acquired occupancy rights and the kudiwaram is no longer in the agraharamdars and the Revenue Court alone has got jurisdiction. It seems to me that this contention must prevail. S. 3 of the said Act has now added the following Explanation to S. 6, Madras Estates Land Act, 1 of 1908 :

In relation to any inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act, or in relation to any land in an inam village which ceased to be part of an estate before the commencement of that Act, the expressions 'now' and 'commencement of this Act' in this sub-section and Expl. (1) shall be construed as meaning the 30th June 1934, and the expression 'hereafter' in this

sub-section shall be construed as meaning the period after 30th June 1934.

So far as S. 6 of the Act is concerned, it has been held to be retrospective in this sense, namely, that on the date of the commencement of the Act if a tenant was in possession of ryoti land, he would acquire occupancy right and the section has been applied to pending litigation where decrees in ejectments had been obtained but no final decree of a competent Court had been passed. In the order of reference to the Full Bench in 36 Mad 439[2], Miller and Krishnaswami Iyer, JJ. made the following observations in regard to the expression "every ryot now in possession" in the section:

> It says "the expression 'every ryot now in possession' shall include every person who continues in possession at the commencement of this Act." It seems impossible to resist the conclusion that it was the deliberate intention of the Legislature to confer a right of occupancy upon a ryot in possession at the date of the commencement of the Act. Such an interpretation may have the effect of nullifying vested rights under contracts previously entered into. But it is impossible to place the interpretation that ryots in possession of land at the date of the commencement of the Act are entitled to occupancy rights on the mere general principle that a legislative enactment should not be interpreted so as to affect vested right or to give it restrospective operation by applying it to pending suits. As pointed out by Bowen, L. J., "no doubt, as a general rule, a statute does not affect pending proceedings, but that rule is only a guide where the intention of the Legislature is obscure; it does not modify the clear words of a statute": (1882) 9 Q B D 672,[3] at p. 677.

The same view was taken in 20 M L J 528,[4] where before 1st July 1908, the date when the Act came into force, the landlord obtained a decree for possession of the ryoti land. Benson and Sankaran Nair, JJ. held it was immaterial that a decree for possession had been already passed. This interpretation was accepted by the Privy Council in 42 Mad 400,[5] at p. 406. Now by virtue of the amendment made by S. 3 of the Amending Act in relation to any inam village which ceased to be part of an estate before the commencement of the Amending Act, the expressions 'now' and 'commencement of this Act' in this sub-section and Expl. 1 shall be construed as meaning the 30th June 1934. This section is prima facie retrospective and there is no saving in regard to pending suits. If on 30th June 1934, a tenant is in possession of land in an inam village which ceased to be part of the estate, he will get occupancy right by virtue of S. 6 (1). Assuming therefore the contention of the agraharamdars is right that the land ceased to be part of an estate, the petitioners have acquired occupancy rights and they are still in possession. I may usefully refer in this connexion to the recent decision of the Privy Council reported in 15 Pat 268.[6] It was a decision under the Behar Tenancy Amending Act. In that case their Lordships of the Judicial Committee applied the Amendment Act of 1934 to a case pending before the Privy Council. The landlord in that case sued to eject the defendant on the ground that she had taken a non-transferable holding and therefore he had become entitled to re-enter. The Subordinate Judge who tried the case accepted the plaintiff's contention and gave a decree in his favour ejecting the defendant. But the High Court took the view that since the transfer the landlord accepted rent and recognized the rights of the transferee and dismissed the suit. The decision of the High Court was pronounced on 27th April 1933, and there was an appeal against the said decision to His Majesty in Council. Pending the appeal to His Majesty in Council the Legislature of Behar and Orissa passed an Act called the Behar Tenancy Amendment Act of 1934, which came into force on 10th June 1935. By S. 26 (N) it was provided that:

> Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before 1st January 1923.

Therefore the question which their Lordships of the Privy Council had to consider was whether this section would apply, because if it applied the Act must be deemed to have taken away from the appellant the right which he was proposing to enforce in the appeal before the Privy Council. Their Lordships held his right was so taken away and they made the following observations referring to

2. Kanakayya v. Janardhana Padhi, (1913) 36 Mad 459=8 I C 736=21 M L J 31 (F B).
3. Quilter v. Mapleson, (1882) 9 Q B D 672=52 L J Q B 44=47 L T 562=31 W R 75.
4. Govinda Parama Guruvu v. Bandari Pradhanu, (1910) 20 M L J 528=7 I C 74.
5. Mallikarjuna Prasada Nayudu v. Somayya, A I R 1918 P C 182=49 I C 708=42 Mad 400 =46 I A 44 (P C).
6. K. C. Mukerjee v. Mt. Ramratan Kuer, A I R 1936 P C 49=160 I C 105=15 Pat 268=63 I A 47 (P C).

S. 26 (N) of the Act which are pertinent to the case now on hand :

> Its provision is that every person claiming an interest as a landlord shall be deemed to have given his consent to every transfer made before 1st January 1923. This is retrospective; the question is not whether general language shall be taken only in a prospective sense. The object of this section can only be to quiet titles which are more than ten years old, and to ensure that if during those ten years the transferee has not been ejected he shall have the right to remain on the land. Within this class the Legislature has not thought fit to discriminate against tenants whose right is under challenge in a suit, a course which it may well have regarded as invidious or unnecessary. As substantive rights of landlords and their acorued causes of action were to be abrogated, respect for pending suits over old transfers cannot be assumed.

Similarly in the present case the section clearly says that if a person is in possession of land in an inam village on 30th June 1934, he shall be deemed to have acquired occupancy right. The object of this section was in unmistakable terms to confer occupancy right on the tenant in possession of such land and respect for pending suits cannot be assumed. In this view the revenue Court alone would have the jurisdiction and the decision of the learned District Judge cannot be sustained and it seems to me unnecessary to consider the argument based on S. 13 of the Amending Act 18 of 1936. The applicability of S. 3 is not controlled or governed by the said section, as in my opinion, apart from S. 13, S. 3 will apply to the cases. All that S. 13 says is that the Act shall apply to all proceedings stayed by S. 127 (2), but it does not affect the application of the Act to the other cases nor does it affect the retrospective operation of the Act, if the Legislature meant the section to be retrospective.

However, I will deal with the contention based on S. 13. It is contended by Mr. Sommayya that the Amending Act 18 of 1936 can only apply to pending suits which are stayed under S. 127 (2), Madras Estates Land Act, Amendment of 1934, and S. 127 (2) according to him can only apply to cases where land is comprised in a village which is not an estate within the meaning of S. 3 (2) (d), and that as the present agraharam was declared to be an estate within the meaning of the said clause, S. 127 (2) would have no application to the present suits. It must be said that the argument of Mr. Sommayya has great force as the language of the section lends support to that contention. But the question is, what was the intention of the Legislature in enacting S. 127, Cl. (2) of the Madras Act 8 of 1934. As Lord Halsbury observed in (1892) A C 498[7] at p. (502) :

> The subject matter with which the Legislature was dealing, and the facts existing at the time with respect to which the Legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act.

The Legislature was contemplating an amendment in regard to the conferment of occupancy right on the tenants in inam villages. They were fully aware that the land may form part of a village which is not an estate within the meanig of sub-cl. (d) of Cl. 2 of S. 3 of the Act or may have formed part of the village within the meaning of the said clause but has ceased to be part of the estate and they wanted to confer occupancy rights in respect of both classes of lands. The Legislature was also aware that in respect of both classes of lands there were pending litigations also. The object of the Legislature was that till they carried out the legislation which they had in contemplation, there should not be any final adjudication of the rights of the parties by Courts of law. This object would be thoroughly frustrated if Mr. Sommayya's contention is given effect to and the expression 'not being an estate' were held to qualify 'village' and not 'land' in Cl. 2 of S. 127 of the Madras Act 8 of 1934. No doubt it is not strictly accurate to talk of any land being an estate. But the expression 'any land in an inam village' might comprise the entire land in an inam village or a part thereof. If it comprises the entire land in an inam village it would be synonymous with the village. If it is not, it would be part of the said village. If the entire land is to be taken into consideration, there is no incongruity in qualifying the said land by the expression 'not being an estate'. That a separate part of an inam village can be an estate is also contemplated by the Legislature. (*Vide* S. 5 of the Amending Act). It seems to me the expression 'not being an estate' must be held to govern the land and not only village. If the contention of Mr. Sommayya were to be accepted, the Court must in every case come to the conclusion whether it is an

7. Sir Robert Herron v. Rathimines and Rathgar Improvement Commissioners, (1892) A C 498 =67 L T 658.

estate or not before the amendment can be applied. On the other hand the object of the Legislature was whenever any question of kudivaram right arose with reference to a land in an inam village, the actions should be stayed. In S. 127, Cl. 2 of the said Act 8 of 1934 the expression used is 'all proceedings involving a decision whether or not the inamdar has the kudivaram right in such land,' and the expression is wide and general. The proviso also seems to indicate that the words 'such land' must only mean any land in an inam village and not any land in an inam village qualified by the expression 'not being an estate.' However it is unnecessary to rest my decision on this ground since I have already held that the application of S. 3 is not controlled or limited by the application of S. 13 of the Amending Act. Even if my view in regard to the applicability of the Madras Amending Act 18 of 1936 is wrong, I am also of the opinion that the case of petitioners on the merits is well founded and I shall proceed to deal with it.

The main question in these suits is whether the plaintiffs have acquired the kudivaram right within the meaning of the Exception to S. 8, Madras Estates Land Act. In the plaints which were originally filed, as already stated by me, the case was that by virtue of the grant the plaintiffs are the owners of both the varams. There was no allegation that they acquired the kudivaram subsequent to the date of the grant. In the cases which went up to the Privy Council, two issues were raised, namely: (2) Whether or not the plaintiffs' predecessors-in-title owned the kudivaram at the time of the grant. (3) Whether the plaintiffs or their predecessors-in-title subsequently acquired the kudivaram right in the suit land. Mr. Narayana Murthy who appeared for the plaintiffs stated that it was not his case that the plaintiffs' predecessors-in-title had the kudivaram interest at the time of the grant or that they subsequently acquired the kudivaram right and therefore he did not press those issues. In 52 Mad 453,[1] their Lordships of the Privy Council observed:

> In the course of these proceedings the respondents have admitted that they did not own the kudivaram before the grant, and that they did not acquire the kudivaram independently of and after the grant. . . . . In view of the admissions made for the purposes of these cases that the respondents did not acquire the kudivaram subsequently to the grant, it becomes unnecessary to consider the subsequent acts of the parties and the inference to be drawn from them.

It may be mentioned that the case of the plaintiffs in those cases as laid in the plaint before it came up to the High Court was that the original grant was lost and that the proper inference from all the facts including acts of ownership by themselves and their predecessors was that under the grant they had both varams. Thus various acts including the acts of ownership were relied on for the purpose of establishing that from the inception they had kudivaram interest in them but not that subsequently the plaintiff's acquired them. From the concession made by them it is also clear that those acts were not relied on for the purpose of proving that they acquired the kudivaram subsequent to the date of the grant. If the plaintiffs want to rely on the Exception to S. 8 of the Act, it is incumbent on the plaintiffs to prove that in a particular plot of land they acquired the kudivaram. It will not therefore be permissible for the plaintiffs to rely on any general evidence regarding the acts of ownership in regard to the whole village or in regard to the other plots in the same village. As observed by Venkatasubba Rao, J. in 1929 M W N 239[8] at p. 249:

> So far as the Exception to S. 8 is concerned, its application depends on the particular facts connected with each separate plot in the village. The decision therefore that certain proved facts brought a specific plot within that exception, is a decision which in the very nature of things cannot apply to other and different plots in the same village.

Again as observed by Spencer, J. in 33 M L J 548 at p. 553 or 41 I C 122[9] at p. 125:

> If the plaintiffs intended to rely on the exception to S. 8, Madras Estates Land Act, for ousting the jurisdiction of the Revenue Court, it was necessary that they should have advanced a specific case to show by what acts they acquired the kudivaram interest of their ryots and became entitled to both varams.

In the present suits even after the plea was allowed to be raised, no acts were alleged by which they acquired the kudivaram right, nor was it alleged when they acquired such kudivaram right or by whom was such right acquired. As stated by the District Munsif, the argument on behalf

8. Ramalinga Mudaliar v. Ramaswami Iyer, A I R 1929 Mad 529=119 I C 577=1929 M W N 239.
9. Venkatadasu v. Udayanarayana, A I R 1918 Mad 569=41 I C 122=33 M L J 548.

of the plaintiffs was that as the plaintiffs were unable at this remote time to prove when or how the kudivaram was acquired and as the subsequent conduct of the agraharamdars showed that they were in full possession and enjoyment of both the varams, it must be presumed that their acquisition of the kudivaram had a legal origin. The District Judge also remarks that:

> There is no direct proof in any of these suits of such acquisition. It is sought to be made out by the plaintiffs from enjoyment of the properties and the conduct of the parties.

It seems to me that this plea ought not to have been permitted at all in the absence of any definite allegations as to the mode of acquisition. The question is whether there is any room in these cases for the application of this theory of lost grant or the presumption of a legal origin and long continued enjoyment of both the varams. At the outset I may state that even this theory of lost grant must be made out with reference to facts of each case. The learned District Munsif dealt with each case separately and arrived at an independent conclusion in regard to each. But unfortunately, though the learned District Judge concurred with the District Munsif in his treatment of the cases, he never adhered to it but dealt with the cases together and arrived at conclusions based on facts relating to the entire village. The evidence relied on in proof of the acquisition of kudivaram right falls into two classes: (1) general evidence regarding the entire village and the acts of ownership exercised by the agraharamdars; and (2) evidence regarding each holding. The general evidence relied on comprises three independent pieces of evidence, namely: (1) evidence furnished by what are called dumbalas which range between 1801 and 1823; (2) evidence furnished by partition proceedings between the agraharamdars in 1859 and 1860; and (3) certain land acquisition proceedings wherein the agraharamdars were paid compensation in respect of certain lands in the village. This general evidence as already observed by me is wholly inadmissible and particularly in this case where concession was made that in respect of certain lands in the village the inamdars have not acquired kudivaram interest subsequent to the grant. The general evidence is admissible only if it was intended to prove that in the entire village they acquired kudivaram right subsequent to the grant. In 1929 M W N 239,[3] Venkatasubba Rao, J. considered the evidence in regard to the whole village because the case there made out was that in regard to the entire village kudivaram was acquired subsequent to the grant. Further the said case can hardly be treated as an authority because it related to a Mirasi village where admittedly the mirasdar is the cultivating ryot and the question in that case was whether the zamindar acquired also the rights of the mirasdar. It was not like this case where the cultivating ryots set up occupancy right as against the landlord. However, as the learned District Judge was considerably influenced by the general evidence, I shall proceed to deal with the legal inference that can be drawn from that evidence. The dumbalas are Exs. A to A-14. Ex. A relates to Fasli 1192 (i. e. 1782-83) and Ex. A-14 relates to Fasli 1231 (1821-22). The learned District Judge says that:

> They furnish valuable evidence in favour of the agraharamdars that whatever might have been the state of affairs at the time of the original grant in 1689 there were no tenants with occupancy rights in the lands on the dates of the dumbalas and far from any of the dumbalas lending any support to the contention of the ryots, each one of them has got a deadly effect against their case.

The learned Judge fell into a serious error in regard to the import of these documents. If, according to the learned Judge, on the dates of these dumbalas there were no tenants with occupancy rights, it could not be said that there was any acquisition by the landlord of such occupancy rights. The learned District Judge entirely forgot that the entire area of this inam village was not cultivated. Even at the time of the inam settlement, as will be seen from Ex. D, it will be found that the total extent of the inam village was 2409 acres whereof 960 acres were cultivated dry and only 84 acres and odd were cultivated wet and the rest of it was uncultivated and waste. Therefore on the dates of these dumbalas it is not possible to know how much was cultivated. In the lands which were not cultivated it cannot be said that there were any tenants with occupancy rights and in these lands there could be no question of any tenants abandoning occupancy rights or the landlord purchasing occupancy rights and any such acquisition thereof by the landlord. Unless it is possible to establish

that the suit lands were lands which were then under cultivation at the time of the dumbalas it cannot be said that there was any acquisition of occupancy right subsequent to the date of the grant. Coming to the nature of these dumbalas they do not seem to have any such deadly effect as is attributed by the learned Judge. These dumbalas are only permits to enable the agraharamdar to deal with the produce freed from the burden of paying the dues to the zamindar. The person with whom the zamindar is concerned is only the agraharamdar because he was the person responsible for the payment of the dues to him. The zamindar is not concerned how the produce is distributed between the agraharamdar and the tenants who cultivate the land. The nature of, and the value that should be given to, these dumbalas have been very accurately summed up in a considered judgment of Pandalai, J. in S. A. No. 1592 of 1926 and I am constrained to quote the observations of the learned Judge at considerable length because that judgment has unfortunately not been reported:

> The dumbalas produced C series and Exs. X and X-a covering the period of 1765 to 1836 have been construed by both the lower Courts on the footing that the Privy Council have by a remark in 43 Mad 166[10] at p. 172, given dumbalas generally the meaning and effect of establishing that the inamdar who is mentioned therein is the owner of both varams. The respondents also rely on it for that purpose. The remark is "there are also some dumbalas or orders dated in the year 1793 requesting that the plaintiffs' ancestor shall be allowed to reap and enjoy the crops pertaining to Billapadu". These are dealt with under the category of other confirmatory documents. We are confident that by this remark their Lordships did not intend that wherever dumbalas are found they should have the meaning and effect attributed to them by the plaintiffs irrespective of any consideration of the nature and object of dumbalas and other facts which establish that the inamdars were not and could not be permitted to remove the whole crop or indeed do anything more than take what as between them and the ryots is due to them. Dumbalas are merely part of the machinery of revenue collection when the revenue is calculated on a share of the produce. The revenue being in theory payable in kind by a share of the produce, the zamindar or Government has necessarily to take care that the crop is not before or after harvest removed by any one till the revenue is paid. The local officials having for this purpose detained the crop the dumbala is simply an intimation to them by the zamindar or superior Government revenue official, who has previously received the revenue, that it has been paid or accounted for and that the crop may be permitted to be removed. In short it simply raises the Government embargo on the produce and permits it to be taken away. By whom and of what? It is natural that the revenue authorities should refer to the person who is bound to pay and has paid the revenue. But it is a misunderstanding of the situation and the document to think that the mention of the inamdar means that the whole produce may be appropriated by him and therefore that he is the full owner of the land and that the tenants have no rights. The inamdar is mentioned in the dumbalas because he is the person responsible for the revenue and he in his turn to protect his own interest as well as of the Government to whom he is bound to pay revenue is bound and interested to see that the produce is not taken away by the cultivators till the melwaram out of which both revenue and the inamdar's share has to come is paid.

On a reference to the printed records of the case it will be found that the nature of these dumbalas is more or less similar to that in the present cases. I think the learned District Munsif has correctly appreciated their true legal effect. The partition proceedings are evidenced by Exs. B, B.1, C and C.1. So far as these documents are concerned, they can never form the basis of any inference in regard to the title to the kudivaram interests. Whenever there is a partition of an estate among the members of a family, it is usual always to divide the lands which form the estate and not the melvaram. From the description of the land it does not follow that actual lands were divided. In a permanently settled estate for example most of the lands would be in the possession of the tenants except lands which were lying waste and were not cultivated. In the case of lands which are in the possession of tenants, when there is a division of lands, it only means that the person to whom the lands are allotted will realise the rents and profits from the tenants who are in occupation of the said lands. It will be seen from Ex. D that nearly 1,400 acres were not in the cultivation of anybody and there is no evidence in the present suit that the lands which are the subject matter of those suits were not comprised in the lands which were not under cultivation then. It is not possible to draw any inference that there were tenants with occupancy rights in the said lands who had abandoned them or from whom the landlords acquired the kudivaram right.

Then the next piece of evidence relied on is certain land acquisition proceedings. The circumstances under which compensation was awarded to the agraharamdars

10. Venkata Sastrulu v. Seetharamudu, A I R 1919 P C 111=51 I C 304=43 Mad 166 = 46 I A 123 (P C).

are not in evidence. They have no bearing on the specific issue in the suits, namely, whether a particular plot ceased to be part of the estate. The fact that with reference to certain lands which formed the subject matter of the said proceedings compensation was not claimed by the tenant, would not be any evidence in regard to other plots of land. Probably they may be evidence in regard to the question whether the zamindar owned both the varams in the entire estate but that question is not in issue. The above three pieces of evidence each by itself being inconclusive even on the question whether the original grant was of both the varams taken together are also inconclusive on the said question and it is not safe to rely upon them to establish the subsequent acquisition of kudivaram interest by the inamdar. Therefore if we eliminate them we fall back upon the evidence with reference to each plot. Before dealing with the said evidence it is necessary to make a few general observations. The lands being prima facie in the Arepalli agraharam, geographically they are within the ambit of an estate within the meaning of the Estates Land Act. Therefore there is a prima facie presumption that in the said lands the tenants have got occupancy rights. The Court therefore has to start with the said presumption in deciding whether the inamdar has got the kudivaram right. Under S. 23, Estates Land Act and S. 185 of the said Act the presumption is that land in an estate is a ryoti land. The learned District Munsif has correctly applied the presumption in estimating the evidence. The learned District Judge has in my opinion fallen into an error in thinking that the presumption ought not to be applied. The learned Judge remarks at the end of para. 7 :

> We have nothing to do with the presumptions laid down in the Act when considering the issue whether such an acquisition has been made.

Under the Exception to S. 8, sub-s. (2), Cl. (d), land in an inam village will cease to be part of an estate if it is proved that the tenants' interest in those holdings have been acquired by the inamdar. It is an exception which the landlord will have to make out. The exception is only to the general rule that in every land comprised in an estate the tenant has got occupancy right. It is not possible to understand how the learned District Judge ignored this elementary rule. The evidence abundantly establishes and it is not challenged before me that the lands were never in the personal cultivation of the agraharamdars. There is no evidence either oral or documentary by which the plaintiffs sought to prove the manner and method of the acquisition of the kudivaram right and no single instance has been proved of a relinquishment by the tenants or of purchase by the inamdar or of inheritance of any other known mode by which the landlord came to acquire the kudivaram right. The sole thing relied on is that the agraharamdars were dealing with the lands as owners and leasing them from time to time for specific periods. The learned District Munsif disbelieved all the unregistered leases relied on by the plaintiffs. In this the learned District Judge has also concurred. He observes : "The safe method to adopt with reference to these exhibits is to ignore the unregistered documents altogether." There remain then the registered leases and other evidence relied on with reference to each of the plots in question. Taking the registered leases they range between 1903 and 1911. The Estates Land Act came into force on 1st July 1908. If before the dates of these registered leases the landlord has not acquired kudivaram right, the execution of these registered leases would not affect their occupancy right if they were in possession of the lands on the date of the commencement of the Act. Therefore it has to be proved apart from these leases whether the landlord has acquired kudivaram right. If so, these leases may be some evidence, in confirmation of the said right.

It is a well-known fact that the zamindars and inamdars anticipating tenancy legislation had been trying by all possible means to deny occupancy rights to the tenants and to prevent acquisition of occupancy rights by the tenants and for that purpose have been taking muchilikas with recitals in and by which the tenants stipulate to surrender possession to the landlord at the end of the term. It has always been held that from such a stipulation it is unsafe to presume absence of occupancy right in the tenant. The value of these leases will also be much discountenanced if it is proved that the tenants from whom these leases were taken were in occupation of the said lands on the dates of the said leases. Certain observations in the Privy Council judg-

ments were relied on by Mr. Somayya in this connexion. But on a careful perusal of the judgments it will be seen that the observations were made with reference to the particular facts of those cases. For example, in 41 Mad 1012[11] it was found that the defendants were let into possession by the inamdars under agreements for terms which expired in each case before the suits for ejectment were brought. Similarly in 43 Mad 166[10] it was found that in 1904 all the tenants formally relinquished their lands to the plaintiff and put him into possession thereof and from that date until the tenancies were granted in the year 1907 the property remained vacant and when the defendants were admitted as tenants, they severally declared that they had no right of occupancy except such as was given to them by the tenancy agreements. Therefore in cases where defendants were let into possession by the inamdar under agreements executed by them, the said muchilikas may be taken into consideration for the purpose of determining whether the landlord or the tenant had the kudivaram right, but when the defendants were not let into possession under those agreements but they were already in possession on the dates when they executed them, the same inference could not be drawn. Again in one place the learned District Judge remarks :

> We find the agraharamdars dealing with the lands as if they were their own, dividing them, mortgaging them, selling, exchanging them and letting them, for particular periods for specified rents. Effect must be given to this course of known enjoyment of the properties ; and under the circumstances it could be given only by presuming that the kudivaram interest in the holding was acquired by the inamdars at some date or dates subsequent to the grant.

To my mind this is a sweeping observation made by the learned Judge not borne out by the evidence on record, at any rate so far as the particular plots in these civil revision petitions are concerned. From the analysis given by Mr. Somayya I find that only in two suits there was either a mortgage or sale. In C. R. P. No. 985 there are two registered mortgages and in C. R. P. No. 984 there are two registered mortgages and one sale. I will deal with the evidentiary value of those documents in dealing with the particular cases. But beyond these so-called mortgages or sales there is no other evidence of mortgages, sales or exchanges. I do not know what the learned Judge means by saying the inamdars divided the lands. That observation can have relevancy only if we were dealing with the question whether in the entire village the inamdars had the kudivaram or acquired the kudivaram right but it will have no bearing on the question whether in a particular plot of land the inamdar acquired the kudivaram right unless there is evidence that that particular plot of land happened to be the subject of division among the agraharamdars. There is another observation which the learned Judge makes which requires some notice, namely :

> There is not a single instance of any sale of the lands by any one of the so-called tenants and no documentary proof of any partition of the lands in the same family. Oral evidence there is of the tenants themselves to the effect that they divided such and such lands in such and such a manner without any reference to the agraharamdars or their rights; but such oral evidence has no value in the face of the documents that have been produced by the plaintiffs.

The proof of alienations of lands in the possession of tenants is given for the purpose of probabilising the existence of kudivaram right in the tenant, but the absence of it could not be taken as negativing occupancy right. Where land has been in the possession of a particular family for a considerable period, say 30 or 40 years, and if the said family was not in need to mortgage or sell a land, it is preposterous to expect any sale or mortgage in the said family. I think possession for a considerable length of time should ordinarily be taken as dispensing with such a proof. In most cases it may not be possible to have them though it is desirable or it might be good if such evidence was forthcoming and the absence of such evidence should not be taken as a factor in negativing occupancy right. Now I shall proceed to take up each of the cases. As I already stated the learned District Munsif examined each case on its own merits and gave findings with reference to each. But the learned District Judge has not done so and this failure considerably vitiates his judgment and therefore I feel at liberty to go into the evidence especially when the matter involves a question of jurisdiction to find out whether the view of the learned District Munsif is correct. (On consideration of each case the judgment proceeded.) Thus on a consideration of the entire evi-

11. Suryanarayana v. Patanna, A I R 1918 P C 169=48 I C 689=41 Mad 1012=1 U P L R 11=45 I A 209 (P C).

dence I am of opinion that the conclusions reached by the learned District Munsif are right. I therefore allow the above revision petitions and reverse the decision of the learned District Judge and restore that of the District Munsif with costs both here and in the Court below. C. R. P. Nos. 971, 973, 979, 980, 982, 988, 989, 990, 991 and 992 of 1934 are not pressed and are dismissed as withdrawn and there will be no order as to costs.

C.R.K./W.D. *Petitions allowed.*

A. I. R. 1937 Madras 694

VENKATARAMANA RAO, J.

Her Highness Princess Sreemathi Shree Radha Bai Maharanee Sahiba (died) by her agent His Highness Prince Sudarsan and *others* — Appellants.

v.

B. Jagannadha Naidu and *others* — Respondents.

Appeal No. 185 of 1933, Decided on 23rd November 1936, against appellate order of Dist. Court, Chingleput, in C. M. A. No. 37 of 1933.

Civil P. C. (1908), Ss. 151 and 144 — Restitution — Mesne profits — Court can under S. 151 order not only restitution of property but also restitution of profits — Auction sale taking place on date already fixed instead of on date postponed—Sale set aside on ground of material irregularity of Court — Application for restitution by judgment-debtor by re-delivery — Restitution of mesne profits, held could be ordered under S. 151 and not under S. 144.

The rule that a bona fide purchaser at a sale held under a Court's decree or order which is subsequently reversed is not affected by the reversal and the remedy by way of restitution does not lie against him, has no application to cases where through a mistake or material irregularity of the Court the property has been sold, such as when one property has been attached and another has been sold or where the property is sold on the one date whereas it ought to have been sold on another date. In such cases restitution is ordered not strictly under S. 144 but under the inherent powers of the Court under S. 151, Civil P. C.; in ordering restitution of the property under S. 151, Civil P. C., it is open to the Court to grant restitution also of the profits of the said property. If the Court has jurisdiction to grant restitution, there is no reason why the restitution should be limited to the property alone and the judgment-debtor denied the restitution of the profits which he has been deprived of. [P 695 C 1, 2]

A sale was set aside on an application by the judgment-debtor on the ground of material irregularity committed by the Court selling the property on the old date fixed instead of the date to which it was postponed. The judgment-debtor filed an application for restitution by re-delivery of possession and mesne profits of the property from the auction purchaser :

Held : that the judgment-debtor was entitled to mesne profits for the period during which he was out of possession of the property : *Alexander Rodger* v. *The Comptoir D'escompte De Paris*, *(1890) 3 P C 465* ; *14 Cal 484* ; *A I R 1922 P C 269* and *23 Mad 306, Rel. on.* [P 695 C 2]

Appellant in person.

K. S. Varadachari and *K. Desikachari* —for Respondents.

Judgment.—This appeal is against an order of the learned District Judge of Chingleput, declining to grant restitution to the appellant confirming the order of the learned Subordinate Judge of Chingleput. The main facts are not in dispute. On 10th July 1928, house and ground No. 69, Subramania Koil Street, Alandur, the property of the appellant, was sold in Court auction and purchased by respondent 3 in this appeal. The appellant judgment-debtor made an application to set aside the sale under O. 21, R. 90, Civil P. C. The ground he alleged was that on 4th July 1928, on his application the Court passed an order giving him leave to raise money by private alienation of the property and granted two weeks time for the said purpose, but in the meanwhile sold the property on 10th July 1928. The mistake occurred thus : The sale was originally fixed to 4th July 1928; on that date when the judgment-debtor applied for time, the learned Subordinate Judge who was dealing with that application passed two orders, viz., by one he adjourned the sale to 10th July and by another he gave leave to raise money under O. 21, R. 83 and put off the sale till 18th July. The application to set aside the sale was refused by the learned Subordinate Judge and also by the District Judge of Chingleput. But on revision Curgenven, J. in C. R. P. No. 1498 held the Court committed material irregularity in holding the sale on the 10th and remanded the petition for inquiry into the question whether substantial injury has resulted by the sale. On 5th November 1931, the learned District Judge came to the conclusion that substantial injury did result by reason of the said material irregularity and set aside the sale. Thereupon an application was made by the judgment-debtor on 22nd February 1932 being M. P. No. 95 of 1932 on the file of the Subordinate Judge of Chingleput for re-delivery of the property and also for mesne profits. An order was made for re-delivery to be given by 10th March

1932. During the course of the said proceeding an order was passed on 29th April 1932, in and by which the purchaser was asked to file an account of the rents and profits of the said property during the period he was in possession and the said statement also appears to have been filed by the auction purchaser, Rajagopal. Possession was delivered on 11th March 1932. The present application, M. P. No. 399 of 1932, has been made for directing the auction purchaser to pay the appellant the mesne profits of the property. Both the Courts have dismissed his application on the ground that under S. 144, Civil P. C., no remedy by way of restitution lies against a bona fide auction purchaser. In this view both the lower Courts went wrong. No doubt it is a well recognized rule that a bona fide purchaser at a sale held under a Court's decree or order which is subsequently reversed is not affected by the reversal and the remedy by way of restitution does not lie against him, but this rule has no application to cases where through a mistake or material irregularity of the Court the property has been sold such as when one property has been attached and another has been sold or where as in this case the property was sold on the one date whereas it ought to have been sold on another date. In such cases restitution is ordered not strictly under S. 144 but under the inherent power of the Court under S. 151, Civil P. C. As has been stated by the Privy Council in 3 P C 465[1] at p. 475, it is the duty of the Court

> to take care that no act of the Court in the course of the whole proceedings does an injury to the suitors in the Court.

Subramania Ayyar, J. explains the principle thus in 23 Mad 306,[2] at p. 312 :

> All that the one has gained and all that the other has lost is due to the agency of the Court and, therefore, no injustice is done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession. He is in no worse position after his being put out by the Court than he would have been if the Court had never acted and the Court cannot, without putting him out, undo its own wrong.

It is on this principle that in the case which went up to the Privy Council in 2 Pat 10,[3] when one property has been attached and another has been sold, the sale was set aside and the re-delivery ordered. In ordering re-delivery, the learned Subordinate Judge who dealt with the matter in the first instance failed to give mesne profits. But the High Court on appeal directed mesne profits to be given. The Privy Council upheld the order but in regard to mesne profits a question arose whether the judgment-debtor was entitled to interest on mesne profits and their Lordships observed that the equities of the case will be met by not allowing interest on the purchase money to a refund of which the auction purchaser was held entitled: 2 Pat 10,[3] at p. 17. This case is clear authority for the position that in ordering restitution of the property under S. 151, Civil P. C., it is open to the Court to grant restitution also of the profits of the said property. If the Court has jurisdiction to grant restitution there is no reason why the restitution should be limited to the property alone and the judgment-debtor denied the restitution of the profits which he has been deprived of. As has been held by Petheram, C. J. in 14 Cal 484,[4] at p. 486 :

> If the Court has got an inherent right to order restitution of the thing which has been improperly taken, as part of that power it must have the right and power to order restitution of everything which has been improperly taken. If they have that power they have the power not only to order restitution of the property itself but restitution of any proceeds which have been improperly taken during the time that it was in the possession of the person who was not entitled to it. These proceeds which have been received are the mesne profits of the property ; and it being admitted that there is a power in the Courts to order restitution of the property, it must follow that they have the power to order restitution of the mesne profits.

On principle the appellant is entitled to restitution of the rents and profits he has been deprived of during the period he was out of possession, namely, 1st May 1930, when possession was delivered to the auction purchaser, to 11th March 1932, when possession was re-delivered to the appellant. It has been represented to me that the auction purchaser had obtained a refund of the sum of Rs. 4,000 with interest up to 1st April 1932. It is just that the auction purchaser should be entitled to set

1. Rodger v. The Comptoir D'escompte De Paris, (1870) 3 P C 465=7 Moor P C (N S) 314=40 L J P C 1=24 L T 111=19 W R 449.
2. Doraiswami Iyer v. Annaswami Iyer, (1900) 23 Mad 306=10 M L J 307.
3. Jai Berham v. Kedar Nath Marwari, A I R 1922 P C 269=69 I C 278=2 Pat 10=49 I A 351 (P C).
4. Mookond Lal v. Mahomed Sami Meah, (1887) 14 Cal 484.

off against the said mesne profits interest on the purchase money during the period he has been directed to render account. Mr. Varadachari contends that in ordering refund of the purchase money he was not awarded interest up to 1st April 1932, and that order was made in the presence of the judgment-debtor and that it must, therefore, be taken that that interest was disallowed on the ground that he was enjoying the profits of the property and, therefore, if the judgment-debtor is allowed mesne profits he must also get interest from the date on which he deposited the money into Court. The order directing refund has not been filed in these proceedings in the lower Court and it is not before me and I am unable to say whether this contention is right or wrong. The order of the lower Court is, therefore, reversed in so far as the question of mesne profits is concerned. The rest of the order is confirmed and each party will bear his own costs of this appeal. I, therefore, remand the petition to the Court of the learned Subordinate Judge of Chingleput for ascertainment of the mesne profits payable to the appellants and passing a decree in favour of the judgment-debtor in the light of the observations made above. I direct each party to bear his own costs in the appeal.

C.R.K./K.B. *Case remanded.*

✻ A. I. R. 1937 Madras 696

FULL BENCH

BEASLEY, C. J., MOCKETT AND HORWILL, JJ.

In the matter of *L. J., A First Grade Pleader, Vizagapatam.*

Decided on 21st April 1937.

✻(a) Legal Practitioner—Misconduct—Misappropriation — It is sufficient to show that legal practitioner used client's money for his own purpose intentionally and without his permission—Intention of defrauding is not material.

Where a legal practitioner has been accused by the client of fraudulently and dishonestly using the money, it is not necessary that fraud or any other criminal offence should be proved. It is sufficient if it is shown that a legal practitioner has intentionally used his client's money for his own purposes without his client's permission; and it is quite unnecessary to consider whether he did so with any intention of defrauding his client. He may have every intention of restoring the money to his client later on but he is nevertheless guilty of professional misconduct in converting the money to his own use even temporarily.

[P 697 C 1, 2]

✻(b) Legal Practitioner — Misconduct — Misappropriation — Misconduct brought to notice of Court—Subsequent agreement to restore money does not affect charge—Charge cannot be permitted to be 'squared'.

When once an act of professional misconduct has been committed, any subsequent agreement by the legal practitioner to restore the money and his client to receive it back does not make the act any the less one of professional misconduct though the subsequent restoration of the money may have some bearing on the question of punishment. When a case of professional misconduct has been brought to the notice of the Courts, then the charge cannot be permitted to be 'squared'.

[P 697 C 2]

Kasturi Seshagiri Rao—for Pleader.

R. Ramamurthi for Advocate-General in support of the notice.

Beasley, C. J.—These proceedings relate to a sum of Rs. 70-10-0 which belonged to one Aletti Mallikarjunudu, a client of the respondent, and which sum the respondent by a letter of 4th February 1934 (Ex. A-3) admitted that he had in his possession. The respondent did not return that money to his client in spite of repeated requests in writing to do so and eventually the client sent a registered letter of demand on 24th December 1934 which the postal acknowledgment shows was received on 2nd January 1935 by the respondent. This registered letter, however, did not produce any reply. A further registered letter was sent to the respondent on 14th March 1935 demanding the return of Rs. 65 within four days and telling him to hand over the papers in the suit to another advocate at Vizagapatam and that he was to take no further steps with regard to this suit. This letter is shown by the postal acknowledgment to have been received by the respondent on 19th March 1935. No reply was made to this letter also. Eventually on 11th June 1935 a petition against the respondent was presented to the District Munsif of Vizagapatam by the client A. Mallikarjunudu setting out the facts and stating that the petitioner believed that the respondent had appropriated his funds for his own needs. He further charged him with not opposing an insolvency petition filed by the judgment-debtor in the suit in which the respondent had acted on the petitioner's behalf, in spite of his instructions. Subsequently the petitioner met the respondent in October 1935 and then the latter admitted that he had used the money temporarily for his own sudden and unforeseen private purpose, namely, for his journey to a village in West Godavari

in connexion with his father-in-law's sudden death and said that he thought that the petitioner would not mind his using the money for such a sudden private purpose.

It appears that the petitioner after this explanation readily forgave the appropriation of the money and it was arranged that of the amount owing Rs. 40 was to be paid in cash and the remaining Rs. 30.10.0 would be kept by the respondent in payment of future professional work to be done by him. The Rs. 40 cash payment is represented by payments in two instalments of Rs. 20 each in October 1935. Subsequently an endorsement was made on Ex. A-4, which is the copy of an account furnished by the respondent to the petitioner on 4th February 1934, as follows: "The matter has been adjusted, and it need not be pressed". There seems to be some confusion with regard to this endorsement which is Ex. A-7, as the District Judge states in his report that when asked by his predecessor Mr. Lancashire on 22nd July 1936 about his petition, the petitioner endorsed on it that the matter had been adjusted and the petition was not pressed. It would appear from this that the endorsement was made upon the petition and not on Ex. A-4. However, that is immaterial. The position at that time was, therefore, that the respondent had had in his hands money belonging to his client for a considerable time and that in spite of repeated demands did not return the money to him but instead upon some date about which no information has been given by him he used his client's money for his own purposes and did so without having first of all obtained his client's permission to do so or told him about it after he had done so.

This was, therefore, a clear case of the wrongful use for his own purposes by a legal practitioner of his client's money; and it is obvious that the money was so used because the legal practitioner had not sufficient money of his own. That these facts disclose a case of professional misconduct is obvious; and although the respondent may have been accused by the client of fraudulently and dishonestly using the money, it is not necessary that fraud or any other criminal offence should be proved. It is sufficient if it is shown that a legal practitioner has intentionally used his client's money for his own purposes without his client's permission; and it is quite unnecessary to consider whether he did so with any intention of defrauding his client. He may have every intention of restoring the money to his client later on but he is nevertheless guilty of professional misconduct in converting the money to his own use even temporarily. It is not out of place to observe that it is probable that in most cases which end disastrously for persons entrusted with the money of others, there is an original intention to restore the money. The clerk entrusted with his master's money may gamble with it hoping that the gamble will be successful in which case he returns his master's money and his master remains in ignorance of the use to which it was temporarily put. But gambles are not so often successful and the money cannot be returned and disaster is the result. Legal practitioners who have in their hands the money of their clients must under no circumstances utilise that money for their own purposes without the sanction of their clients; and even to take a loan from a client is undesirable, so much so that in the "Instructions to the members of the Bar" issued by the Madras Bar Council dated 2nd April 1933 it is laid down that :

> Practitioners should avoid arrangements by which client's moneys in their hands are converted into loans. But in no case should such conversion be made without the previous consent in writing of the client.

This instruction was given in pursuance of views expressed by the Judges of this High Court. That being so, how is the charge of misconduct affected by the amicable settlement of the matter come to between the petitioner and the respondent once such an offence has been brought to the notice of the Court ? The answer is that, when once an act of professional misconduct has been committed such as the one here, any subsequent agreement by the legal practitioner to restore the money and his client to receive it back does not make the act any the less one of professional misconduct though the subsequent restoration of the money may have some bearing on the question of punishment. When a case of professional misconduct has been brought to the notice of the Courts, then the charge cannot be permitted to be "squared". Clients whose money legal practitioners have wrongly utilized have no interest at all except to get their money back and if they do, are quite prepared to withdraw the charges. They

are not in the least degree interested in any rules of professional conduct, although many of these are framed for the benefit of the public, nor do they care anything about the prestige and honourable name of the legal profession; and where the disciplinary functions of the Courts have been invoked and the money has been returned to them, they are not interested in the control of the Courts over legal practitioners.

This however is the concern of the Courts; and mere restoration of the money to the client by a legal practitioner who has improperly used it for his own purposes cannot be any ground for allowing the withdrawal of such a charge. The Court's concern is to exercise its control over legal practitioners who have converted their client's money to their own use; the client's concern is to get his money back. We have dealt with this topic at some length because it has been made clear to us not only in these proceedings but in similar proceedings that there is an impression that charges like this when they have once been made to the Court, can be "squared" in the same way as this obviously has been; and we are all the more constrained to say what we have because it appears to us that to some extent the District Judge is under the same misapprehension. He finds that the legal practitioner appropriated this money to his own sudden and unexpected private use in the bona fide belief that his client would not mind it in the circumstances and without any fraudulent or dishonest intent to misappropriate the amount and further that he foolishly detained the money and failed to reply to his client's letters owing to his pique at another vakil having been engaged and was expecting his client to go to him in person and was intending to return the money then after some rebuke for having engaged another vakil. He thinks that the legal practitioner believed that his client would approve of this diversion of his funds for his own private purpose in the special circumstances and that this cannot be said to be wholly unreasonable in view of the relationship as lawyer and client and the sudden death and the consequent urgent journey rendered necessary by it and indeed his client's readily forgiving the diversion is itself proof he thinks of the reasonableness of the legal practitioner's belief. In other words, in order to escape serious consequences of his conduct a legal practitioner who converts his client's money to his own use has only got to say that he thought that his client would not object to its use in that way and subsequently be agreeing to repay the money to his client and obtain his client's forgiveness.

The District Judge in the end certainly says that the legal practitioner deserves to be severely censured for utilizing his client's money for his private use without having previously obtained his client's permission to do so. We are quite unable to understand why in the circumstances of this case the District Judge should think that the legal practitioner's belief that his client would not object to the use of his money by him was reasonable or even bona fide. The circumstances to which we refer are his studied neglect to tell his client that he had done so or to comply with his client's demands to return the money or even to reply to them and his obvious difficulty in repaying only a part of the money in October 1935. The reasonableness of the legal practitioner's belief and his bona fides at the time when he so used the money seem to us to be better tested by these latter facts than by the subsequent forgiveness of his conduct by his client upon his agreeing to restore the money to him. We on the contrary think that the legal practitioner's belief was not a reasonable one at all and indeed it is difficult to accept his statement that he had such bona fide belief. We are clearly of the view that the legal practitioner was guilty of professional misconduct and, were it not for the fact that the suspension of the renewal of his sanad pending the proceedings in this High Court, has resulted in his being unable to practise for some time, we should not be satisfied with the punishment proposed by the District Judge, namely, severe censure. We think, however, that in view of what we have stated no further punishment need be inflicted upon him. The order of the Court is that Mr. L. J., First Grade Pleader, Vizagapatam is severely censured for his conduct.

C.R.K./S.C. *Order accordingly.*

*** * A I R 1937 Madras 699**

FULL BENCH

VENKATASUBBA RAO, OFFG. C. J.,
CORNISH AND VENKATARAMANA RAO, JJ.

Lakshmi Ammal and *another* —
Appellants.

v.

Anantharama Ayyangar and *another*—
Respondents.

Appeal No. 443 of 1930, Decided on 29th January 1937, against decree of Sub-Judge, Tinnevelly, in O. S. No. 66 of 1927.

*** * (a) Hindu Law of Inheritance (Amendment) Act (2 of 1929), S. 2—Hindu male dying before Act 2 of 1929, succeeded by limited female heir—Latter living after passing of Act 2 of 1929—Succession to deceased male opens after passing of Act and is governed by the Act—For succession, crucial date is that of death of female and not male holder :** *57 Mad 718=A I R 1934 Mad 138=147 I C 1139, Overruled.*

(Per *Full Bench*).—Under Hindu law, it is the death of the female heir that opens the inheritance to the reversioners, who till then possess an inchoate right, generally termed a *spes successionis*; in other words, the male holder is regarded by the Hindu law as having lived up to and died at the moment of the death of the female heir. When a female heir intervenes, therefore, the fictional death of a Hindu male is something different from his actual death, the result being that the date of his death is for this purpose postponed to the death of the limited owner. Thus there is no vesting at the date of the male holder's death, in other words the crucial date is that of the death of the female heir, on whose death alone the succession opens. [P 699 C 2; P 700 C 1, 2]

Where therefore a Hindu male dies intestate before the passing of Act 2 of 1929, leaving a limited female heir who is alive after the Act 2 of 1929 has come into force, the succession to the deceased male member opens after the passing of the Act and is governed by the provisions of that Act : *57 Mad 718=A I R 1934 Mad 138=147 I C 1139*, **Overruled**; *Case law discussed.* [P 701 C 1]

(b) Hindu Law—Widow—Nature of estate.

(Per *Full Bench*).—The position of a Hindu widow or other female heir is an anomalous one, for, although she is said to possess a qualified interest, she can in certain circumstances alienate the entire estate. She is thus in one sense the heir of the last male holder. [P 700 C 1]

(c) Hindu Law—Alienation — Declaratory suit by remote reversioner in presence of nearer reversioner—Suit need not always be dismissed—Court must exercise judicial discretion to determine whether remote reversioner is entitled to sue and may require nearest reversioner to be made party.

(Per *Madhavan Nair* and *Stodart, JJ.* in Final Judgment).—Though the Hindu law does not generally encourage declaratory suits by remote reversioners when nearer reversioners are in existence, still it is not always necessary that such suits should be dismissed, for Courts in a proper case may well allow the suit to go on, taking care to safe-guard the interests of the nearer reversioners in existence. In such a case the Court must exercise a judicial discretion in determining whether remote reversioner is entitled to sue and would probably require the nearest reversioner to be made a party to the suit : *Case law discussed.* [P 703 C 1]

S. Srinivasa Ayyengar, P. N. Appuswami Iyer and *A. Nagaswami Iyer* — for Appellants.

T. R. Venkatarama Sastriar, T. M. Krishnaswami Iyer and *R. Krishnaswami* — for Respondents.

OPINION

Venkatasubba Rao, Offg. C. J. — The question referred to the Full Bench is, whether the succession to a Hindu male dying before the passing of the Act 2 of 1929, leaving a female heir a limited owner under the law who is alive after the Act has come into force, is governed by the provisions of that Act. The last male holder was one Venkatakrishna, who died a minor on 11th July 1922. He was succeeded by his mother, Lakshmi Ammal (defendant 1), against whom the action has been brought by the plaintiffs claiming to be the presumptive reversioners, with a view to obtain certain reliefs in regard to her deceased son's estate. The plaintiff's right is challenged by the sister of Venkatakrishna, Sundarathammal (defendant 2 in the suit) and her son, who allege that under the Act they have a preferential right to the succession; and if this contention is well founded, the plaintiffs would cease to be the nearest or presumptive reversioners. Act No. 2 of 1929 received the assent of the Governor-General on 21st February 1929, on which date it came into force. The short question to be decided is, whether the succession to Venkatakrishna, who died before the Act leaving his mother as his immediate heir, is governed by that Act or by the law in force previously. This in turn depends upon the question, when does the succession to a Hindu male open?

This Act, as its Preamble shows, has been passed with a view to alter the order of succession to a Hindu male dying intestate. In the present case, if Venkatakrishna who was succeeded by his mother is to be deemed as having died in 1927, the provisions of this Act can have no operation. But the true principle seems to be that under the Hindu law it is the death of

the female heir that opens the inheritance to the reversioners, who till then possess an inchoate right, generally termed a *spes successionis*; in other words, the male holder is regarded by the law as having lived up to and died at the moment of the death of the female heir. When a female heir intervenes, therefore, the fictional death of a Hindu male is something different from his actual death, the result being that the date of his death is for this purpose postponed to the death of the limited owner. If this principle is kept in mind, the question presents no difficulty. It would be begging the question to say that to adopt this view would be to give retrospective effect to the Act. If a male intestate succeeded by a female heir is assumed as dying on the day of his actual death which happens to be before the Act, to apply the provisions of this enactment to such a person would undoubtedly amount to giving it retrospective effect. But the true doctrine of the Hindu law is thus declared by their Lordships of the Judicial Committee :

> The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who have been the heirs of the husband, if he had lived up to and died at the moment of her death : 7 I A 115[1] at page 154.

The position of a Hindu widow or other female heir is an anomolous one, for, although she is said to possess a qualified interest, she can in certain circumstances alienate the entire estate. That she is thus in one sense the heir of the last male holder cannot be disputed. Referring to the widow, their Lordships say that what she holds is "an estate of inheritance to herself and the heirs of her husband" : 7 I A 115[1] at p. 154. The persons described here as the heirs of the last male holder are the reversioners, whose interest, so long as the female holder is alive, is only contingent, "differentiated little, if at all, from a *spes successionis*": 43 I A 207[2] at p. 209. The case last cited is an instructive one. There, the Courts in India declared the plaintiff to be the nearest reversionary heir of the deceased Ramaswami Ayyar, after the lifetime of defendants 1 and 2, his widow and mother. Their Lordships of the Judicial Committee held that such a declaration was both unavailing and premature, for as they point out :

> The question of who is the nearest reversionary heir or what is the class of reversionary heirs, falls to be settled at the date of the expiry of the ownership for life or lives—that is to say, in the present case, at the death of the survivor of the appellant and her late husband's mother : p. 209.

The Hindu law conception is this : So long as a female heir is alive, no one can claim any vested interest in succession, a fortiori there is no vesting at the date of the male holder's death, in other words, the crucial date is that of the death of the female heir, on whose death alone the succession opens. The Judicial Committee has repeatedly declared that the succession opens only on the death of the female heir. In 7 I A 115,[1] as already stated, their Lordships observe :

> The succession does not open to the heirs of the husband until the termination of the widow's estate : page 154.

Again, in 31 I A 67,[3] after refusing to interfere with a declaration granted by the lower Courts in favour of certain reversionary heirs, their Lordships, in order to guard against any possible misapprehension, emphasize :

> Whenever the inheritance opens by the death of the widow, the present decision will have settled nothing as to who should succeed : 31 I A 67[3] at page 70.

The same idea that the succession does not open prior to the death of the female heir, is again expressed in 43 I A 207,[2] already quoted, at page 209. The plaintiff's learned counsel has argued that there is what is known as a fixed line of succession, with which the Act could not have intended to interfere. The answer is simple. There is no interference with any vested rights at all. During the lifetime of the female heir it cannot be predicated who would be the reversioner who would succeed. Possibly none who was alive at the death of the last male holder would eventually survive to succeed to his estate; how can it then be stated that anyone's vested rights are interfered with? Again, a case may be conceived where a suit is brought for the safeguarding of the estate by the presumptive reversioner on behalf of all the reversionary heirs, but at the death of the female heir, not one of the rever-

1. Moniram v. Keri Kolitani, (1883) 5 Cal 776=7 I A 115=6 C L R 322=4 Sar 103 (P C).

2. Janaki Ammal v. Narayanaswami Ayyar, A I R 1916 P C 117=37 I C 161=43 I A 207=39 Mad 634 (P C).

3. Thakurain Jaipal v. Bhaiya Indar Bahadur Singh, (1904) 26 All 238=7 O C 239=31 I A 67=8 Sar 625 (P C).

sioners existing at the date of the action may be alive to reap the benefit of the decree. The notion therefore of a fixed line of succession seems opposed to the principles governing this branch of the law.

In our opinion, therefore, the plaintiffs are not the presumptive reversioners of Venkatakrishna, and we base that view upon what we consider is the true doctrine of the Hindu law. As for the authorities, in all the decided cases this view has been taken, excepting in 57 Mad 718.[4] In our opinion that case, with great respect, was wrongly decided and it is unnecessary, having regard to what we have said, to discuss it in any detail. Moreover, in Allahabad, Lahore and Patna the view that we have indicated has prevailed: A I R 1933 All 152,[5] A I R 1936 All 507,[6] A I R 1932 Lah 361,[7] A I R 1936 Lah 124,[8] A I R 1934 Pat 324,[9] and in some of those cases, especially in A I R 1936 Lah 124,[8] the arguments adopted in 57 Mad 718,[4] have been fully answered. In the result, we would answer the reference by stating that in a case like the present, the succession opens to the heirs of the last male holder after the passing of the Act and is therefore governed by its provisions.

[On receipt of the opinion of the Full Bench the case was placed before Madhavan Nair and Stodart, JJ. for final judgment].

Madhavan Nair, J —The essential facts necessary for the disposal of the appeal have been stated in our Order of Reference to the Full Bench. The suit was instituted by the plaintiffs who were the nearest reversioners to the estate of the last male holder at the time of the institution of the suit. But the question was raised by defendant 2, having regard to Act 2 of 1929, that she and her son were nearer reversioners than the plaintiffs and that the latter are therefore not entitled to maintain the suit. The Full Bench has now answered the question that in a case like the present the succession opens to the heirs of the last male owner after the passing of the Act and is therefore governed by its provisions. It would follow from this decision that defendant 2 and her son, that is the sister and her son, are nearer reversioners to the estate of the late Venkatakrishna Ayyangar than the plaintiffs. It may be mentioned here that the son of defendant 2, who is a minor under her protection, is not a party to the suit.

On the answer of the Full Bench it is argued by the appellants that the plaintiffs not being the nearest reversioners, are not entitled to institute the suit and it must therefore be dismissed. On the other hand, the respondents argue that the suit of the plaintiffs being of a representative character, need not necessarily be dismissed and that the merits of the appeal should be gone into. On these arguments the first question for our decision is whether the appellant's contention should be accepted and the suit should be dismissed. The appellants' learned counsel referred to various cases. In the leading case of 6 Cal 764,[10] to which reference is usually made in all the decisions dealing with this question, their Lordships of the Privy Council laid down the general rule that a declaratory suit

> must be brought by the presumptive reversioner, that is to say, by the person who would succeed if the widow were to die at that moment. Such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow or have precluded themselves from interfering .... The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue .... In such a case .... the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit.

In 47 All 929,[11] it was held that there is no ground for the proposition that it is competent to persons who are not in fact the nearest reversioners to sue where the actual nearest reversioner is a minor. In that decision it was pointed out by the

4. Krishnan Chettiar v. Manickammal, A I R 1934 Mad 138=147 I C 1139=57 Mad 718=66 M L J 70.
5. Bandhan Singh v. Mt. Daulata Kuer, A I R 1933 All 152=138 I C 389=1932 A L J 884.
6. Rajpali v. Surju Rai, A I R 1936 All 507=163 I C 756=58 All 1041=1936 A L J 659 (F B).
7. Shib Das v. Nand Lal, A I R 1932 Lah 361=138 I C 291=13 Lah 178=33 P L R 423.
8. Shakuntla Devi v. Kaushalya Devi, A I R 1936 Lah 124=162 I C 718=17 Lah 356=38 P L R 673.
9. Chulhan v. Mt. Akli, A I R 1934 Pat 324=150 I C 1039=15 P L T 707.
10. Rani Anand Kunwar v. Court of Wards, (1881) 6 Cal 764=8 I A 14 = 8 C L R 381=4 Sar 195 (P C).
11. Kalicharan Singh v. Bhageshra Kunwari, A I R 1925 All 585=89 I C 374 = 47 All 929 =23 A L J 653.

learned Judges: "Indeed so far as we are aware, there is nothing to prevent the minor suing through a next friend at this stage". In 13 Lah 178,[7] Mt. R, having succeeded to the property of her deceased son, made a gift of the same to her daughter's son. The reversioners in the fourth degree were, in April 1925, granted a decree declaring that the gift would not affect their rights after the death of Mt. R, but while the appeal from this decision was pending and while Mt. R was still alive, the Hindu law of Inheritance (Amendment) Act 2 of 1929 came into force. This altered the order of succession so as to make the donee (sister's son) rank before the plaintiff reversioners. It was held that as Mt. R was still alive at the date of the coming into force of the new Act, the appeal must be accepted and the suit must be dismissed: *see* the head note. In 49 All 815[12] it was held, following the Privy Council decision in 6 Cal 764,[10] that if the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue. In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit. Amongst the other cases cited, reference may be made to *Ram Tawakkal Tewari* v. *Mt. Dulari*[13] and A I R 1934 Pat 324.[9] Relying on these cases the appellant's learned counsel argues that the plaintiffs had no justification to proceed with the suit seeing that they are not the nearest reversioners, especially so since they did not make the minor son of defendant 2 a party, even though it was pointed out to them that they should do so having regard to Act 2 of 1929.

The respondents contend that though suits by reversioners when nearer reversioners are in existence had been dismissed, it does not necessarily follow that they should in all cases be dismissed, that the Court has a discretion in such cases and that the plaintiffs may be allowed to go on with the suit. In 50 All 678,[14] the plaintiff alleging himself to be the nearest reversioner of her husband brought a suit against a Hindu widow. At the time of the suit there was in existence a nearer heir, a minor daughter of the defendant who lived with her, but she was not made a party to the suit. The learned Judges pointed out that although it is not correct to say that the existence of a nearer female heir can always be ignored by the next male heir, yet even without any express proof of refusal, concurrence or collusion on her part, the Court may exercise its discretion and grant declaratory relief to the male reversioner and without insisting upon the female heir being joined in the suit, provided such a course is not prejudicial to her interests. This case is strongly relied upon by the respondents to show that cases may arise where even when a nearer reversioner is not made a party, relief may be given in a suit by a remote reversioner. In 1936 M W N 1111,[15] plaintiffs as reversioners brought this suit in 1927 for a declaration that an adoption alleged to have taken place in June 1921 was neither true nor valid. By the time the suit came on for trial, Act 2 of 1929 had been passed, with the result that defendants 5 to 7 became nearer heirs than the plaintiffs, and got themselves impleaded as parties. Defendants 5 to 7 did not support the adoption but asked for a declaration in terms of the plaint. It was contended that the plaintiffs ceased to be the nearest reversioners as soon as Act 2 of 1929 came into force and that they had no locus standi to maintain the suit. The learned Judges held that there was no legal bar to the maintainability of the suit and that the declaration could be granted. A dismissal of the suit in the circumstances would practically amount to the preclusion of the possibility of the declaratory suit in this case and defeat the policy of the law underlying the principle that suits relating to the status of a person should as far as possible be tried within a reasonable time and before evidence bearing upon the question is lost by lapse of time: *see* the head note. Reference was also made to

12. Sita Saran v. Jagad, A I R 1927 All 811=102 I C 296=49 All 815=25 A L J 636.
13. A I R 1934 All 469=154 I C 412.
14. Deoki v. Jwala Prasad, A I R 1928 All 216 = 113 I C 737=50 All 678=26 A L J 449.
15. Subba Rao v. Venkayya, (1936) M W N 1111.

the decision in 23 I C 809[16] to show that declaratory reliefs are always matters of discretion for the Court.

An examination of the above decisions reveals that though the law does not generally encourage declaratory suits by remote reversioners when nearer reversioners are in existence, still it is not always necessary that such suits should be dismissed, for Courts in a proper case may well allow the suit to go on, taking care to safeguard the interests of the nearer reversioners in existence. In this connexion attention may be drawn to the following passage in 6 Cal 764,[10] already quoted:

> In such a case the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the nearest reversioner to be made a party to the suit.

In the present case the entire evidence with respect to the relief asked for has been given by the plaintiffs and Ex. G has been declared by the lower Courts to be valid only during the lifetime of defendant 1. The acts of defendants 1 and 2 have been shown to be prejudicial to the interest of the plaintiffs. They may be prejudicial to the interest of the minor son of defendant 2 also. Of course defendant 2 sided with defendant 1, her mother. What the attitude of the minor son in this matter may be, cannot be stated at the present moment because he is not a party to the suit. As pointed out in 6 Cal 764[10] and in 47 All 929,[11] it appears to us that the proper action to be taken in this case should be to ask the plaintiff-respondents to make the minor son of defendant 2 a party-defendant to the suit, so that the case on behalf of the reversioners may once for all be tried and disposed of. At present defendant 2's son is a minor and under the protection of his mother. He being a minor his interests will have to be represented by a guardian.

In the circumstances of this case it will not be proper to make the mother his guardian. We would therefore set aside the decision of the lower Court and give permission to the plaintiffs to proceed with the suit making defendant 2's minor son a party to the suit represented by a proper guardian. We are told that his paternal uncle and paternal grandfather could well represent his interests; but who his proper guardian should be must be left for the decision of the parties and of the Court. After the minor son is made a party-defendant, if his guardian wishes he may transpose himself as a plaintiff if necessary. We asked the counsel whether they would be in a position to agree, after making defendant 2's son a party to the suit, to accept the evidence already recorded as evidence for the purpose of the continuance of the case, but they have not been able to give us any assurance on the point. If the guardian insists that the case must go on afresh, he may file his statement and the case will have to be heard and tried de novo. We set aside the decision of the lower Court and remand the entire case for proper disposal according to law in the light of our observations. Having regard to the course the case has taken, we express no opinion on the various findings recorded by the lower Court. The appellants are entitled to get the costs of this appeal. No costs on the memo of objections. The other costs will be provided for in the decree of the lower Court. The court-fee will be refunded both in the appeal and in the memo of objections.

C.R.K./V.B.B. *Appeal allowed.*

16. Baldeo Dube v. Shamdhur Pande, A I R 1914 Cal 518=23 I C 809.

A. I. R. 1937 Madras 703

PANDRANG ROW AND
VENKATARAMANA RAO, JJ.

Madras and Southern Mahratta Ry. Co., Ltd. — Appellants.

v.

Maharajah of Pithapuram and *others* — Respondent.

Second Appeals Nos. 1566 and 1572 of 1931, Decided on 27th November 1936, against decrees of Dist. Court, East Godavari, in A. S. Nos. 105 and 106 of 1930, respectively.

Tort — Diverting flood water — Rights of riparian owner—Railway Company making opening in bank of stream within its own limits to divert flood water in order to save railway property—Diversion causing damage to neighbouring land—Railway Company is liable for damages.

A riparian owner may make defences against floods any where on his own land, provided he does not interfere with the *alveus* or with a recognized flood channel, but if flood water comes on to his land he must not take active steps to turn it to his neighbour's property. [P 704 C 2]

Where therefore the Railway Company made an opening in the bank of a stream within its

own limits to divert flood water in order to save railway property and the diversion caused damage to the neighbouring land:

Held: that the Company was liable for damages: *Case law referred.* [P 706 C 2; P 707 C 1; P 709 C 1]

K. S. Krishnaswamy Iyengar — for Appellant.

Advocate-General and *C. Rama Rao* — for Respondents.

Pandrang Row, J.—There is no dispute about the facts of this case. In fact, we have the admission of the defendant Railway Company itself that the act complained of was one performed by one of their officers. Para. 2 of the written statement of the company which has been extracted in full by my learned brother is clear on the point. In substance the company admits that water in the stream swelled into a flood on account of heavy rains on 27th July 1925 and rose as to submerge the bridge and threatened to wash away the bridge and the railway lines endangering the property and also the plaintiff's lands and that thereupon the company's permanent way inspector made an opening in the northern bank of the stream at a point within its own limits solely for the purpose of averting imminent danger to its property. In other words the company's attitude was: "We have done what is complained of, but we were justified in doing it and we did no wrong in doing it." That was the main defence, namely, a justification of what they had done. There was a further defence put forward which was based on what might be called the right to abate the nuisance which had been committed by the plaintiff by raising the bank of the stream in question in 1923. This defence needs no further consideration because it has not been pressed before us during the hearing of these appeals. A further defence which was not raised in the written statement appears to have been raised in the lower appellate Court, viz., that the flooding of the plaintiff's lands was inevitable and therefore the plaintiff was not entitled to get damages, reliance being placed on (1881) 43 L T 435.[1] But this contention was not pressed by the learned Government Pleader who appeared for the appellant company and it is enough to point out that the finding of the lower appellate Court is to the effect that the inevitability of the flooding of the plaintiff's lands was not established.

The main defence, therefore, that is left is the defence of justification and on this point a very elaborate argument was addressed to us supported by copious reference to English law beginning with 32 R R 103.[2] The general principle regulating the liability of land-holders with regard to the escape and overflow of water has been stated, in my opinion, correctly in Coulson and Forbes on the Law of Waters, 5th Edn., p. 143. In substance, for the purpose of this case, it is enough to say that that principle is that where the owner of land, for his own convenience, diverts or interferes with the course of a stream, he will be liable for all direct and proximate damages, unless he can show that the escape of the water was caused by *vis major* or the act of God or the like. The cases referred to in the argument have all been discussed in Coulson and Forbes and the result is summed up so far as the present point is concerned, at p. 172 as follows:

> The result of the cases appears to be that a riparian owner may make defences against floods anywhere on his own land, provided he does not interfere with the *alveus* or with a recognized flood channel, but if flood water comes on to his land he must not take active steps to turn it on to his neighbour's property.

This in my opinion is the correct view of the law on the subject and there is nothing in any of the cases relied upon by the advocate for the appellant which militates against this view. The difference between taking protective measures against a future danger and getting rid of or diverting the danger after it has come, that is to say, a present danger, is referred to even in the earliest case, 32 R R 103,[2] which is the *locus classicus* on the subject. Reference is made there to certain passages in the Digest 39. 1.1.1. to the effect that the action *aquae pluviae arcendae* will lie as often as water is about to do harm in the field of a neighbour by reason of the hand of man, that is, if by something that was done by the hand of man water flows differently than it would flow by nature. This is the general principle. Reference is, no doubt, also made to the existence of some other passages in the Digest which appear to have a con-

1. Thomas v. Burmingham Canal Co., (1881) 43 L T 435=49 L J Q B 851=45 J P 21.

2. Menzies v. Earl of Breadalbane, (1828) 32 R R 103=3 Bligh (N S) 414=3 Wilson & Shaw Sc. App. 235.

trary tendency. One of these is apparently Digest 39, 3.2.9 which is to the effect that if a person diverts a torrent so that the water might not reach him and if by this a neighbour is injured the latter cannot have the action *aq. pl. ar.*; for to ward off water means only not letting it flow in (to injure). (*Si vicinus flumen torrentem averterit, ne aqua adeum prevenit, et hoc modo sit effectum, ut vicino noceatur, agi cum eo aquae pluviæ arcendæ non posse; aquam enim arcere, hocesse, curare ne influat*). In fact the principle that no one can by his own act cause water to overflow into his neighbour's fields so as to damage them is one of the most ancient principles known to law. That principle is found even in the most ancient code of laws that has come down to us, namely the Code of Hammurabi, which is about 5,000 years old, which provides that if a breach occurs in a man's irrigating dam by reason of his negligence and laziness and his neighbour's fields are flooded by the overflow of water therefrom, the man in whose dam the breach has occurred shall reimburse the loss.

The same principle is repeated in another provision of that Code which says: if any one opens his canal in a negligent manner and thereby floods the fields of his neighbours, he shall be held to account to those neighbours and to pay them grain corresponding with their losses. The principle therefore is of very great antiquity, and it was well established in the Roman law and has been accepted and enforced by the Courts in England, and in this country including Burma. Reference may be made in this connection to the decision of the Privy Council in 3 Rang 494,[3] where it is stated that the law applicable in Burma to the flow of and flooding by fresh water rivers or watercourses, whether they be natural or artificial or trespasses on the bed and soil of such rivers and streams, is the same as that in England. In that case their Lordships of the Judicial Committee rely on 32 R R 103[3] (*see* pp. 501 and 502) though by a curious slip the judgment in that case is attributed to Lord Eldon instead of to Lord Lyndhurst who was the Lord Chancellor in 1823 when the decision was pronounced, Lord Eldon having resigned his office after his long tenure of it in the previous year on the accession of Canning to power. In no subsequent case was any doubt thrown on the difference between protective measures taken against a future or anticipated flood and the actual diversion of a flood after it has come. That difference so far as Madras is concerned has been stressed in 18 Mad 158.[4] The difference is stressed in (1884) 13 Q B D 131[5] which is referred to and followed in 26 I C 800[6] in which reference is also made to (1869) 7 Eq 377.[7] The important point to remember is that in the present case we are not dealing with a protecting dam or a barricade put up against a flood, but we have before us a case in which the protecting wall or bank of a natural watercourse was itself cut and the water of the stream diverted when the flood was actually on. The lower appellate Court's quotation from Clerk and Lindsell on Torts in para. 14 of its judgment is quite apposite and it is enough to refer only to a portion thereof to the following effect:

> Even where the flood is extraordinary if the water has already invaded the land and collected on it, the owner may not, in order to protect himself against the consequences of the water remaining there, dig a cut for the purpose of getting rid of the water, if by so doing he will cause damage to the parties on whose land he discharges it, for there is a difference between protecting yourself from an injury which is not yet suffered by you and getting rid of the consequences of an injury which has occurred to you.

The same view is taken in 43 All 688.[8] Reference may also be made to the recent case, in 63 Cal 1008,[9] where at p. 1021 the statement in Coulson and Forbes at p. 172, already quoted above, has been approved. The cut was made in the present case in what was undoubtedly the bank of the river or stream with the knowledge, and indeed it may be said, with the object of diverting the flood water from its natural course along the stream into

3. Maung Bya v. Maung Kyi Nyo, A I R 1925 P C 236=90 I C 193=3 Rang 494=52 I A 385 (P C).

4. Gopal Reddi v. Chenna Reddi, (1895) 18 Mad 158=4 M L J 244.

5. Whalley v. Lancashire and Yorkshire Ry. Co., (1884) 13 Q B D 131=53 L J Q B 285=50 L T 472=32 W R 711=19 J P 500.

6. Gopala Krishna Yachendralu Varu v. Secy. of State, A I R 1915 Mad 372=26 I C 800=28 M L J 98.

7. Attorney General v. Earl of Lonsdale, (1869) 7 Eq 377=38 L J Ch 335=20 L T 64=17 W R 219.

8. Sami Ullah v. Mukund Lal, A I R 1921 All 182=63 I C 980=43 All 688=19 A L J 786.

9. Lankapara Tea Co., Ltd. v. Gopalpur Tea Co., Ltd., (1936) 63 Cal 1003=40 C W N 916=63 C L J 210.

the plaintiff's lands. A river is said to consist of the bed, the bank and the water, but in fact the bank is really the outermost part of the bed in which the river naturally flows. It is the natural wall which contains the water in the stream and holds it to its course. Any interference with the watercourse in this manner must necessarily be wrongful, and I do not think that any doubt has ever existed on this point. What is wrongful cannot be justified by reason of the fact that the wrongful act was committed for the purpose of getting rid of danger or damage to oneself. Such selfishness cannot be regarded as reasonable selfishness. The judicial *imprimatur* to reasonable selfishness was given by Bramwell, B. in (1874) 10 Ex 4[10] but that was a case which related to an artificial canal and not to a natural stream, and it was expressly stated there that there was no duty on the owners of a canal analogous to that on the owners of a natural watercourse not to impede the flow of water down it, and I may add, nor to divert such flow.

In another case, namely 106 L T 429,[11] which was also relied upon on behalf of the appellant company, what was done by the defendants was a protective work against an anticipated common danger, and in that case Lush, J. at p. 431 observes that if it could have been shown that the defendants, when water or filth was on their land, had by artificial means discharged it on to their neighbour's land, they would be liable. Even if it be that there is no duty cast by law on frontagers of non-tidal rivers to maintain the natural protecting walls or banks at their usual height on the ground that, as held by Lord Esher, M. R. in (1886) 16 Q B D 754,[12] the doctrine established in (1880) 14 Ch D 58[13] was meant to apply only to natural protecting banks against the sea and the waters of tidal rivers, it does not follow that the cutting of such natural protecting walls or banks of non-tidal rivers is permitted by law or that it does not constitute a wrong. In (1878) 9 Ch D 503,[14] there is a reference to the ordinary liability of a riparain proprietor who intermeddles with an existing river wall which it is his duty to maintain, and it is added that there can be no such maintenance if there is any opening in it, as an inclosure or defence not continuous is no inclosure or defence at all.

The present case is a much stronger one for it is not a case of mere neglect of duty to maintain the river wall, but an active cutting down of that wall deliberately and wilfully and with knowledge of the consequences. It may be that this was done for the purpose of protecting the railway bridge and for other praiseworthy motives, but it does not cease to be a wrongful act merely because the motive was a good one. The law does not permit a man even for a good motive to do what is wrongful. The end does not justify the means. The statement of the law contained in Halsbury, Vol. 28, pp. 453, 454 and 456, is also clear on the point that while a person can protect his own property by some defensive measure for the purpose of warding off a danger and prevent the danger from coming into his land, he would be liable if he diverts or interferes with the course of a stream on his own land for all direct and proximate damages resulting from such overflow. It would suffice to refer to two more cases: (1877) 2 A C 781[15] and 1917 A C 556,[16] the latter being a case of interference with the natural course of a natural stream though not by cutting the bank of the stream but by substituting an artificial watercourse for the natural watercourse. It was held in that case that even though the flood was an extraordinary one, wholly unprecedented, the company which made the diversion was liable. Lord Wrenbury said that the case was not that of a man who has brought a wild beast upon his land and has effectually chained it and the chain has been broken by the act of God as was

10. Nield v. London and North Western Ry. Co., (1874) 10 Ex 4=44 L J Ex 15=23 W R 60.
11. Maxey Drainage Board v. Great Northern Ry. Co., (1912) 106 L T 429=10 L G R 248 =76 J P 236=56 S J 275.
12. West Norfolk Farmers' Manure Co. v. Archdale, (1886) 16 Q B D 754=55 L J Q B 230=54 L T 561=34 W R 401=50 J P 500.
13. Attorney General v. Tomline, (1880) 14 Ch D 58=49 L J Ch 377=42 L T 880=28 W R 870=44 J P 617.
14. Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine's Docks Co., (1878) 9 Ch D 503=39 L T 433= 27 W R 267.
15. Fletcher v. Smith, (1877) 2 A C 781=47 L J Ex 4=37 L T 367=26 W R 83.
16. Grenock Corporation v. Caledonian Ry. Co., (1917) A C 556=86 L J P C 185=117 L T 483=81 J P 269=33 T L R 531=54 Sc L R 600=15 L G R 749=62 S J 8.

the case in *Nichols* v. *Marsland*,[17] but that it was a case in which the act of God (if there was one) brought the wild beast and (but for the act of man) there was a safe exit for the wild beast, and it would have gone away and there would have been no injury. The act of man consisted in closing the exit, which, had it remained would have rendered the advent of the wild beast harmless. In the present case however there was no closing of the exit but the making of a different exit different from the natural exit for the flood water with full knowledge that the consequences of such diversion would be to damage the plaintiffs' property. One more reference and that to the statement of the law in Salmond on the Law of Torts may perhaps be made. At p. 576 the rule of law is laid down as follows :

> Although a person is not responsible for allowing the escape of things which are naturally on his land, he is responsible for causing their escape. He is not entitled to relieve his own land of a burden by casting it upon the land of his neighbour. Thus he is responsible for the escape of water from his land, if the escape is due to some embankment, channel or other artificial structure made or maintained by him there, or to any other alteration in the natural condition of his land.

It is unnecessary to multiply authority on this point which to my mind is very clear. This is certainly a case in which there has been considerable damage, and the only point urged was that there was no *injuria*. But from what I have said above it is clear that in this case there is both *injuria* as well as *damnum*. It therefore follows that the decrees appealed from are right and that the second appeals should be dismissed with costs. There is a memorandum of cross-objections filed in one of these appeals, S. A. No. 1566 of 1931, on which nothing has been said though attention was directed to its existence. It is therefore unnecessary to say anything about it except that it is dismissed but without costs.

Venkataramana Rao, J.—These second appeals raise a question as to the right of a land-owner to divert the flood water of a natural stream passing through his land on to adjoining lands to save his property from injury. The facts are not in dispute. There is a natural stream known as Gorrikandi which passes through Gollaprolu village which belongs to plaintiff and irrigates the lands in the said village and other villages. It runs from west to east. There are bunds on either side of the stream which are mostly of sand and earth and they form the banks of the stream and conserve and confine the ordinary course of the stream within them. The railway line of the defendant, the Madras and Southern Mahratta Railway Co., from Madras to Waltair passes through the village of Gollaprolu and runs from south to north. There is a railway bridge belonging to the railway company across the stream in the village of Gollaprolu. It is also a fact that Gorrikandi is a rapid stream at or about the suit locality. On or about 27th July 1925, there were heavy rains, the result of which was to cause high floods in the stream. On 28th July 1925, it was found at about 10 A. M. the water had considerably risen in the stream. The permanent way inspector who was on the spot thought that owing to the impact of water the bridge was in danger. He waited for two hours and then resolved to cut open the northern side of the bund to the east of the bridge to prevent danger to the bridge and to the travelling public. He accordingly did so. The result was the flooding of the lands of the plaintiff and the consequent damage to them. It was found that the inspector did not act negligently but acted bona fide with the intention aforesaid. It was also found that the site of the bund at the suit locality was the property of the railway company and the place where the breach was effected was within its limits. The suit out of which S. A. No. 1566 of 1931 has arisen was filed by the Maharajah of Pithapuram as the then proprietor of the Gollaprolu estate for damages and other reliefs. A similar claim was made by the tenants of the estate in regard to the lands in their occupation in the suit out of which S. A. No. 1572 arises. The allegations in the plaints in both the suits are more or less similar. The plaintiff in the suit out of which S. A. No. 1566 of 1931 arises, after alleging wrongful opening of the bund and diversion of water, puts the basis of the claim thus in para. 10 of the plaint :

> The bund has been in existence from time immemorial at that height till the defendant interfered with it and has served to protect the plaintiff's lands on the north from floods and also to ensure a steady supply of water to the plaintiff's lands at the tail end of the stream. The plaintiff is entitled to enjoy the protection afforded, as aforesaid, by the bund in the accustomed manner and without interference by the defendant.

17. (1876) 2 Ex D 1=46 L J Ex 174=35 L T 725 =25 W R 173.

The main defence of the railway company is thus formulated in paras. 2 and 3 of the written statement :

"2. The defendant company states that on or about 27th July 1925, there were heavy rains in and about Gollaprolu and the water in the Gorrikandi stream swelled into a flood and rose so as to submerge the girders of the defendant company's bridge No. 449 over the said stream and threatened to wash away the bridge and the railway line thus endangering the property of the defendant company and the safety of the public and also the plaintiff's lands. Thereupon, the defendant company's permanent way inspector made an opening in the northern bank of the stream at a point lying within its own limits solely for the purpose of averting imminent danger to its property which was occasioned by forces beyond the defendant company's control.

3. The defendant company charges that in the circumstances it was legally justified in the steps it took to defend its property and is not liable to the plaintiff in damages or otherwise for any injury caused by the flood water flowing on to the plaintiff's lands as a consequence of measures taken in defence of its property.

Both the Courts gave a decree in favour of the plaintiffs for damages. These second appeals are against the decrees in the said suits. The question therefore is: is the railway company liable in the circumstances and on the facts admitted and found as above? It is well-settled that an owner of land by or near a river is not entitled to make any change in the *alveus* and disturb the ordinary course of a river. The effect of such interference might be to direct the flow of the river with a great degree of violence upon the opposite bank or upon some other portion of the same bank and would be productive of considerable damage to property at or near the said bank. As a necessary corollary to this, it has been laid down that the course which the flood water takes, should not be changed to the prejudice of the proprietors lower down: *vide* 32 R R 103,[2] and the natural barriers should not be cut so as to permit water to flow where otherwise it would not: *cf.* (1880) 14 Ch D 58.[13] This obligation is imposed by law irrespective of the ownership of the bed. Of course a landlord may take such precautions on his lands to defend his property against flood, but always subject to the limitation that he cannot interfere with the *alveus* of the river: (1921) 1 A C 395[18] at p. 397. It is admitted in the written statement that the bunds in this case forms the banks of the stream. The bank is only the outermost part of the bed on which the river naturally flows. The bunds therefore form the natural barriers confining the flow of water in a particular course. As observed by the learned Judges in 43 All 688[9] at p. 690 :

Where there is a natural outlet for a natural stream, no one has power, for the safety of his own property, to divert or interfere with its flow, and, if he does so, he is ordinarily liable to pay to any one who is injured by his act, no matter how the water, before the mischief, came into the water course.

Therefore the cutting open of the bund is an interference with the natural outlet of the water in the stream in question. Mr. Krishnaswami Iyengar relied on a passage in Salmond on the Law of Torts to the effect that a land-owner may lawfully remove from his land an embankment or other artificial structure which serves as a protection to the adjoining land of his neighbour against the natural flow of water. There is no evidence given in this case that the natural flow of flood water was through the lands of the plaintiff and that the bund is an artificial protection against the said natural flow. On the other hand it is conceded in the written statement as pointed out above that it is a natural barrier being the bank of a stream. Therefore the observations of the learned writer have no application to the facts of the present case. It is again contended that the rule above stated in regard to the obligation not to divert the flow of a natural stream would not apply to a case of extraordinary flood and certain observations of the Lord Chancellor in 32 R R 103[2] at p. 108 had been relied on, viz. :

These passages to which I am now alluding have reference to the accidental and extraordinary casualties, from the floods suddenly bursting forth, and they go to this, that in such a case, the parties may, even to the prejudice of their neighbours, for the sake of self preservation, guard themselves against the consequences.

But here comes the distinction made in law between steps taken to prevent an extraordinary flood coming on and steps taken to divert it when the flood is on, or in other words between strictly protective measures and measures actively transferring the flood water on to the land of another. One of the recognized exceptions to the maxim *sic uteri tuo ut alienum non lædas* is that a land-owner can erect works on his land or take steps to prevent a risk from a common enemy such as rain.

18. Viscount Cave in Gerrard v. Crowe, (1921) 1 A C 395=90 L J P C 42 = 124 L T 486=37 T L R 110.

floods or incursions from the sea. The law allows "a reasonable selfishness" in doing so even though damage might be caused to a neighbour thereafter. As Lord Bramwell observes in (1874) 10 Ex 4[10] at p. 7 :

He who puts up a barricade against a flood is entitled to say to his neighbour who complains of it 'why did not you do the same ?'

This is to prevent a threatened flooding. Lindley, L. J. likewise says in (1884) 13 Q B D 131[5] at p. 140 :

If an extraordinary flood is seen to be coming upon land, the owner of such land may fence off and protect his land from it, and so to turn it away, without being responsible for the consequences, although his neighbour may be injured by it.

But he then adds :

Of course there is a difference between protecting yourself from an injury which is not yet suffered by you, and getting rid of the consequences of an injury which has occurred to you.

The rule of law is thus stated in Theobald's Law of Land at page 6 :

A landowner may protect his land against an unusual flood though he may thereby cause an injury to a neighbour : but if an excess of water has come on to a man's land, for instance, by an unusually heavy rainfall, he must not, in order to get rid of it, do any act which would have the effect of casting it on his neighbour's land in such a way as to cause damage which would not have been caused if the act had not been done : (1874) 10 Ex. 4[10]; (1884) 13 Q B D 131[5]. *See* (1881) 43 L T 435.[1]

In 43 All 688[3] at p. 691, the learned Judges of the Allahabad High Court similarly observe :

The right of a person to protect his land from extraordinary flood extends to the doing of anything which is reasonably necessary to save his property; but he cannot actively adopt such a course as might have the effect of diverting the mischief from his land to the land of another person which would otherwise have been protected.

In this case what was done was to cut open the bund and let down the water in concentrated violence on to the plaintiff's lands. That is active transference of the mischief and not a protective measure in anticipation of apprehended danger. The defendants therefore cannot escape liability for their action. Nor can they plead successfully that the occasion was such that there was no exercise of volition behind the action as in the case of lighted squibs, 2 Black W 892,[19] for, according to the evidence, the permanent way inspector waited for two hours before he deliberately did the act now complained of. The railway company is therefore liable for the damage to the lands of the plaintiff and the decree of the lower Courts is correct. The second appeals fail and are dismissed with costs. The memorandum of objections in S. A. No. 1566 of 1931 is dismissed without costs.

C.R.K /P.R. *Appeals dismissed.*

19. Scott v. Shephard, 2 Black W 892=96 E R 525.

A. I. R. 1937 Madras 709

CORNISH, J.

Munshi Mohammad Abdul Aziz— Appellant.

v.

Gulam Julani — Respondent.

Second Appeal No. 323 of 1932, Decided on 3rd March 1936, against decree of Dist. Court, Ellore, in A. S. No. 324 of 1927.

(a) Civil P. C. (1908), S. 11, Expln. (IV)— Directly and substantially in issue— Framing of issue is not necessary — Right of way claimed by defendant in his written statement argued and decided by trial Court — Claim to right of way held to be ground by defence in suit and thus matter in issue.

It is not necessary for the purpose of S. 11, Expl. IV that an issue should be framed to make the point raised to be matter in issue. [P 710 C 1]

Where the defendant claimed right of way over a plot in suit and made a claim to it in his written statement and the point was argued and decided by the trial Court in his favour :

Held: the right of way claimed by the defendant as against plaintiff was a ground of defence in the suit and thus a matter in issue in that suit : *A I R 1924 P C 144* and *A I R 1921 Mad 21*, *Rel. on.* [P 710 C 2]

(b) Civil P. C. (1908), S. 11—Issue in former suit decided by trial Court but not decided in appeal cannot be held to have been finally decided in that suit.

Where in a former suit between the same parties an issue was decided by the trial Court but the appellate Court refrained from deciding it, the issue cannot be deemed to have been finally decided and it can be raised in a subsequent suit between the same parties : *24 Cal 616* (*P C*) and *A I R 1917 P C 201*, *Foll.* [P 710 C 2; P 711 C 1]

V. Suryanarayana — for Appellant.

P. Somasundaram — for Respondent.

Judgment.—The appellant was plaintiff in the suit, O. S. No. 251 of 1926, for a declaration of his right of way from a doorway in his premises over the defendant's adjacent yard marked *Y* on the plan, and for the removal of an obstruction by the defendant to that right of way. The suit was decreed by the trial Court. On appeal objection was taken that his claim was barred by operation of S. 11, Expln. IV, Civil P. C. As a result of an issue framed by the District Judge on this point, the trial Court found, and this finding has been accepted by the District

Judge, that plaintiff's claim to an easement could and should have been raised by him in the previous suit between the parties, and that his failure to then raise it, is a bar to his setting it up in the present suit. The suit has accordingly been dismissed. In that previous suit, O. S. No. 496 of 1923, the position of the parties was reversed. The present defendant was then the plaintiff and he sued for a declaration of his sole ownership of the yard *Y* and for an injunction to close the doorway giving access to it and to restrain the then defendant, the present plaintiff, from trespassing in yard *Y*. In that suit the trial Court found in favour of plaintiff's sole title to the yard, but held that the defendant had established his claim to a right of way over it. The plaintiff's claim to the suit yard *Y* was decreed, but the rest of his suit was dismissed. The plaintiff appealed. The Subordinate Judge confirmed the trial Court's decree. But in the course of his judgment, although he accepted the finding that the doorway in question had been in existence for 30 years, he observed that the defendant's claim to an easement over the site *Y* had not been the subject of an issue and that it was unnecessary to decide it in that suit. The material allegation in the plaint is to be found in para. 6 :

> The defendant in the abovesaid manner unlawfully has not only occupied but has also been trespassing into the plaintiff's plot *Y* through the gateway at *T* improperly opened by him. The defendant has no right to open a gate at place *T* or to pass into lane *Z* through the zenana plot marked *Y* which is in plaintiff's enjoyment as of right.

And the relief prayed is :

> That plaintiff's absolute right to *Y* be declared, that *T* be closed as before, and that defendant and his successors in title be restrained by a permanent injunction from trespassing into plaintiff's site *Y*.

The written statement alleges that the defendant and his men had for a long time uninterrupted passage through this gateway. This was not the accurate manner of pleading an easement of way, but I think it sufficiently indicates that defendant was setting up a claim to a right of way over the plaintiff's yard. It was sufficiently definite in contradicting the averment in the plaint to require an issue to be framed upon it. But it is not essential for the purpose of S. 11, Expln. IV that an issue should have been framed. What the rule says is :

> Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Undoubtedly the defendant's claim to a right of way was set up by way of defence to the plaintiff's prayer for an injunction. It was not only raised in the pleading, but argued and supported by evidence at the trial, and decided by the Court. An issue which has been decided by the Court, although the issue was not in fact necessary or proper to be tried, will operate as res judicata: 51 Cal 631.[1] In 13 M L W 25,[2] it was held by Abdur Rahim, J. that if a question has been allowed to be raised by a party before the trial Court, and that Court has given a decision upon it, and that decision is challenged in appeal by the other party, the case falls outside Expln. IV of S. 11. In my judgment, the defendant's claim to a right of way was made a ground of defence to the plaintiff's suit and must be deemed to have been a matter in issue in that suit. I think the Subordinate Judge was in error in refusing to decide it in the appeal. There remains the question whether, as held by the District Judge in the present suit, the decision in the previous suit does not bar the defendant from denying the plaintiff's claim to a right of way. It has been argued by the appellant's learned advocate that seeing that the Subordinate Judge in the previous suit confirmed the decree of the trial Court, his observation that it was unnecessary to decide the question of right of way must be regarded as meaningless. As already observed, I think the Subordinate Judge was wrong in the attitude he took towards this question. But when the Subordinate Judge has expressly refrained from deciding it, I cannot say that he has decided it. And if he has not decided it, the issue has not been finally decided within the meaning of S. 11, Civil P. C. In 45 Cal 442[3] a particular issue had been decided by two Courts, but when the case came to the final Court of appeal that Court refused to decide the issue, and it was held that there had been no final decision on it. Their Lordships

1. Midnapore Zamindary Co., Ltd. v. Naresh, Narayan Roy, A I R 1924 P C 144=80 I C 827=51 I A 293=51 Cal 631 (P C).
2. Venkataratnamma v. Krishnamma, A I R 1921 Mad 21=57 I C 735=13 M L W 25 (F B).
3. Abdulla Ashgar Ali Khan v. Ganesh Dass, A I R 1917 P C 201=42 I C 959=44 I A 213=45 Cal 442 (P C).

referred to the judgment in 24 I A 50,[4] where it is said :

To support a plea of res judicata, it is not enough that the parties are the same and that the same matter is in issue. The matter must have been finally heard and determined. If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of appeal.

So here I think the result of the Subordinate Judge's judgment on appeal is that the question of the defendant's alleged right of way was not finally determined. The District Munsif in the present suit has held that the plaintiff had established this right of way over the yard *Y*. The case must go back to the lower appellate Court to decide the appeal from that decision on its merits. As each party to this second appeal has in part succeeded I think the proper order is to make no order as to the costs of the second appeal. The costs of the two lower Courts will abide the result of the appeal. Court-fee will be refunded. (Leave to appeal refused.)

C.R.K./W.D. *Order accordingly.*

4. Sheosagar Singh v. Sitaram Singh, (1897) 24 Cal 616=24 I A 50=7 Sar 124 (P C).

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*A. I. R. 1937 Madras 711

KING, J.

Velayudham Pillai and *another* — Appellants.

v.

Emperor.

Criminal Appeal No. 666 of 1936, Decided on 6th April 1937, against judgment of Addl. Sess. Judge, Coimbatore Division, D/- 11th November 1936.

***Penal Code (1860), S. 28 — Counterfeit coins — Accused counterfeiting coins with intention to foist false case upon his enemy — Accused moving police on putting such coins in enemy's house — No proof of intention on part of accused to put such coins in circulation — Intention of accused is not to practise deception as understood by S. 28 — Such coins are not "counterfeit" coins under S. 28.**

Where the accused counterfeits coins with the intention of using them to foist a false case against his enemy and on putting the coins in the house of the enemy informs the police that the enemy is in possession of such coins and there is no intention proved on the part of the accused to infringe the monopoly of the mint by the manufacture of false coins or to cause loss to the currency-owning public by the circulation of such coins, the intention of the accused is not to practise deception as understood by S. 28, Penal Code. Such coins cannot be said to be "counterfeit" coins within the meaning of S. 28. [P 712 C 1, 2]

V. L. Ethiraj and *A. S. Sivakaminathan* — for Appellants.

Parakat Govinda Menon — for the Crown.

Judgment. — The two appellants have been convicted in this case by the learned Additional Sessions Judge of Coimbatore of various charges connected with the manufacture of what according to the prosecution are counterfeit King-Emperor's coins during May 1936. The facts found by the learned Judge and, in view of the legal argument to which I shall refer later, not seriously challenged in the appeal before me, were that appellant 1 instructed appellant 2 to make for him a number of two anna pieces and that when these pieces were manufactured he made most of them up into a bundle which he gave to P. W. 3, his servant, with instructions that P. W. 3 should surreptitiously introduce them into the shop of P. W. 6 with whom he had lately conceived various grounds of enmity. P. W. 3 accordingly took the bundle and placed it in P. W. 6's shop. Information was then given to the police to the effect that if they searched P. W. 6's shop and house they would discover that he had counterfeit coins in his possession. A search was accordingly made and the bundle was duly discovered. It is on these facts that the two appellants were charged. There were four charges against them. The first was against accused 1 that some days before 24th May 1936 he had abetted the counterfeiting of King-Emperor's two anna coins by accused 2 and therefore he had committed an offence punishable under Ss. 109 and 232, I. P. C. The second charge was that accused 2 had actually counterfeited those coins and committed an offence punishable under S. 232, I. P. C. The third charge was that accused 1 had on 24th May 1936 been in possession of certain materials knowing or having reason to believe that they were intended to be used for the purpose of counterfeiting coins, an offence punishable under S. 235, I. P. C. And fourthly accused 1 was charged at about the same time and place with being in possession of counterfeit coins fraudulently or with intent that fraud might be committed, an offence punishable under S. 243, I. P. C. I ought at this stage to add that in addition to the counterfeit coins discovered by the police in P. W. 6's shop, a few more coins said to

be similar in design to those were also discovered in a cash box in accused 1's house.

The argument that has been pressed before me in appeal is a very ingenious one which does not seem to have occurred either to the learned Additional Sessions Judge or to any of the parties at the trial. It is this: that if coins are made to resemble genuine coins and the intention of the makers is merely to use them in order to foist a false case upon their enemies, those coins do not come within the definition of "counterfeit coins" given in the Penal Code. I think there can be no doubt that this argument must be accepted. The definition of "counterfeit" is to be found in S. 28, I. P. C. A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised. The important words for our present purpose in that definition are "intending by means of that resemblance to practise deception." Now if the intention of a person who makes or causes coins to be made is to use them in order to commit some other offence such as giving false information against an enemy, that intention prima facie is not to practise such deception. If we examine the situation in the present case we find that it was exactly the reverse of that intention. It was obviously the intention of accused 1 that the police officers should be the first to see these counterfeit coins and that they should not be deceived by their appearance because if they were deceived then the whole purpose of making the complaint to the police against P. W. 6 would be frustrated.

It is clear therefore that if the object of the manufacturer was to carry out this nefarious scheme of foisting a false case on P. W. 6, these coins are not counterfeit because they do not fall within the definition of S. 28. Of course there is no direct evidence in this case that accused 1 and accused 2 were heard talking over the details of their plot. It is conceivable, theoretically, that all that accused 1 did was to go to accused 2 and ask him to make counterfeit coins without disclosing to him the reason why he wanted them. But on the other hand it is quite clear from the way in which the case has been treated and discussed in the judgment of the learned Additional Sessions Judge, and clear also from the actual four charges which have been framed in this case that the prosecution case was this, that the manufacture was for the deliberate purpose of foisting a false case on P. W. 6. There is nothing at all to suggest in this case that either accused 1 or accused 2 had attempted or intended to attempt to put these coins into circulation. And although some little difficulty is introduced into the case by the fact that certain coins were found not only in P. W. 6's shop but also in accused 1's cash box, that difficulty ought not to outweigh the fact that in the case as a whole stress was laid by the prosecution on the fact that both these coins and the others must have been recently made by accused 2, and no kind of suggestion was made that either of the accused wished at any time to put these coins into circulation.

I am therefore of opinion that what has happened in this case is that the prosecution has misconceived entirely the sections under which the accused ought to have been prosecuted. The real complaint of the Crown or of society against these accused was not that they made a number of coins to look like genuine two anna coins but that they dishonourably attempted to bring an innocent man, P. W. 6, to trouble by means of the coins which they made. They ought certainly to have been prosecuted for the real offences which on the evidence, if believed, they must have committed, viz., falsely causing criminal proceedings to be instituted against P. W. 6 under S. 211, I. P. C., or fabricating false evidence against him under S. 195, I. P. C. I do not know why no attempt was made to prosecute the two appellants or at any rate appellant 1 under these sections. It is obvious that the appellants are not persons who are manufacturing coins with the intention of infringing the monopoly of the mint or of causing loss to the currency-owning public. As I have already said more than once, there is nothing in the case to show that they intended any of these coins ever to be put into circulation. Therefore even if they could rightly have been held to be guilty under the sections under which they have been charged, their offences would in one sense of the word be only technical offences under those sections. However I have held that the coins which were seized in this case and which are the subject matter of the charges are not counterfeit coins

because it was the clear prosecution case that the intention of the appellants in manufacturing them was merely to make use of them in order to assist them in filing a false charge.

The result is that the appellants must be found not guilty and acquitted and their bail bonds cancelled.

C.R.K./W.D. *Appeal allowed.*

A. I. R. 1937 Madras 713

KING, J.

Y. Kothandarama Reddi and *others* — Petitioners.

v.

Kandra Balarami Reddy — Opposite Party.

Criminal Revision Case No. 862 and Petition No. 781 of 1936, Decided on 17th March 1937, from order of Second Class Magistrate, Muthukur, D/- 2nd November 1936.

(a) Penal Code (1860), S. 206 — Interpretation — Phrase 'taken in execution' should be interpreted to mean 'appropriated towards execution or utilized effectively in aid of execution'.

The phrase 'taken in execution' in S. 206, Penal Code, should be more widely interpreted, as meaning something equivalent to 'appropriated towards execution or utilized effectively in aid of execution' : *1936 M W N 212, Foll.* [P 713 C 2]

(b) Penal Code (1860), S. 206—Scope—Amin sent by Court to harvest attached crops—Accused going to field openly and harvesting same crop — Action of accused held though dishonest was not fraudulent.

Where an amin was sent by the Court to harvest the crop which was attached and the accused, in order to forestall the action of the Court went openly to the field and harvested the same crop :

Held : that as there was no deceit or intention to deceive or secrecy on the part of the accused, the action of the accused, though dishonest, could not be held to be fraudulent under S. 206, Penal Code: *1936 M W N 212* and *A I R 1936 Mad 471, Rel. on.* [P 714 C 1]

K. Umamaheswaran—for Petitioners.

C. A. Vaidhyalingam — for Opposite Party.

Public Prosecutor—for the Crown.

Order. — This case arises out of an incident which is alleged to have occurred on 8th January 1936. Accused 1 is the guardian of two minor judgment-debtors against whom a decree-holder had obtained an order for attachment of a standing crop. On 8th January, an amin was being sent from the District Court to harvest the crops which had been attached. The accusation in the complaint, which was filed by a surety in whose custody the attached crops had been left, was to the effect that accused 1, the guardian of the minors, and the two lessees of the property had begun to harvest the crop before the amin came and refused to desist from their unlawful action when the amin arrived and protested. The complaint was laid under S. 379, Penal Code. The prosecution evidence was over and a charge was framed under that section, and when all the prosecution witnesses, except one, had been further cross-examined after the charge, the accused raised the technical objection to the prosecution that the Court was incompetent to entertain the complaint on the ground that it disclosed an offence under S. 206 which required the sanction of the District Court. The learned Sub-Magistrate of Muthukur who tried the case thereupon wrote an order refusing to uphold this objection. The reason he gave was that once the property had been attached and handed over to the custody of a surety, it could no longer be said that any action of the accused in harvesting the crop was done to prevent the crop being "taken in execution".

There can be no doubt, I think, that the particular reason which the Sub-Magistrate gives for his decision is not a sound one. As has already been pointed out in a judgment of mine in 1936 M W N 212,[1] the phrase "taken in execution" should be more widely interpreted, as meaning something equivalent to "appropriated towards execution or utilized effectively in aid of execution". I have however been also referred to a judgment of Burn, J. in Cr. R. C. No. 311 of 1936, reported in 1936 M W N 210.[2] In that case the facts of which are almost precisely similar to the facts before me, Burn, J. had to consider what was the meaning of the adjective 'fraudulently' which is found in S. 206, Penal Code. Burn, J. refused to accede to the proposition that 'fraudulently' means nothing more than 'dishonestly'. If I may say so with respect, he was amply justified in so holding. I may refer in this connexion to S. 424, Penal Code, which deals with an offence very similar to that defined in

1. Sidhaya v. Chinnamathyan, 1936 M W N 212.
2. Ramaswami Ambalan v. Nagasubramanya Iyer, A I R 1936 Mad 471=1936 Cr C 622=162 I C 425=37 Cr L J 627=70 M L J 503=1936 M W N 210.

S. 206. S. 424 contains both the words "dishonestly or fraudulently". It is clear that if the two words mean exactly the same thing, there was no need for only one of them to have been used in S. 206 and for both of them to have been used in S. 424. In the head-note to the case reference is made to a definition of Sir James Stephen who says :

Whenever the words 'fraud or intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements at least are essential to the commission of the crime; namely, first, deceit or an intention to deceive, or in some cases mere secrecy.

On the facts of the present case there is no deceit, there is no intention to deceive, and there is no secrecy. All that has happened is that in order to forestall the action of the Court the accused are said to have gone openly to the field in question and harvested the crops. Their action is undoubtedly dishonest, if the prosecution evidence is to be believed, but it is not fraudulent within the meaning of that word as given by Sir James Stephen and as applied in the ruling in 1936 M W N 210.[2] I am therefore of opinion that although the reason given by the Sub-Magistrate for refusing to entertain the objection of the petitioners in this case is not a correct one, the Magistrate's order is after all correct for the other reason which I have applied. In the result this revision petition is dismissed.

C.R.K./W.D. *Petition dismissed.*

A. I. R. 1937 Madras 714

VARADACHARIAR AND PANDRANG ROW, JJ.

Matta Sura Reddi and *another* — Appellants.

v.

Mana Rama Narasu — Respondent.

Appeal No. 264 of 1935, Decided on 11th February 1937, against decree of Sub-Judge, Bezwada, in O. S. No. 105 of 1933.

(a) Contract — Sale — Transaction in substance one of sale—Mere existence of various other covenants or giving of consideration to seller to induce him to enter into sale transaction would not affect character of transaction of sale.

The mere fact that in the contract between the parties there might be various covenants, or that any consideration is given to the seller for his having brought about the transaction of sale, would not change the character of the transaction if in substance it is one of sale : *A I R 1936 P C 204* and *25 Mad 603, Rel. on.* [P 715 C 1, 2]

(b) Transfer of Property Act (1882), S. 54 —'Price'—Vendor selling property to vendee in consideration of certain decretal amounts due from him to vendee — Such decretal amounts are 'price'.

Where the vendor agrees to sell property to the vendee in consideration of certain decretal amounts due from him to the vendee, the decretal amounts change their legal character and become purchase money in the hands of the vendors : *11 All 47, Rel. on.* [P 715 C 2]

(c) Transfer of Property Act (1882), S. 55, Cl. 6 (b)—Lien under, can be excluded only by contract to the contrary.

The lien given by S. 55, Cl. 6 (b), T. P. Act, can be excluded only by a contract to the contrary : *31 Cal 57 (P C), Rel. on.* [P 716 C 1]

P. V. Rajamannar and *K. Subba Rao* —for Appellants.

P. Satyanarayana Rao — for Respondent.

Judgment.—This is an appeal by defendants 1 and 2 against a decree which gave the plaintiff a right to recover a sum of Rs. 3,540 and interest by sale of the plaint properties. The plaint claimed two reliefs in the alternative, either the specific performance of a contract of sale of the suit properties (evidenced by Ex. A) or recovery of what the plaintiff described as prepaid purchase money as a charge on the properties contracted to be sold. The lower Court held that the claim for specific performance had become barred by limitation. As regards the money claim, the lower Court held that the plaintiff was not entitled in this proceeding to recover one portion of the consideration amount recited in Ex. A, namely, a sum of Rs. 1,750 representing what was due to the plaintiff from one Rama Reddi, the defendant's uncle, under the decree in O. S. No. 25 of 1922. But it allowed in plaintiff's favour the other items of consideration, viz. the sum due under the decree in O. S. No. 24 of 1922, which had been obtained against the appellant's father.

Exhibit A is an ill-drawn document ; but on its proper construction it seems to us to embody several agreements which, though to some extent interdependent, constitute several legal transactions. The first part of the agreement with which we are concerned in this litigation provides that the appellant's father and defendant 3 should convey certain properties to the plaintiff in satisfaction of the plaintiff's claim under the two decrees above

referred to. The second portion of the agreement provides for the plaintiff selling certain lands to the appellant's father on payment of a sum of Rs. 952.8.0. The third portion provides that in consideration of the appellant's father having brought about that settlement including an arrangement in respect of the decree in O. S. No. 25 of 1922, the plaintiff should give up certain properties in favour of the appellant's father or pay him Rs. 1,000 at the time of the appellant's father registering the instrument in respect of the lands now in question. The final part of the agreement provides for another benefit to the appellant's father for the same consideration. Before us the learned counsel for the appellants has objected to the lower Court's decree on two grounds: (1) that the transaction evidenced by Ex. A is not one of sale and that therefore plaintiff is not entitled to claim a charge as for prepaid purchase money; (2) that in any event plaintiff has been himself guilty of breach of contract or at any rate has failed to fulfil his obligations under the contract and that therefore he is not entitled to claim the benefit of the lien declared under S. 55, Cl. (6) (b), T. P. Act.

In answer to the first argument, it is sufficient to say that the fact that Ex. A provides for various matters does not necessarily detract from each part of it embodying a transaction of a known legal category. As stated already the first part provides for a sale by the appellant's father and defendant 3, to the plaintiff, the second for a sale by the plaintiff to the appellant's father and the third for certain other transfers by the plaintiff to the appellant's father. The circumstances that these various contracts embodied in one and the same document are to some extent interdependent does not justify the contention that the arrangement embodied in the first part of the contract does not in law amount to a sale. The specific provision in Ex. A to the effect that on plaintiff's request appellant's father and defendant 3 should come and execute a deed of sale and get it registered is itself the clearest indication that the parties meant it to be a 'sale'. The existence of another provision giving the appellant's father certain rights against the plaintiff as consideration for his having brought about the arrangement or having included in the settlement his brother's debt as well does not detract from the true character of the transaction provided for by the first part of the document. In 59 Mad 910[1] a Judicial Committee recognized that the mere fact that in the contract between the parties there might be various covenants would not change the character of the transaction if in substance it was one of sale. In 25 Mad 603,[2] the Privy Council recognized that any consideration given to a lessor to persuade him to enter into the lease transaction was something outside the lease transaction and that the lease transaction stood by itself. The same reasons are equally applicable here.

As to the second contention we have not been shown anything in the evidence which will disentitle the plaintiff to the benefit of the lien declared by Cl. 6 (b), S. 55, T. P. Act. The terms of Ex. A clearly make the decree amcunts the "consideration" for the sale. In that sense they are undoubtedly 'price' within the meaning of S. 54 being amounts which were already due to the plaintiff from the other parties to Ex. A. The result of the arrangement embodied in Ex. A is that the decree amount changes its legal character and becomes purchase money in the hands of the vendors: *see* 11 All 47.[3] The case is therefore clearly one of prepaid purchase money. There has been no suggestion nor was it ever proved that the plaintiff improperly declined to accept delivery of the property. The evidence shows that within a few days after Ex. A the plaintiff sent word to the appellant's father asking him to execute and register a sale deed in terms of Ex. A. The appellant's father, without complying with the request, merely took advantage of the execution of Ex. A, and applied to enter up satisfaction of the decree in O. S. No. 24 of 1922. The plaintiff naturally objected to that prayer alleging that as appellant's father had not given up possession nor executed a registered deed of sale as required by Ex. A, satisfaction of the decree should not be entered up. This Court no doubt held in 56 Mad 198[4] that

1. Zamindar of Polavaram v. Maharajah of Pithapur, A I R 1936 P C 204=163 I C 4=63 I A 304=59 Mad 910 (P C).
2. Subramanian Chettiar v. Arunachalam Chettiar, (1902) 25 Mad 603=29 I A 138=12 M L J 479=8 Sar 316 (P C).
3. Bassu Kuar v. Dhun Singh, (1889) 11 All 47 =15 I A 211=5 Sar 260 (P C).
4. Ramanarasu v. Venkata Reddi, A I R 1933 Mad 28=141 I C 429=56 Mad 198=63 M L J 598.

even the existence of Ex. A as an executory contract justified the application to have the decree entered up as satisfied. But the opposition to that prayer will not by any means constitute a breach of contract on the plaintiff's part; on the other hand he was insisting on the terms of Ex. A being carried out. Even after the decision of the High Court in 56 Mad 198,[4] he sent notices insisting upon the carrying out of the sale contract and this suit was instituted in the alternative, praying for specific performance as well. It is, therefore, impossible to hold that the plaintiff has declined to accept delivery of the property. All that has been said against him by appellant's learned counsel is that there are other terms in Ex. A which the plaintiff has not fulfilled. Assuming it to be so we do not see how that excludes the application of S. 55, Cl. 6 (b). As held by the Privy Council in 31 Cal 57,[5] the lien given by that section can be excluded only by a contract to the contrary. The appeal accordingly fails and is dismissed with costs.

C.R.K./T.M. *Appeal dismissed.*

5. Webb v. Macpherson, (1904) 31 Cal 57=30 I A 238=8 C W N 41=8 Sar 554 (P C).

A. I. R. 1937 Madras 716

MOCKETT AND LAKSHMANA RAO, JJ.

Varadarajulu Naidu — Accused.

v.

Emperor.

Criminal Revn. Case No. 777 and Case Referred No. 50 of 1936, Decided on 15th December 1936, Reference by Chief Presidency Magistrate, Egmore, Madras, D/- 9th October 1936.

Criminal P. C. (1898), S. 476 — Fabricated documents produced during trial of suit by High Court Judge in exercise of his original civil jurisdiction — Any High Court Judge has jurisdiction to make complaint under S. 476.

When a suit is tried by a Judge of the High Court, the term 'Court' occurring in S. 476, Criminal P. C., must be taken to mean "the High Court". There is nothing to prevent any Judge of the High Court from dealing with the matter, though as a matter of convenience this would seldom be done. [P 717 C 1]

Where therefore some fabricated documents are put in evidence during trial of a suit by the High Court and the trial Judge is absent, the officiating Chief Justice of that High Court has jurisdiction to make a complaint under S. 476, Criminal P. C.: *A I R 1925 Bom 436, Rel. on.* [P 717 C 1]

A. S. Sivakaminathan — for Accused.

K. V. Ramaseshan — for the Crown.

Lakshmana Rao, J.—This is a Reference by the Chief Presidency Magistrate, Madras, and the questions referred are: (1) Whether the complaint preferred in pursuance of an order passed by the Officiating Chief Justice on an office note is an order passed by the Court within the meaning of S. 476, Criminal P. C. (2) Whether the Officiating Chief Justice could pass an order under S. 476, Criminal P. C., in a case where no orders were passed under S. 476, Criminal P. C., either by the trial Judge or his successor or the appellate Bench that decided the Original Side appeal against the judgment and decree in C. S. No. 542 of 1931. (3) Whether the Officiating Chief Justice could be deemed to be the successor to the trial Judge who decided C. S. No. 542 of 1931 in the exercise of the original civil jurisdiction.

The facts are set out in the order of reference, and briefly stated, they are that during the trial of C. S. No. 542 of 1931 on the file of the High Court, two documents dated 10th March 1928 and 10th May 1928, purporting to be certified copies of orders dated 2nd March 1928 and 26th April 1928 alleged to have been passed in O. P. No. 38 of 1928, were filed on behalf of one of the defendants. The trial Judge, the present Chief Justice, found that the documents were fabricated and used by Varadarajulu Naidu, one of the defendants in the suit, knowing them to be such, and the matter was under the directions of the trial Judge reported to the police for necessary action. The police filed a charge-sheet against Varadarajulu Naidu under S. 471 read with S. 466, I. P. C., and he was committed to the High Court Sessions for trial. There was however no complaint in writing by the High Court as required by S. 195, Criminal P. C., and the order of committal was quashed by Cornish, J. on the ground that the offence under S. 471, I. P. C., cannot be taken cognizance of except on the complaint of the Court in which the documents were given in evidence. The Original Side office then put up a note to the Officiating Chief Justice setting out the entire facts, and the Officiating Chief Justice passed an order under S. 476, Criminal P. C., directing the Registrar to make a complaint under S. 471 read with S. 466, I. P. C. The complaint was filed accordingly and pro-

cess was issued to the accused. Objection was taken by him to the validity of the complaint and hence this reference.

The order was in terms passed under S. 476, Criminal P. C., and the real question is whether the Officiating Chief Justice had no jurisdiction to pass the order. The complaint required by S. 195, Criminal P. C., is the complaint of the Court in which the documents were given in evidence and not of the trial Judge, and as pointed out in 49 Bom 710,[1] when a suit is tried by a Judge of the High Court, the term 'Court' occurring in the section must be taken to mean "the High Court". There is nothing to prevent any Judge of the High Court from dealing with the matter though as a matter of convenience this would seldom be done, and the matter was in this case placed before the Officiating Chief Justice, as the trial Judge was absent at the time. The Court may, under S. 476, Criminal P. C., make the complaint on the application made to it or otherwise, and it need not hold a preliminary enquiry. Notice to the person proceeded against is not essential, and it is apparent from the order itself that it was passed by the Officiating Chief Justice in the exercise of ordinary original jurisdiction. There is therefore no substance in the contention that the Officiating Chief Justice had no jurisdiction to pass the order under S. 476, Criminal P. C., and questions 1 and 3 do not arise. The proper course for the accused was to appeal against the order under S. 476, Criminal P. C., and it is queer that objection should have been raised and permitted before the Magistrate. The reference is answered accordingly and the records will be retransmitted to the Chief Presidency Magistrate for proceeding with the case according to law.

C.R.K./S.C. *Reference answered.*

1. Bai Kasturbai v. Vanmalidas, A I R 1925 Bom 436=88 I C 709=26 Cr L J 1189=49 Bom 710=27 Bom L R 616.

A. I. R. 1937 Madras 717

BEASLEY, C. J.

Bhyradevanhalli Lingappa — Petitioner.

v.

Official Receiver, Bellary — Opposite Party.

Civil Revn. Petn. No. 1489 of 1935, Decided on 27th January 1937, from decree of Dist. Munsif, Bellary, in Small Cause Court Suit No. 1445 of 1934.

Insolvency—Person after being adjudicated insolvent endorsing pro-note to another — Subsequent dismissal of insolvency petition—Debtor's property revests in him from date of adjudication—Transfer to assignee of pro-note being valid, assignee can sue on it.

A person was adjudicated insolvent and subsequent to that he endorsed over a promissory note to another person. The insolvency petition was dismissed afterwards :

Held : that as the effect of the dismissal of the insolvency petition was to revest the debtor's property in the debtor as from date of the order of adjudication, the transfer by the insolvent to the assignee of the promissory note was a good transfer and the transferee could sue on it : *20 Mad 452* ; *27 Mad 7* and *A I R 1928 Cal 644, Rel. on.* [P 718 C 1, 2]

A. Gopalacharlu — for Petitioner.

Official Receiver, Bellary, in person.

Order. — The suit here was to recover Rs. 165-11-0 due on a promissory note dated 10th August 1930 executed by the defendant in favour of one Malliah who endorsed it to plaintiff 1 for Rs. 120 payable with interest at 12 per cent. per annum. The date of the endorsement is 14th August 1934. Before that, on 14th July 1934, Malliah the transferor had been adjudicated an insolvent and the Official Receiver was made a party to the suit. The defendant contended amongst other things that the plaintiffs were not entitled to sue and he also pleaded partial discharge. This latter plea was found against by the trial Judge who held that the suit was maintainable and that plaintiff 2, namely the Official Receiver, stood in the shoes of the debtor and he therefore gave a decree in favour of plaintiff 2 with costs but dismissed plaintiff 1's suit, plaintiff 1 being the endorsee of the promissory note. If the adjudication of Malliah had stood, there would be nothing wrong so far as I am able to see with the lower Court's order ; but further information shows that the order of adjudication

passed on 14th July 1934 was passed on a creditor's petition and was ex parte, and that later on, on 20th August 1936, on a petition by the debtor and after contest the insolvency petition itself was dismissed, the order of dismissal being dated 28th October 1936. All this appears from the report made to the High Court by the District Judge dated 21st January 1937.

As before stated, as things stood on the date of the lower Court's order, that order was correct; but from what has transpired since, the order was wrong although of course the trial Court could not know what was going to happen in the future. In my view, the lower Court's order should now be corrected in view of later proceedings and what has to be considered therefore is what effect those later proceedings have had upon this transfer. Obviously, after the date of an adjudication the insolvent has no power whatsoever to deal with his property which, by reason of the order of adjudication, vests in the Official Receiver. Therefore any transfer by the insolvent of any of his property subsequent to the order of adjudication is void. What effect however has a subsequent order dismissing the insolvency petition upon such a transfer? The effect of such an order is to revest the debtor's property in the debtor as from the date of the order of adjudication. There is clear authority for this in this High Court and I am much obliged to learned counsel for the petitioner for having directed my attention to them. The first of these cases is 20 Mad 452[1] where it was held that the effect of an order setting aside an adjudication was to revest the debtor's property in him as from the date of the vesting order, subject however to all acts done by the assignee, or under his authority, during the continuance of the vesting order. The second case is 27 Mad 7[2] and is to the same effect, There is also a Calcutta case reported in A I R 1928 Cal 644,[3] where in the course of the judgment there are similar observations.

Viewing this case in the light of its subsequent history, the transfer by the insolvent to the assignee of the promissory note was a good transfer and plaintiff 1, the assignee, was entitled to sue. That being so, I consider that the proper order to make now is to give a decree to plaintiff 1 in the suit instead of the Official Receiver for the amount claimed. The Official Receiver, although a respondent to this petition, has not appeared to assert any claim to the decree amount. Had he done so, I should have considered whether I should set aside the decree passed in his favour because, although the effect of a subsequent setting aside of the adjudication is as I have already stated, nevertheless any intervening acts properly done by the Court are validated, but since the Official Receiver now makes no claim to this decree, I make the order already indicated. No costs. The civil revision petition is dismissed otherwise.

C.R.K./T.M. *Petition dismissed.*

1. Ramaswami Kottadiar v. Murugesa Mudali, (1897) 20 Mad 452=7 M L J 229.
2. Kothandarama Ravuth v. Murugesa Mudaliar, (1904) 27 Mad 7.
3. Lachmi Chand v. Bepin Behari, A I R 1928 Cal 644=115 I C 356=32 C W N 716.

A. I. R. 1937 Madras 718

VARADACHARIAR AND PANDRANG ROW, JJ.

Periaswami — Appellant.

v.

Vaidhilingan Pillai and *others* — Respondents.

Appeal No. 193 of 1934, Decided on 1st March 1937, against decree of Sub-Judge, Trichinopoly, in O. S. No. 111 of 1931.

(a) Civil P. C. (1908), S. 11 and O. 23, R. 1 —Applicability — Expln. V to S. 11 applies only to cases of adjudication by Court— Plaintiff asking decree against joint family including minor sons — Claim against sons withdrawn — Such withdrawal does not operate as res judicata under S. 11 but bars plaintiff from instituting suit on same cause of action under O. 23, R. 1.

Explanation V to S. 11, Civil P. C., can be invoked only in respect of any adjudication made by the Court. The fact that the plaintiff who, in the first instance, asks for a decree against the joint family property so far as the interests of the minor sons therein are concerned, subsequently withdraws his claim as against them, can only bring the case under O. 23, R. 1, Civil P. C. The result of such a withdrawal is not to bring in the operation of the rule of res judicata embodied in S. 11 but only to entail the statutory penalty enacted in O. 23, R. 1 itself, viz. that no fresh suit can be instituted against those defendants on the same cause of action.

[P 719 C 2]

(b) Hindu Law—Alienation by father—Setting aside of—Sons seeking to set aside mortgage on ground of immorality of debts discharged by such mortgage — Reasonable and bona fide enquiries by mortgagee—Validity

of mortgage is not affected by impropriety of original loan.

Where the sons seek to set aside a mortgage by the father on the ground of immorality of debts which have been discharged by the execution of the mortgage and it is found that if the mortgagee had made reasonable enquiries and acted bona fide, the validity of the mortgage would not be affected by the impropriety of the original loan which was paid off with the money borrowed under the mortgage. [P 720 C 1, 2]

A. V. Narayanaswami Iyer —
for Appellant.

S. Ramaswamy Ayyer —
for Respondents.

Varadachariar, J.—This appeal arises out of a mortgagee's suit for sale. The mortgage sued on (Ex. A) was executed in 1925 by defendant 1 for himself and as guardian of his five minor sons. Defendant 2, the eldest son, attained majority during the pendency of the suit and by the written statement filed on behalf of the minor sons, questions were raised as to the binding character of the mortgage as against the interests of the sons in the mortgaged property. The mortgage was for a sum of Rs. 4,000. Objection was taken particularly in respect of two items of consideration, viz. a sum of Rs. 2,242 directed to be paid by the mortgagee to one Manicka Pillai who had obtained a decree against the father in O. S. No. 30 of 1921 on the file of the Court of the Trichinopoly Subordinate Judge's Court and a sum of Rs. 960-12-0 left with the mortgagee to be paid to a Nattukottai Chetti from whom money had been borrowed by defendant 1 on a promissory note (Ex. F) dated 9th October 1923. It was contended that the father had no necessity to borrow at all and had been leading an immoral life and that the moneys due both under the decree in O. S. No. 30 of 1921 and under the promissory note Ex. F had been borrowed for and applied to immoral purposes.

With reference to the decree debt, a further contention was raised on the strength of what happened during the pendency of O. S. No. 30 of 1921. In the first instance, the sons had also been impleaded as defendants in that suit. But on 12th July 1921, the pleader who appeared for that plaintiff endorsed on the plaint that he exonerated the sons. It is somewhat difficult to understand the reason given for the exoneration. It seems to be the opposite of a reason given for exonerating them. The result was that defendants 2 to 4 were treated as having been given up by the plaintiff and a decree was passed only against defendant 1 in that suit. It has been argued that the decree in O. S. No. 30 of 1921 must be read as having impliedly negatived the liability of the sons for the amount then claimed and that their interests in the family property could no longer be made liable for that decree debt. The contentions above referred to, advanced on behalf of the sons, were overruled by the lower Court. Hence this appeal, by defendant 2.

In answer to the contention based on what happened in O. S. No. 30 of 1921, we may observe that it is not possible to hold that S. 11, Civil P. C., has any application to the circumstances of this case. Expln. V to that section can be invoked only in respect of any adjudication made by the Court. The fact that the plaintiff who in the first instance asked for a decree against the joint family property so far as the interests of the minor sons therein were concerned, subsequently withdrew his claim as against them, can only bring the case under O. 23, R. 1, Civil P. C. The result of such a withdrawal is not to bring in the operation of the rule of res judicata embodied in S. 11 but only to entail the statutory penalty enacted in O. 23, R. 1, itself, viz. that no fresh suit can be instituted against those defendants on the same cause of action. It cannot therefore be said that anything that happened in O. S. No. 30 of 1921 amounted to an adjudication, whether express or implied, that the sons are not liable in respect of the claim in that suit.

As regards the contention that the father's debts were incurred for immoral purposes, no serious attempt has been made before us to prove that plea in respect of the amount of the claim in O. S. No. 30 of 1921. The attack of the learned counsel of the appellant under this head has been directed mainly against the sum due under Ex. F. The plea of immorality in respect of it rests on the evidence of D. Ws. 1 and 5. The learned Subordinate Judge has given good reasons for not accepting that evidence. D. W. 1 was summoned on the plaintiff's side because he was one of the attestors to the payment made by the plaintiff in satisfaction of the claim under Ex. F. He preferred not to attend Court in answer to that

summons and appeared later as an unsummoned witness on the defendant's side. His story by itself is not by any means easy to believe; on the other hand both D. Ws. 1 and 5 admit that the father was at that time carrying on business as an abkari contractor. It is significant that Ex. F is executed not merely by the father but also by the maternal uncle of the minors. If as the witnesses would have it, the father was leading such an immoral life as practically to stay away from his wife, it is scarcely likely that the maternal uncle would have joined in a transaction of borrowing money for payment to the alleged concubine of the father. In this view, it is not necessary to consider the further point raised before us whether even if the loan had really been applied to an immoral purpose, it was incumbent upon the sons to go further and prove that the lender was aware of the intended immoral purpose. We may also point out that in the present suit we are concerned not with the rights of the original lender but of a person from whom money was subsequently borrowed under an independent transaction, part of the money thus borrowed being utilized to pay off the alleged original immoral debt.

In 5 Cal 148[1] the Privy Council held that when a father conveys ancestral property to raise money for payment of an antecedent debt, the sons can get their share released from such conveyance only on proof that the antecedent debt was immoral and also that the purchaser was aware that it was so. In 15 M L T 872,[2] this observation was held to be limited to a purchaser and not to be applicable to a mortgagee. It is unnecessary in this case to consider whether that distinction is well founded, because even the learned Judges who decided 15 M L T 372[2] were prepared to hold that if the mortgagee had made reasonable enquiries and acted bona fide, the validity of the mortgage would not be affected by the impropriety of the original loan which was paid off with the money borrowed under the mortgage. Applying that test to the present case, we are satisfied that the plaintiff here has acted in perfect good faith and as a prudent man. The main portion of the consideration was required to stave off impending sale of the family property in execution of the decree in O. S. No. 30 of 1921; and the mortgage transaction was entered into by the father with the knowledge of all the relations interested in the minor sons as shown by the fact that the mortgage document is attested by defendant 1's elder brother, by defendant 1's wife and the wife's brother. We therefore see no reason to differ from the conclusion of the lower Court that the mortgage is binding on the interests of the minor sons as well.

A point was raised in respect of a sum of Rs. 90 which was remitted by the decree-holder in O. S. No. 30 of 1921, and it was contended that the mortgagee should have applied it in reduction of the mortgage debt and not paid it over to defendant 1. We see no force in this point. In making a payment to the decree-holder the mortgagee was only acting as the agent of the mortgagor and when the mortgagor insisted upon the remitted amount being paid over to him, the mortgagee had no legal right to resist that claim. Finally, a question was raised as to the rate of interest to be allowed to the plaintiff. The document provided for 13½ per cent. on regular payment, for 18 per cent. in the event of default in the regular payment of interest, and for 24 per cent. on default of payment of the principal on the stipulated date. In the plaint, interest was claimed at 13½ per cent. up to a particular date and at 21 per cent. from date of default. The learned Subordinate Judge rightly held that the provision for 24 per cent. interest was penal. It is not clear whether he held that the 18 per cent. also was penal. Anyhow he has awarded only simple interest at 15 per cent. throughout. It is not possible to say that the award is unreasonable or one that we will be justified in interfering with in appeal. The appeal fails and is dismissed with costs of respondent 1. The appellant will pay to Government the court-fees due on the memorandum of appeal.

C.R.K./K.B. *Appeal dismissed.*

1. Suraj Bunsi Iswar v. Sheo Pershad Singh, (1880) 5 Cal 148=6 I A 88=4 C L R 226 =4 Sar 1 (P C).
2. Savumian v. Narayanan Chettiar, A I R 1914 Mad 244=23 I C 248=15 M L T 372.

A. I. R. 1937 Madras 721

MOCKETT AND HORWILL, JJ.

Annamalai Chettiar — Appellant.

v.

V. T. Chettiar Firm — Respondent.

Appeals Nos. 551 of 1934 and 84 of 1935, Decided on 21st January 1937, against orders of Sub-Judge, Devakottai, D/- 4th August 1934 and 1st March 1935 respectively.

Surety—Liability—Execution proceedings—Surety bond to produce judgment-debtor till and after disposal of objections to execution and of petition for stay—Order from Court passing decree to stay execution pending disposal of objections to order of execution—Executing Court not deeming fit to keep on file indefinitely execution petition dismissing it after remark that it may be renewed after stay was vacated — Court passing decree rejecting objections to order of execution—Stay automatically cancelled — Subsequent execution petition by decree-holder—Prior execution petition held not dismissed but only adjourned sine die—Subsequent petition revived former—Surety according to surety bond was liable.

In execution of a decree the executing Court ordered the arrest of the judgment-debtor. A surety executed a bond promising to produce the judgment-debtor at any time till and also after his objections to the execution petition and his petition praying for stay were disposed of. Failing this he promised to pay the decretal amount. The executing Court on receiving an order from the Court passing the decree to stay execution pending the disposal of the judgment-debtor's objection to order of execution, dismissed decree-holder's execution petition after remarking "the application may be renewed after stay is vacated". The Court passing the decree rejected judgment-debtor's objections to execution and so the stay order became automatically dissolved. Thereupon the decree-holder filed another execution petition praying execution against judgment-debtor and his surety. It was contended that the surety's liability ended with dismissal of the first execution petition of the decree-holder :

Held : that the execution petition was dismissed because it was the practice of the Courts in such cases not to keep the petition pending indefinitely. But the order of dismissal was simply equivalent to an order adjourning the execution petition *sine die*. The subsequent execution petition revived the former and it was not necessary in the subsequent execution petition to state definitely that it was in renewal of the prior execution petition provided that the nature of the proceedings were the same as in the prior execution petition. The surety according to the terms of the bond was therefore liable : *A I R 1934 Lah 92* and *A I R 1934 Lah 349, Doubted*; *A I R 1935 Mad 365, Foll.* [P 722 C 2; P 723 C 1; P 724 C 1, 2]

M. Patanjali Sastry, S. R. Muthuswamy Iyer and *T. R. Sundararaman* — for Appellant.

B. Sitarama Rao and *V. Ramaswamy Iyer* — for Respondent.

1937 M/91 & 92

Horwill, J.—The respondent in these appeals obtained a decree against Alagappa Chettiar and the members of his family in the Rangoon High Court and got it transferred to the Devakottai Sub-Court for execution. On the application of the decree-holder in E. P. No. 359 of 1933, the Sub-Court ordered arrest, and Alagappa Chettiar was brought to the Court under arrest on 24th October 1933. On that day he filed two documents. One was a counter to the E. P. denying that he was liable under the decree in that (1) he was not a partner of the firm, although his father was, and (2) that he received no notice of the application to transfer the decree for execution to the Sub-Court of Devakottai. He also filed E. A. No. 1309 of 1933 praying for release from arrest and stay of execution until his objections to the execution petition had been disposed of. He added a further prayer that if the Court deemed itself debarred from going behind the decree of the High Court, it should stay execution until he could get a stay from the Rangoon High Court. On the same day the present appellant appeared and offered to stand surety for Alagappa Chettiar if the Court would release him from arrest. The Court thereupon adjourned E. A. No. 1309 of 1933 and E. P. No. 359 of 1933 to 5th January 1934 to get a stay from the Rangoon High Court or to consider the objections and dispose of the petition. The question that arises in these appeals is whether the appellant is still liable under the surety bond. The important words by which the appellant made himself liable are :

> If he (Alagappa Chettiar) is released from the said warrant, I hereby agree to produce him at any time required by this Hon'ble Court till the said objections are heard and decided and till the disposal of the petition which has been filed praying for stay; and in case orders are passed against him in the two matters set forth above, I further agree to produce him subsequent to that at any time fixed by this Hon'ble Court; and if I fail to produce him as stated above I and my heirs further agree to pay the decree amount of this suit from and out of my moveable and immoveable properties.

The grounds on which the appellant seeks to escape liability under this bond are these : On 21st December 1933 a stay order was received from the Rangoon High Court in these words : "Let execution be stayed pending the application", the application in question being the one by Alagappa Chettiar to set aside the

order that was ex parte, so far as he was concerned, transferring the decree for execution against him from Rangoon to Devakottai. On 26th January 1934, E. P. No. 359 of 1933 and E. A. No. 1309 of 1933 were called and the E. P. was endorsed, "The application may be renewed after stay is vacated". Then comes a symbol which is said to mean "dismissed". On the E. A. the endorsement is "E. P. has been dismissed. Petition dismissed". On 26th November 1934 the Rangoon High Court dismissed the application by Alagappa Chettiar and so the stay became automatically dissolved. On 14th July 1934 the present appellant filed E. A. No. 676 of 1934 to cancel the surety bond on the ground that his liability ceased when the E. P. and E. A. were dismissed on 26th January 1934. That application was dismissed and so the surety has filed C. M. A. No. 551 of 1934. On 4th January 1935 the respondent decree-holder filed E. P. No. 6 of 1935 for execution against defendant 6, Alagappa Chettiar, adding under his name the name of the appellant. The prayer was that in view of the fact that the Rangoon High Court had on 26th November 1934 dismissed the petition of Alagappa Chettiar to set aside the ex parte order and that the stay was thereby cancelled, the surety (appellant) may according to the terms of his bond be ordered to produce Alagappa Chettiar before the Court, and that if he failed to do so, the appellant should be ordered to pay the decree amount in accordance with the terms of the bond, and in default should be arrested and sent to jail. In view of the order passed in E. A. No. 676 of 1934, the Court naturally ordered execution to proceed and against that order the surety has filed C. M. A. No. 84 of 1935.

The main argument adduced on behalf of the appellant is that it must be presumed that he stood surety for Alagappa Chettiar only for the pendency of E. P. No. 359 of 1933, and that he could not possibly be liable indefinitely until such time as the decree-holder thought fit to proceed against him. Mr. Patanjalai Sastri has quoted a number of cases in which various High Courts have held that when an execution petition has been dismissed for default, any subsequent proceedings are entirely distinct from the proceedings in respect of the prior execution petition that was dismissed, and that the surety could only have contemplated becoming so for the appearance of the judgment-debtor during the proceedings that were then pending and not for proceedings that had not then even been contemplated. We are not prepared to disagree with the principle laid down in these cases; but they differ in an important respect from the proceedings we are now considering. When a petition is dismissed for default, it naturally comes to an end; and the argument that the surety could not have considered proceedings which were not in the contemplation of even the principal parties is a very sound one. In A I R 1934 Lah 92[1] and A I R 1934 Lah 349,[2] the dismissed petitions were restored to file and the Judge who decided these cases held that the surety was not liable after the petition was restored. I however doubt very much whether these decisions can be held to be good law, at any rate in Madras. In 58 Mad 721,[3] a Full Bench case of this Court, a surety furnished security for the decree amount pending disposal of the suit. The suit was dismissed for default but later restored on an application by the plaintiff. It was held that with the restoration of the suit all the ancillary proceedings must be deemed to be restored also and that the surety bond must therefore be deemed to have been restored with the restoration of the suit. This very sound reasoning would apply equally well to execution proceedings. A case, where the execution petition was dismissed and not restored, presents no difficulties. The important distinction between the present case and those above quoted is that in this case the petition was not dismissed for any fault on the part of the decree-holder; it was dismissed merely because there had been a stay order from the Rangoon High Court and because the Subordinate Judge was not willing to keep the E. P. and E. A. on the file indefinitely. This would appear from the expression used in dismissing the E. P. "The application may be renewed after stay is vacated." There is no justification for an order of this sort. It is clearly not one passed under O. 21, R. 57, Civil P. C., for any default, nor can it be said to be an

1. Kali Ram v. Umrao Singh, A I R 1934 Lah 92=148 I C 570.
2. Kashmiri Lal v. Chuni Lal, A I R 1934 Lah 349=155 I C 503.
3. Veeraswamy v. Ramanna, A I R 1935 Mad 365=157 I C 528=58 Mad 721=68 M L J 444 (F B).

order passed under S. 47, Civil P. C., which provides for the determination by the Court of all questions arising between the parties to the suit in which the decree was passed. The nature of the order passed by the learned Subordinate Judge is well understood, especially in this Presidency, as one passed for administrative or statistical purposes, so that the Subordinate Courts shall not be called in question by the High Court for having a large pendency of applications. The Court which passes such an order and the parties and their pleaders all understand it as being equivalent to an order adjourning the petition *sine die*. It is usual to revive the proceedings by the filing of a fresh E. P. properly stamped, and it is not usual in such an E. P. to state definitely that it is in renewal of the prior E. P.; but the decisions of this High Court have made it quite clear that it is in fact a renewal of the prior E. P., provided of course that the nature of the proceedings is the same as in the E. P. that has been dismissed for administrative or statistical purposes, or such as to necessitate a revival of the earlier E. P. If on the other hand, the reliefs asked for in the two E. P.s have no necessary connexion, the later would not revive the earlier. A later E. P., for example, applying for arrest, would not ordinarily revive one praying for attachment or some entirely different relief. A paragraph from 50 M L J 215[4] illustrates the attitude of this Court towards petitions of this nature:

> In 36 Mad 553,[5] Benson and Abdur Rahim, JJ. follow the decision of Miller and Munroe, JJ. in 31 Mad 71.[6] The principle of these cases is that if an execution application is pending, a subsequent application is not an application under Art. 181 but an application asking the Court to continue the proceedings in a pending application.
>
> The decision in 1923 M W N 670,[7] to which one of us was a party, is in point. It was held in that case that an order of dismissal of an execution petition for statistical purposes did not amount to a dismissal of the petition but that the petition should be considered as pending.

This practice in mofussil Courts was recognized by their Lordships of the Privy Council in 27 All 334[8] and it is now too late to deny that applications of the kind under consideration, where it is quite clear from the orders passed that they were dismissed merely because the Court did not want to keep its file encumbered with petitions on which no action could be taken, are dismissed in any sense contemplated by the Civil Procedure Code or that against orders on such petitions appeals can be preferred. I cannot see in what way the surety is prejudiced by an order of this kind. It is true that he had no idea at the time when the order was passed of the date when the application would be revived; but the same might be said of an order adjourning the petition *sine die*. It has been pointed out by this Court on more than one occasion that the closing of petitions by dismissal or by adjourning them *sine die* is objectionable; and that the proper course is to adjourn the petitions from time to time for a few months. However, the practice is still in vogue and the nature of the order passed is perfectly well understood by all parties concerned. If the surety thought himself aggrieved by such an order because his liability was to continue for an indefinite time, he could have moved this Court by revision or he could have done what he has done; he could have moved the Court to cancel his surety bond in case the decree-holder did not take prompt steps. The practice of removing from the file execution petitions in which immediate action cannot be taken is so widespread that if Courts did not take the sensible view set out in 50 M L J 215[4] and a host of other cases, a great deal of injustice would be done; for the dismissal of such petitions would cause future petitions to be time-barred, and in cases like the present both the judgment-debtor and the surety would escape liability. The appellant here has secured the release of the judgment-debtor, Alagappa Chettiar, who has since filed an insolvency petition, and gross injustice would be done if the surety were now allowed to wriggle out of his responsibility.

In interpreting a bond, it is necessary to see what the parties contemplated when they entered into the agreement. It would seem from the careful wording of the bond in question that it was drawn up by the

4. Pattannayya v. Pattayya, A I R 1926 Mad 453=92 I C 782=50 M L J 215.
5. Subba Chariar v. Muthuveeran Pillai, (1913) 36 Mad 553=14 I C 264=24 M L J 545.
6. Chalavadi Kotiah v. Poloori Alimelammal, (1908) 31 Mad 71=18 M L J 46.
7. Ayissa Umma v. P. K. Abdulla, A I R 1924 Mad 178=76 I C 126=1923 M W N 670.
8. Qamar-ud-din Ahmad v. Jawahar Lal, (1905) 27 All 331=32 I A 102=2 A L J 397=8 Sar 810 (P C).

legal advisers of the parties in express contemplation of such a disposal of the execution petition as has actually taken place; for the surety undertook to produce Alagappa Chettiar at any time required by the Court until the said objections were heard and decided and till the disposal of the petition which had been filed praying for stay. It has been pointed out that the petition was not disposed of, even though it was dismissed, and that the order passed was merely one removing it temporarily from the file of pending applications. The other contingency had certainly not arisen; for, the objections had not been heard and decided and the introduction of the two conditions, the hearing of and deciding the objections and the disposal of the petition, shows that the parties did intend that the surety should be liable until both the conditions had been fulfilled. It is contended that the objections have not been heard and decided by the Devakottai Court and never will be and that the bond should not be read as if the surety remained liable in perpetuity; but this contention is not warranted. As soon as the stay was raised, the surety could himself have asked the Court, as he did, to dispose of the pending execution petition. It is true that the execution Court at Devakottai did not directly hear and decide the objections of Alagappa Chettiar to the execution of the decree. The decision of the Rangoon High Court on the disputed points had to be followed by the sub-Court of Devakottai; but in deliberately following the decision of the Rangoon High Court, the sub-Court must be deemed by implication to have heard and decided the same matters. The reason why no reference was made to those objections in the final order of the Court in E. P. No. 6 of 1935 is that nobody then referred to these objections, because the parties knew that the sub-Court at Devakottai was bound to follow the decision of the Rangoon High Court.

It is argued that E. P. No. 6 of 1935 did not purport to revive E. P. No. 359 of 1933; but I am satisfied that it did. It is not customary, as I have already pointed out, to ask expressly in the subsequent execution petition for the old execution petition to be revived. If it is referred to in the later execution petition and the prayer in the later execution petition is such that it makes it clear that it continues the old execution petition, it has the effect of reviving it. In E. P. No. 6 of 1935 the decree-holder refers to the arrest of Alagappa Chettiar in E. P. No. 359 of 1933 and the execution by the appellant of the surety bond. He states that as the petition of Alagappa Chettiar was dismissed and the stay raised, the surety (appellant) is bound to produce defendant 6 in Court. He thereupon prays that the Court may order the surety to produce Alagappa Chettiar in Court and penalise him in default. By this the decree-holder was asking that execution should be resumed at the stage at which it was discontinued when E. P. No. 359 of 1933 was dismissed. The state of affairs then was that Alagappa Chettiar had been arrested and released on the undertaking by the appellant that he would produce Alagappa Chettiar whenever called upon to do so at any time before the hearing and the deciding of the objections and under certain conditions after that. When E. P. No. 6 of 1935 was filed, the decree-holder asked that the surety, in pursuance of the terms of his bond, should produce Alagappa Chettiar once more before the Court. This would leave the decree-holder free to pursue his remedy against Alagappa Chettiar in the same way as if the security had never been furnished. It has been pointed out that E. P. No. 359 of 1933 prayed for the arrest of three judgment-debtors, whereas E. P. No. 6 of 1935 related only to Alagappa Chettiar; but as the object of E. P. No. 6 of 1935 was only to bring Alagappa Chettiar once more before the Court and to bring back E. P. No. 359 of 1933 to the stage at which it was before Alagappa Chettiar was released, this could not be otherwise. It therefore seems clear that E. P. No. 6 of 1935 did purport to revive E. P. No. 359 of 1933 and did in fact do so. The appellant is therefore still liable under his bond.

The appellant further complains that he was not given a reasonable time to produce Alagappa Chettiar. He was served on 6th February 1935 with a notice to produce Alagappa Chettiar in Court by the 1st March. He had therefore ample time to do so. He appeared in Court on 1st March and at his request the Court gave him a further three days, which the Court considered sufficient to bring a man from his residence 15 miles away. 15 days' time was asked for on the ground that it was not easy to procure Alagappa Chettiar; but it was clear that this was a misrepresentation and that 15 days were

required not to produce Alagappa Chettiar but to get a stay order from the High Court. Had the appellant made a truthful representation to the Court, time to move the High Court would doubtless have been granted; but under the circumstances I do not think that the lower Court failed to give the surety reasonable time to produce Alagappa Chettiar. In the result the appeals are dismissed with costs in C. M. A. No. 551 of 1934 only.

Mockett, J.—I have had the advantage of reading my learned brother's judgment and I agree with it. I do not propose to repeat his statement of the facts. The difficulties arising in this case are of course entirely due to the continuance of the objectionable practice of disposing of execution petitions in a summary manner for statistical purposes so frequently condemned by this High Court. This practice should now become extinct owing to the recent amendment of O. 21, R. 57. The cases are referred to in a judgment of a Bench of this High Court, A. S. Nos. 358 and 359 of 1924. As to this, I do not think there is any more or less magic in the words 'dismissed' than in the words 'struck off,' 'rejected', 'closed', or 'recorded'. In all such cases in the absence of any suggession that the matter has been disposed of under O. 21, R. 57, which is certainly not the case here, and in the further absence of any suggestion of a disposal under S. 47, Civil P. C., the Courts in this Presidency have, for the prevention of gross injustice, treated such disposals as virtually being adjourned *sine die* and capable of revival, and I agree that E. P. No. 6 of 1935 did revive E. P. No. 359 of 1933.

The appellant has argued that by the dismissal of E. P. No. 359 of 1933 he has been relieved of his liability under the bond, but the short answer is that the execution petition has never in fact been dismissed but has been revived by E. P. No. 6 of 1935. What the intention of the learned Judge was in this matter is abundantly clear from his order dated 4th August 1934, and I have not the slightest doubt that the whole course of events in the case was entirely in the contemplation of all the parties including the surety. The bond is dated 24th October 1933 and its whole basis is the obtaining of a stay. Can it be doubted that the parties contemplated that this matter might be finally disposed of by the Rangoon High Court? It will be observed that what was also contemplated was that the obligation of the surety should continue 'till his said objections are heard and decided and till the disposal of the petition which has been filed praying for a stay'. It is quite obvious that, to put it shortly, a decision as to the liability of Alagappa Chettiar was what was to be awaited, he having objected that he was not a partner and not liable. The surety bond was executed on the same day as Alagappa's objections and his petition for release. The two were directly connected. He went to Rangoon with the knowledge of the surety and raised those objections there. It is quite clear that the moment they were decided there, they became res judicata in the Devokattai Court. What it comes to therefore is that the surety's complaint in this case is that the decree-holder has not gone through the formality of reviving E. P. No. 359 of 1933, the issue in which had already been decided in his—the decree-holder's—favour in Rangoon in order that the objections of Alagappa already decided against him might be disposed of. The only disposal could be their rejection because they had been rejected in Rangoon. It seems to me that if there has been any variation in the surety's liability it has never been a material variation but one on the face of it unsubstantial: (1878) 3 Q B D 495.[9] I agree that ample time has been given to produce Alagappa who lived quite near the Devakottai Court, and it has not been suggested to us that any attempt has ever been made to produce him. I agree that these appeals should be dismissed with costs in C. M. A. No. 551 of 1934.

C.R.K./P.R. *Appeals dismissed.*

9. Holme v. Brunskill, (1878) 3 Q B D 495=47 L J Q B 610=38 L T 838.

A. I. R. 1937 Madras 725

BEASLEY, C. J.

Marreddi Seshireddi — Petitioner.

v.

Official Receiver, Guntur, and *another* — Opposite Parties.

Civil Revision Petn. No. 1596 of 1935, Decided on 25th January 1937, from decree of Sub-Judge, Tenali, D/- 3rd July 1935.

Provincial Insolvency Act (1920), Ss. 28 (2) and 34 (2) — Essentials of provable debt —

Leave to sue—Partition suit against *A* and debtor—Debtor adjudged insolvent during pendency of partition suit which was decreed against both with costs—Suit by *A* against Official Receiver for recovery of half of costs paid by *A*—Suit being one for partition, debtor held was under no liability, contingent or otherwise towards *A*, his co-defendant, before decree in partition suit—Obligation to pay costs having arisen by decree subsequent to adjudication, amount of costs held was not debt provable in insolvency—Permission of Court to file suit for recovery of same held was not necessary.

If a plaintiff starts a suit against another person and during the pendency of the suit that other person becomes an insolvent and subsequent to the adjudication a decree is obtained, the plaintiff can prove in the insolvency both as regards the amount obtained under the decree and as regards the costs awarded, the costs being added to the decretal amount. But there is this all important condition that the debt in respect of which the costs are an incident must be one which itself is provable in insolvency. [P 726 C 2, P 727 C 1]

In a suit for partition brought by the younger brother of the debtor against the debtor and *A*, the debtor was adjudged insolvent during the pendency of the partition suit and after his adjudication the decree in the partition suit was passed against the defendants with costs. *A* then filed a suit against the Official Receiver in insolvency claiming half the amount of costs which he had paid. It was contended on behalf of the defendant that the suit could not lie as leave was not obtained from the Court to file the suit:

Held: that the suit being one for partition the debtor was under no obligation contingent or otherwise towards *A* before decree in partition suit. The obligation arose when the order for costs was made in the decree in the partition suit subsequent to the adjudication of the debtor as insolvent. The amount of costs was not therefore a debt provable in insolvency within the meaning of S. 34 (2), Provincial Insolvency Act. No leave of the Court to file suit for recovery of half share of such costs was necessary before the institution of the suit as required by S. 28 (2) of the Act: *In re British Gold Fields of West Africa*, (1899) 2 Ch 7, *Ref.* [P 727 C 1]

V. Subramaniam — for Petitioner.

K. Kottayya — for Respondent.

Order.—The plaintiff filed a suit against the Official Receiver in an insolvency claiming half the amount of the costs which he had paid as an unsuccessful co-defendant in a partition suit filed against him, the debtor and others. The decree so far as it relates to costs, and to the petitioner, is against him jointly and severally. His claim in the suit filed by him is that as he was forced by reason of the terms of the decree for costs to pay up the whole of the costs, he is entitled to claim from the debtor half the amount which he (the petitioner) was compelled to pay. The lower Court has dismissed the suit on the ground that the leave of the Court to file the suit had not been obtained as is required by S. 28 (2), Provincial Insolvency Act. A few further facts must first be stated; and these are, that the suit in respect of which the costs were awarded against the present petitioner was a suit for partition brought by a younger brother of the debtor claiming that certain alienations which had been made were to be set aside—and for this purpose the alienees were made party defendants—and also to have declared void certain bonds executed. During the pendency of that suit the debtor who was defendant 2 in it was adjudicated an insolvent and after his adjudication the decree in the partition suit and also as regards the costs was passed.

There is, therefore, if the plaintiff's claim for contribution is good, a debt, i. e. the decree for costs, to which the debtor had become subject after his adjudication but before his discharge and for the purpose of seeing whether the leave of the Court is required when a suit in respect of such a debt is filed, S. 34, Provincial Insolvency Act, has to be examined. The position being as I have already stated, the question is whether it is a debt that is provable or not. It is provable if in respect of it the debtor had incurred before adjudication any obligation to the plaintiff-petitioner, that is to say, the debtor must, where the debt is incurred after his adjudication and before his discharge, have been under an obligation to the claimant before the date of the adjudication and it is only if he was that, the suit debt will be one provable in insolvency. The position, I think is quite clear where a claim for costs is made against an insolvent's estate, the order for the payment of costs being subsequent to the date of the adjudication. The position is this, that if a plaintiff starts a suit against another person and during the pendency of the suit that other person becomes an insolvent and subsequent to the adjudication a decree is obtained, the plaintiff can prove in the insolvency both as regards the amount obtained under the decree and as regards the costs awarded, the costs being added to the decretal amount. This position has been clearly stated in the judgment of Lindley, L. J. in (1899) 2 Ch 7[1]

1. *In re* British Gold Fields of West Africa, (1899) 2 Ch 7=68 L J Ch 412=80 L T 638=47 W R 552=6 Manson 334=15 T L R 363.

at p. 11 and since then, that decision and the words of Lindley, L. J. have been frequently cited in other English decisions relating to the English Bankruptcy Act. But there is this all-important condition which is also laid down in that the debt in respect of which the costs are an incident must be one which itself is provable in insolvency. Therefore what has to be seen here is whether the decree in respect of which the order for costs was made is one which is provable in insolvency and that is why an examination of S. 34 (2) becomes so necessary. The question is, under what obligation was the debtor towards the plaintiff-petitioner previcus to the adjudication ?

It is argued that he was under some contingent liability to pay him the costs of the suit or something towards them. I do not agree. There was no liability whatsoever to do so until the decree had been passed, that is to say, so far as the plaintiff-petitioner is concerned. It could have been argued that if the facts had been those which Lindley, L. J. had in mind, certainly the debtor was under an obligation not only to pay the decretal amount to the plaintiff, but also the costs which were incidental to the decree, but it seems to me—and this appears to be conceded in the argument on behalf of the respondent—that in the present case, that is the suit in which the costs were awarded, the plaintiff in that suit, it being a partition suit, had no debt which was provable in the insolvency by reason of his decree and that therefore also he had no debt so far as it related to costs which was provable in insolvency. I think that the petitioner here is in even a stronger position than the plaintiff in the partition suit would have been. He was a co-defendant and it cannot be said that during the pendency of the suit the debtor was under the obligation, contingent or otherwise, towards the present petitioner. The obligation only arose when the order for costs was made which was subsequent to the adjudication. In my view, therefore, having regard to the words of S. 34 (2), Provincial Insolvency Act, this suit debt was not one provable in insolvency. It follows, therefore, that leave of the Court to file the suit was not necessary and the lower Court's order dismissing the suit for that reason that no such leave had been obtained was wrong. This petition must therefore succeed with costs here and the order of the lower Court set aside and the suit remanded for disposal according to law.

C.R.K./K.B. *Case remanded.*

A. I. R. 1937 Madras 727

VENKATARAMANA RAO, J.

Haji Abdul Kuthus Sahib and *others* — Appellants.

v.

Inayathulla Sahib and *others* — Respondents.

A. A. A. O. No. 84 of 1935, Decided on 14th December 1936, against order of Dist. Court, Vellore, D/- 11th March 1935.

Insolvency—Order of discharge—Effect of — Property attached before judgment — Claim of wife to property disallowed — Judgment-debtor adjudged insolvent — Official Receiver not taking possession of attached property nor any proceedings in respect thereof — Insolvent discharged — Property declared to be wife's in subsequent litigation — Decree-holder not party to it — Husband succeeding to it on wife's death — Debt held was not extinguished — Decree held could be executed by attachment of such property.

Though an order of discharge releases the bankrupt from certain debts provable in the bankruptcy, its effect is not to destroy the debt as though it had never been. If a creditor can otherwise realize his debt, there is nothing in the Insolvency law which precludes him from doing so as the debt is not extinguished. [P 729 C 1, 2]

Certain property was attached in a suit before judgment. The wife of the judgment-debtor preferred a claim to the property but it was disallowed. The judgment-debtor was adjudged insolvent after the decree and then an order of discharge was also passed. The Official Receiver did not take possession of the property attached nor any proceedings in respect thereof. In a suit between the judgment-debtor and his wife to which the decree-holder was not a party, it was decided that the property belonged to the wife. After the death of the wife the judgment-debtor obtained the property as her heir. An application was made by the decree-holder to execute the decree by attachment and sale of the property :

Held : that the decree debt was not extinguished by the insolvency of the judgment-debtor. The judgment-debtor must be deemed to have taken the property after the death of his wife subject to the result of the adjudication already had against her, and the property therefore was liable to be attached and sold in execution of the decree : *Case law referred.* [P 729 C 1, 2; P 730 C 1]

K. S. Krishnaswami Iyengar and *N. Srinivasa Iyengar* — for Appellants.

T. M. Krishnaswami Iyer and *N. Sivaramakrishna Iyer* — for Respondents.

Judgment. — This civil miscellaneous second appeal arises out of an order of

the learned District Judge of North Arcot confirming an order of the learned District Munsif of Vellore allowing execution of a decree in O. S. No. 86 of 1923 on the file of the said District Munsif's Court. It was a money decree obtained by one Habibulla Sahib against defendants 1 to 4 in the suit on 22nd November 1923. Subsequent to the institution of the suit and before obtaining a decree, an application for attachment before judgment of a house belonging to defendant 1 was made and an attachment thereof obtained on 21st February 1923. The wife of defendant 1, one Maimoona Bi, preferred a claim to the said property on the ground that it was sold to her on 12th February 1923.

The plaintiff decree-holder resisted the claim on the ground that it was a fraudulent transaction. The claim was disallowed on 24th July 1923. The said Maimoona Bi filed O. S. No. 670 of 1924 on 25th July 1924 to set aside the order on the claim petition, but the said suit was dismissed for default on 6th July 1925 and the claim order had thus become final. An execution petition was filed on 12th July 1926, to execute the said decree by arrest of defendant 1, but it appears to have been dismissed for non-payment of batta. Subsequent to this, in 1927, an application seems to have been made by defendant 1 to adjudicate him an insolvent, and he was accordingly adjudicated. There was an order of discharge passed in the said insolvency proceeding on 6th February 1928. It transpires that the house which was under attachment was not reduced to possession by the Official Receiver, nor does he appear to have taken any proceedings in respect thereof. The decree-holder died, and the present application is made by his legal representatives to have the said property attached and sold in realization of the decree debt. There seems to have been a subsequent litigation to which the decree-holder in the said O. S. No. 86 of 1923 was not a party, in and by which it was established that the house belonged to the wife, the said Maimoona Bi, and not to defendant 1 (Judgment in S. A. No. 8 of 1931 dated 14th October 1932, Ex. 3). The said Maimoona Bi died later. Subsequent to her death, defendant 1 as her heir settled his share in favour of one Kalik Sahib on 27th December 1932. After the present execution application was filed, defendants 2 and 3 appear to have conveyed the shares they inherited also in favour of their brother, Kalik Sahib, by two deeds dated 25th August and 24th October 1933, and Kalik Sahib having died, the whole property is now vested in defendant 1. He resists the execution application on two grounds, namely (1) that it is barred by limitation, and (2) that by reason of the order of discharge this property is not liable to be proceeded against in execution of a decree against him. In regard to the first point, both the Courts have concurrently found against him and this finding is not challenged before me.

The remaining question is whether this property is not liable to be proceeded against by virtue of the order of discharge. The learned District Munsif did not deal with this contention on the ground that the order of discharge was not filed before him. The learned District Judge refused to admit the said order in appeal and therefore did not deal with the contention. Mr. K. S. Krishnaswamy Iyengar made an application for the admission of the said order in this appeal. This application was opposed by the respondents. Their learned counsel however submitted that if I should permit the order to go in, he should be allowed to raise the question that the order of discharge would not preclude him from attaching and selling the said property by reason of the execution proceedings already had and the order on the claim petition and the dismissal of the suit O. S. No. 670 of 1924 and he should be allowed to file documents relating thereto. In the interests of justice I allowed the documents on either side to be filed. It is contended that under S. 44 (2), Provincial Insolvency Act, the decree has become incapable of execution. S. 44 (2), Provincial Insolvency Act, provides : "An order of discharge shall release the insolvent from all debts provable under the Act." The effect of such a release as stated by Blackburn, J. in 7 Q B 527[1] is that the insolvent is discharged from the debt altogether, and the debt is in fact gone, and he further says : "If the debt is gone, the creditor's right to seize in respect of it should be gone also." The object of the enactment is

to enable a debtor who had given up all his property for the benefit of his creditors, to obtain his discharge, so that he might begin the world again freed from all his obligations and protected

1. Thompson v. Cohen, (1872) 7 Q B 527=41 L J Q B 221=26 L T 693.

from oppression by his creditors: Per Kelly, C. B. in 4 Ex D 26[2] at pp. 28 and 29.

But is the debt gone for all purposes? It is stated by Williams on Bankruptcy Practice, at p. 136:

> Though an order of discharge released the bankrupt from certain debts provable in the bankruptcy, its effect is not to destroy the debt as though it had never been.

He relies on the decision in (1922) 1 Ch 22[3] in support of that position. In that case, the testator, with the intention of producing equality between legatees, directed that a debt due from his son be deducted from the moiety of his residuary estate bequeathed to trustees upon trust for the benefit of the son and his children, and subsequently in the liquidation of his son's affairs, by arrangement, received a dividend on the debt, and thereafter a certificate of discharge was given to the son thereby releasing him from all his indebtedness to the testator. A question arose whether the son was entitled to the legacy without deduction of the debt. Lawrence, J. held the son was not entitled to have the deduction of the debt. This decision seems to indicate that the debt is not destroyed altogether. It may also be noted that it is open to a debtor for a new consideration to enter into a contract to pay the old debt. By the order of discharge therefore, as Mellish, L. J. says, "he is free from all debts . . . . and his future assets belong to him," 10 Ch 479[4] at pp. 484 and 485, but the property which he owned at the time of adjudication and vested in the Official Receiver would not revert to him as on an annulment. The question is, did the decree-holder in this case by virtue of the execution proceedings and the order made on the claim petition therein obtain any right to proceed against the property irrespective of this order of discharge? Before the insolvency, he had obtained a valid right to realize his debt from the said property. But the insolvency having supervened, he was prevented from doing so. The effect of the insolvency is, by virtue of S. 51, Provincial Insolvency Act, he cannot have the benefit of the execution against the receiver. But the execution does not become void. It deprives the executing creditor from having the benefit of the execution for his sole benefit. His title does not prevail against the Official Receiver. If the execution is proceeded with the leave of the insolvency Court and the property is sold, the sale proceeds will have to be delivered over to the receiver for distribution among all the creditors of the insolvent. As stated in (1900) 1 Q B 264[5] at p. 268:

> If there has been only a partial execution, a levy and no subsequent completion, the intention of the Act apparently is that the other creditors may step in and insist on having the whole of the debtor's estate rateably divided.

If the Official Receiver does not intervene, the question arises whether the creditor can proceed with the execution. If the house had vested in the Official Receiver, the creditor cannot proceed with the execution without notice to him and without the leave of the insolvency Court as the property ceased to be that of the judgment-debtor. As by the order of discharge the property is not vested in the debtor, in my opinion the creditor will have to move the insolvency Court for the necessary directions for sale of the property. But in this case the house on the date of adjudication was, by virtue of the conveyance in favour of Maimoona Bi, vested in her and the Official Receiver has not reduced the same into his possession. And as between her and the judgment-debtor, the property had been held to be her property. By reason of the order on the claim petition and the dismissal of the suit, the decree-holder in the said O. S. No. 86 of 1923 had however obtained a valid adjudication as against Maimoona Bi, that the said property was liable to be attached for his debt. So far therefore as the decree-holder is concerned, it would not be open to Maimoona Bi to resist the execution. She must be deemed to have taken the property subject to the liability of being proceeded against for the debt.

The plaintiff decree-holder is not seeking to attach and sell any property of the judgment-debtor which is in his hands qua his property. If a creditor could otherwise realize his debt, there is nothing in the insolvency law which precludes him from doing so as the debt is not extinguished. Defendant 1 must be deemed to

2. Jakeman v. Cook, (1879) 4 Ex D 26=48 L J Ex 165=27 W R 171.

3. *In re* Ainsworth; Millington v. Ainsworth, (1922) 1 Ch 22=91 L J Ch 51=126 L T 247 =66 S J 107=(1922) B & C R 21.

4. Ebbs v. Boulnois, (1875) 10 Ch 479=44 L J Ch 691=33 L T 342=23 W R 820.

5. *In re* Ford; *Ex parte* Official Receiver, (1900) 1 Q B 264=69 L J Q B 74=81 L T 648=48 W R 173.

have taken the property after the death of his wife subject to the result of the adjudication already had against her. A decision of Cornish, J. in (1935) M W N 1328[6] has been cited before me. In that case there was an attachment of the property in execution of a decree but subsequent to the execution an alienation was made by a judgment-debtor in favour of a third party. Then there was an adjudication of the judgment-debtor in insolvency and a subsequent order of discharge. The learned Judge observed that though the order of discharge might release the insolvent from the debt, yet it did not prevent an execution creditor from proceeding to sell the property in the hands of the alienee who must be deemed to have taken the property subject to all claims enforceable under the attachment. This decision seems to proceed upon the principle already adverted to by me that the debt is not destroyed altogether by the release. It therefore seems to me that the house is liable to be attached for the decree debt. In the result, the second appeal fails and is dismissed with costs. Leave granted.

C.R.K./S.C. *Appeal dismissed.*

6. Doraiswamy Pillai v. Arumuga Naicker, A I R 1936 Mad 100=159 I C 1027=1935 M W N 1328=69 M L J 799.

A. I. R. 1937 Madras 730

CORNISH, J.

Kothapalli Kanuparthi Subbayya and *another*—Petitioners.

v.

Nichenametla Subbarayadu and *others* — Opposite Parties.

Civil Revn. Petn. No. 1079 of 1935, Decided on 2nd April 1937, from order of Dist. Munsif, Nandalur, D/- 26th August 1935.

Partnership Act (1932), S. 69 (3) — Scope — Property attached in suit against partner of unregistered firm — Another partner of such firm applying to set aside such attachment claiming attached property as partnership property — Such application is not proceeding to enforce any right under contract between applicant and other partner under S. 69 (3) and is not barred by S. 69.

In a suit against a partner of an unregistered firm, certain property was attached before judgment. Another partner of the same firm made an application to set aside the attachment claiming that the attached property belonged to the partnership as between himself and such partner :

Held : that the application was not a proceeding to enforce a right arising under a contract between the applicant and other partner of the firm under S. 69 (3), Partnership Act ; the applicant was not asking to enforce any right which depended on any contract between him and the other partner. The right which the applicant had and which he was seeking to enforce was that his property should not be attached except as allowed by law. This did not depend on contract but on the provisions of the Civil Procedure Code governing the attachment of partnership property. The application was not therefore barred by S. 69 of the Act. [P 730 C 2; P 731 C 1]

Kasturi Seshagiri Rao—for Petitioners.

Ch. Raghava Rao—for Opposite Parties.

Order.—Respondent 1 in this civil revision petition filed a suit against respondent 2, and in that suit attached before judgment a quantity of indigo. Thereupon, the present petitioner, claiming that the indigo was the property of a partnership of which he and respondent 2 were members, made an application under O. 21, Rr. 49 and 58 and O. 38, R. 8 to have the attachment set aside. The lower Court held that S. 69, Partnership Act, was a bar to this application, inasmuch as the alleged partnership had not been registered, and dismissed the application. S. 69 (1) provides that no suit to enforce a right arising from a contract shall be instituted by a member of a firm suing as a partner against the firm unless the firm is registered ; and sub-s. 2 provides that no suit to enforce a right arising from a contract shall be instituted by or on behalf of an unregistered firm against a third party. Then comes sub-s. 3 which applies the provisions of sub-ss. 1 and 2 to claims by way of set-off or other proceedings to enforce a right arising from a contract, and then follow certain exceptions.

I think the effect of sub-s. 3 is that the prohibition against a suit by the member of an unregistered firm or by an unregistered firm against a third party to enforce a contract is extended to other proceedings which have for their purpose the enforcement of a right arising under a contract between the parties to the proceedings. The question is therefore : Is the present petitioner's application to have the attachment removed, a proceeding to enforce a right arising under a contract between him and respondent 1 ? In my opinion it is not. The petitioner is seeking to enforce no right which depends on any contract between him and respondent 1. The right which he has, and which he is seeking to enforce, is that his property shall not be

attached except as allowed by law. This does not depend on contract but on the provisions of the Code governing the attachment of partnership property. In my opinion the lower Court's order was wrong, and the matter must be remanded for the Court to decide whether the property attached was partnership property. If it was attached contrary to the provisions of the Code, the fact that respondent 1 has got a decree in his suit against respondent 2 will not mend the position. The civil revision petition is allowed with costs.

C.R.K./W.D. *Revision allowed.*

A. I. R. 1937 Madras 731

VARADACHARIAR AND PANDRANG ROW, JJ.

Kotambiyakath Pathu Kutti Umma and *others* — Appellants.

v.

Nedungadi Bank Ltd., Calicut and *others* — Respondents.

Appeal No. 202 of 1931, Decided on 8th March 1937, against decree of Sub-Judge, Calicut, in O. S. No. 56 of 1927.

(a) Mahomedan Law — Wakf — Shafi and Hanafi Schools—Delivery of possession is not necessary to constitute valid wakf.

So far as the Shafi School is concerned and even according to the Hanafi School, delivery of possession is not necessary to validate a wakf which is otherwise valid: *15 All 321, Expl.*; *Case law referred.* [P 732 C 1]

(b) Mahomedan Law—Hanafi law—Interpretation — Opinion of Abu Yusuf is to be preferred.

It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf. When the two disciples differ from their master and from each other the authority of Abu Yusuf is generally preferred: *Case law discussed.* [P 732 C 2]

B. Pocker and *K. T. M. Ahmad Ibrahim* — for Appellants.

T. L. Venkatarama Iyer — for Respondents.

Pandrang Row, J.—This is an appeal from the decree of the Subordinate Judge of South Malabar at Calicut dated 11th December 1930 in O. S. No. 56 of 1927, a suit to set aside an order passed in execution proceedings in O. S. No. 63 of 1924, which was a suit on the foot of a mortgage executed by defendant 5 in favour of the plaintiff, the Nedungadi Bank Ltd. The mortgage-deed, Ex. C, was one dated 8th May 1922. In execution of the decree the bank purchased the mortgaged property, but when an attempt was made to obtain delivery of possession there was resistance by defendants 1 to 4 in respect of the particular item which is the subject matter of the present suit, there being in all 21 mortgaged items. The resisters relied upon a wakf deed executed by defendant 5, namely Ex. 2 dated 29th September 1921, i. e. about seven months before the mortgage in favour of the Bank. An application by the Bank to remove the resistance of these defendants was made in 1926; that application was dismissed by the Subordinate Judge who upheld the contentions of defendants 1 to 4, though the plaintiff Bank relied on a cancellation deed whereby the wakf was revoked or cancelled not only by defendant 5 but also by defendants 1 and 2 and some others in April 1922, Ex. B. The present suit was one instituted with a view to set aside this order and the suit has been decreed by the Subordinate Judge, the main ground being that though the cancellation of a valid wakf is invalid, the wakf itself had not been completed or become valid by reason of the fact that there was no delivery of possession of the property. The decree was also based on a finding to the effect that there was an estoppel in favour of the plaintiff Bank; but this ground of the decision of the Court below has not been seriously supported in the arguments in this appeal. It is sufficient to say in this connection that so far as defendants 3 and 4 are concerned, there can be no estoppel as they are not parties to the cancellation deed, the estoppel being based on what is contained in the deed. As regards even the other defendants there is no evidence to show that the plaintiff Bank took the mortgage on the strength of any recitals contained in the cancellation deed. There is indeed no evidence whatever which bears on the plea of estoppel, and the finding of the Court below on the question of estoppel cannot therefore stand. It is also conceded during the arguments that if the wakf deed is valid, the cancellation is of no force. The main point therefore that was argued, and indeed the only point on which serious argument was possible, was that delivery of possession is not necessary to validate or complete a wakf which is otherwise valid. This is not a case in which it is found that the wakf deed was executed

with a view to defeat or delay creditors; nor is there anything alleged against the deed which will have the effect of invalidating it except the want of delivery of possession. On this point the finding of the Court below was that there was no delivery of possession. The correctness of this finding has been questioned in appeal by the appellants (defendants 1-4) but there is really no sufficient reason why the finding of the trial Court on a question of fact of this kind should be disregarded expressly in view of the fact that that is based on the recitals in Ex. B itself to which defendants 1, 2 and 5 were parties.

I must therefore proceed on the basis that this finding to the effect that there was no delivery of possession is correct, and address myself to the pure question of law, whether delivery of possession is necessary in order to constitute a valid wakf. On this point there is some difference of opinion; but there can be no doubt that the weight of authority is in favour of the view that delivery of possession is not necessary. The executant of the wakf in this case is a Mapilla of South Malabar, and it is well known that Mapillas in South Malabar are generally followers of the Shafi School of Mahomedan law. The Court below has however treated the question as if the law which applies to the present case is the Hanafi School of law. So far as the Shafi School is concerned, there is no doubt that delivery of possession is not necessary to constitute a valid wakf. In this connection I may refer to p. 231 of Amir Ali's Mahomedan Law, Vol. 1, 4th Edn., where there is a quotation from Ramz-ul-hakaik to the following effect :

> According to Abu Yusuf, merely saying that 'I have made this property wakf' is sufficient to extinguish the proprietary right of the wakif, for by that the property is assigned over to God like the emancipation of a slave ; and in this view the other three Imams agree (viz. Shafei, Malik and Ibn Hambal).

Even according to Hanafi School, it does not appear that delivery of possession is necessary to constitute a valid wakf, the only authority to the contrary being that of certain decisions of the Allahabad High Court. These decisions of the Allahabad High Court can be traced finally to 15 All 321,[1] on which the subsequent decisions are based. The decision in 15 All 321,[1] appears to be based on a mistaken notion of what was stated by a majority of the Full Bench of the Calcutta High Court in 20 Cal 116.[2] This point has been noticed by more than one text-book writer, and also in one comparatively recent decision of the Allahabad High Court itself. For instance, on p. 15 of Mulla's Principles of Mahomedan Law, the learned author says :

> It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Mohammad, the opinion of the disciples prevails. Where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf. When the two disciples differ from their master and from each other, the authority of Abu Yusuf is generally preferred.

In the foot-note to the last sentence the learned author refers to the decision in 15 All 321,[1] and points out that the Court in that case thought erroneously that the opinion of Imam Mohammad should be preferred to that of Abu Yusuf because it was so laid down by the Full Bench in 20 Cal 116.[2] In Wilson's Anglo-Mahomedan Law, Edn. 5, p. 92, it is stated that the decision in 15 All 321,[1] was in fact based on a statement that in 20 Cal 116,[2] the comparative authority of Abu Yusuf on questions of Mahomedan law among Sunnis was discussed, and the majority of the Full Bench decided that the authority of Abu Yusuf is to be postponed to that of Mohammad. The learned author adds that the report of the Calcutta Full Bench case

> shows that no general proposition of the sort was affirmed, but that while the one dissentient Judge based his opinion partly on a general preference for Abu Yusuf, partly on a number of untranslated Arabic authorities, the majority took their stand on a series of British decisions which were, as it happened, in agreement with Mohammad on the particular point in question, and refused to go behind those decisions or to be drawn into a discussion about the relative weight of the ancient authorities.

Finally in 49 All 391,[3] Ashworth, J. observes as follows :

> This decision (15 All 321[1]) purports to follow a Full Bench decision of the Calcutta High Court in 20 Cal 116.[2] I have examined that decision of the Calcutta High Court, but cannot find that it expressly states that Imam Mohammad is to be preferred to Abu Yusuf.

1. Mohammad Azizuddin Ahmad Khan v. Legal Remembrancer to Government, (1893) 15 All 321=1893 A W N 109.

2. Bikani Mia v. Shuk Lal Poddar, (1893) 20 Cal 116 (F B).

3. Mohammad Shafi v. Mohammad Abdul Aziz, A I R 1927 All 255=99 I C 1052=49 All 391 =25 A L J 299.

The learned Judge also says that the contrary opinion of Mr. Amir Ali would require to be given due weight and that in Mr. Mir Ali's Handbook of Mahomedan Law published in 1925, he reiterated the view expressed by him in 20 Cal 116,[2] that Imam Mohammad's opinion is not recognized among the Hanafis of India. It would therefore appear that the decisions of the Allahabad High Court to the effect that delivery of possession is necessary to validate a wakf according to the Hanafi law are to some extent the result of a misapprehension of what was decided by the majority of the Full Bench in 20 Cal 116.[2] It may also be partly due to the fact that according to Shiah law, which is prevalent in the United Provinces, delivery of possession is undoubtedly necessary to constitute a valid wakf. Whatever the case may be, it is only in Allahabad that the view has been taken that delivery of possession is necessary to constitute a valid wakf. Most of the other High Courts have expressed the opposite view. This High Court itself does not appear to have decided the question; at least no case of this Court has been brought to our notice. But the view that no delivery of possession is necessary to constitute a valid wakf has been expressed by several other High Courts, namely, Calcutta (49 Cal 477[4]), Lahore (16 Lah 432[5]), Bombay (14 Bom L R 295[6] and 22 Bom L R 846[7]), Rangoon (2 Rang 495[8]), and Patna (8 Pat 484[9]), and it has also found acceptance in a recent Full Bench decision of the Oudh Chief Court, A I R 1936 Oudh 213.[10] The view taken in Calcutta goes back to 1838. The case in 1838 (1 Fulton 345[10a]) is of considerable importance and in view of its importance the judgment in that case has been reproduced in full in Ameer Ali's Mahomedan Law, Vol. 1, Edn. 4, p. 236. It is important in view of the fact that it was pronounced after consulting the two moulvies attached to the Court and in accordance with the opinion which they submitted and after a consideration of the important authorities which were quoted by the learned moulvies in support of their opinion. The exact question which arises for decision in the present case is the second question that was referred to the moulvies, namely, whether delivery of property is essential to render the endowment valid according to the rule which governs other gifts. The answer of the moulvies was :

> Abu Yusuf does not consider the consignment and delivery of consecrated real property to the Mootuvullee as necessary to render the wakf or consecration legal. In this opinion Mohammad differs, but the practice is in accordance with the opinion of Abu Yusuf, as written in the Mooneeah, Furthul, Kuddeer Saraj-ul-wahaj, Hedayah and Veekyat-ul-rawahij.

This answer is supported by the actual authorities and quotations therefrom subjoined below. This opinion of the moulvies was accepted by the Bench which held that the opinion of Abu Yusuf on both the points must be considered as the law now prevailing and sanctioned by the more recent authorities. They laid stress on the opinion of the translator of the Hedaya (i. e. Hamilton) who himself seemed inclined to Abu Yusuf's opinion as would appear from his note at p. 351 and also from certain passages in the text of the Hedaya itself where it was stated that Abu Yusuf's is the more generally received doctrine. This decision of 1838 has been followed till now, i. e. for nearly a century, in Calcutta. It is sufficient to make a brief reference to the decision reported in 12 W R 344[11] at p. 346, in which Kemp, J. followed the ruling of 1838 and quoted with approval the following passage from Harrington's Analysis, Vol. 1, page 229 :

> When the two disciples, Abu Yusuf and Imam Mahommad, differ from their master Huneefa, the Mahomedan Judge is at liberty to adopt either of the two decisions which may seem to him the more consonant to reason. Futwahs or law decisions, are given primarily according to Abu Yusuf, next according to Imam Mohammad.

Reference was made to this observation of Kemp, J. by Woodroffe, J. in a later case reported in 10 C W N 449[12] at

4. Jinjirakhatun v. Mahomed Fakirullah Mea, A I R 1922 Cal 429=67 I C 77=49 Cal 477 =26 C W N 749=34 C L J 444.
5. Mahomed Said v. Mt. Sakina Begum, A I R 1935 Lah 626=159 I C 250=16 Lah 432=37 P L R 772.
6. Abdul Rajak v. Bai Jimbabai, (1912) 14 Bom L R 295=14 I C 988.
7. Husseinbhai Cassimbhai v. Advocate-General of Bombay, A I R 1920 Bom 152=57 I C 991 =22 Bom L R 846.
8. Ma E Khin v. Maung Sein, A I R 1925 Rang 71=88 I C 167=2 Rang 495.
9. Mahomed Ibrahim v. Bibi Mariam, A I R 1929 Pat 410=117 I C 638=8 Pat 484.
10. Mt. Rahman v. Mt. Baqridan, A I R 1936 Oudh 213=160 I C 495=11 Luck 735= 1936 O W N 165 (F B).
10a. Doe *d.* Janu Beebee v. Abdullah Barber, (1838) 1 Fulton 345.
11. Khajah Hossein Ali v. Shah Zadee Hazara Begum, (1869) 12 W R 344.
12. Kulsom Bibee v. Golam Hossain Cassin Ariff, (1906) 10 C W N 449.

p. 488 ; he says that where the two disciples differ from their master and from each other, it appears that the authority of Abu Yusuf was generally preferred and reference is made to Morely's Digest CCLXIII, Amir Ali XLIII, XLIV, and Harrington's Analysis, Vol. 1, at p. 229, besides 12 W R 344.[11] Our attention has been drawn to a decision of the Bombay High Court reported in A I R 1934 Bom 257,[13] where it was said that physical delivery is not essential, but such delivery as is possible must be given ; this view is however based on the decision of the Privy Council in 6 Pat 259,[14] which was a case in which parties were governed by the Shiah School of law according to which a wakf is not complete unless possession is given. The decision of the Rangoon High Court reported in A I R 1927 Rang 125,[15] merely decided that the wakif should actually divest himself of property to be made wakf in order that the wakf may be valid, and this does not necessarily mean that possession must be given to the mutavalli before the wakf can become valid. The divesting by the wakif himself can be completed by an unequivocal declaration that the property is made wakf. The opinion of the text book writers is also generally in favour of the view that the authority of Abu Yusuf is generally preferred, though there is no inflexible rule to that effect. I have already referred to the opinion expressed in Mulla's Mahomedan Law at p. 15. Abdur Rahim in his Mahomedan Jurisprudence, at p. 308, when dealing with this question whether delivery of possession is necessary, says :

> The weight of juristic opinion seems to lie in favour of Abu Yusuf's view according to which delivery of possession is not necessary.

I may also refer to pp. 187 and 188 which deal with the general question of the difference of opinion between the various authorities and in particular to the following passage :

> It is also stated that the learned have given fatwa according to the view of Abu Hanifa on all questions of 'Ibadat' or devotional matters and that, in all judicial matters and in questions relating to the duties of the Magistrate and the law of evidence, fatwa is based on the opinion of Abu Yusuf because of his experience as the Chief Qazi of Baghdad, and in questions relating to the succession of distant kindred on the opinion of Mohammad.

Reference may also be made generally to pp. 237 and 238, in Ameer Ali's Mahomedan Law, Vol. 1, where according to several authorities the 'fatwa' is that of Abu Yusuf; in other words, the legal decision is to follow the opinion of Abu Yusuf. Wilson, at p. 344 of his Anglo-Mahomedan Law, states as follows :

> The difference between Abu Yusuf and Mohammad on this point follows naturally from their divergence as to whether wakf can be constituted by mere declaration of intention without transfer of possession to a mutawalli. But the Fatwa Alamgiri, which on that question declared that opinions were equally balanced, says nevertheless that on this point the moderns decide according to the opinion of Abu Yusuf, and that is approved.

The learned author adds that according to M. Clavel such wakfs are common in modern Egypt. This is perhaps because it is Egypt which is the stronghold of the doctrines associated with the name of Shafei which also find acceptance among the Mapillas of South Malabar generally. It will thus be seen, apart from the fact that the executant of the wakf in the present case is governed by the Shafei School of law and therefore the doctrine of Shafei must apply without question to the present case, that even according to the Hanafi School the weight of authorities is certainly in favour of the view that no delivery of possession is required to validate a wakf which is otherwise valid. This view would moreover bring all the four schools into line, because there is no doubt that the founders of the other three schools are of this opinion. I am satisfied that the law as actually understood by the Courts, the Mahomedan jurists, and the bulk of the Mahomedans who are governed by the Hanafi law, is that delivery of possession is not necessary in order to constitute a valid wakf. The insistence on transfer of possession in the opinion of Mohammad must have been due to the importance attached by him to archaic doctrine according to which generally possession is regarded as nine points of ownership, and no transfer of property could be conceived without actual change of seisin or possession. In all comparatively ancient systems of law we find the same stress placed on what the old English lawyers called "livery of seisin." No feoff-

13. Maher Hussein v. Ali Mahomed, A I R 1934 Bom 257=152 I C 50=36 Bom L R 526.
14. Abadi Begum v. Kaniz Zainab, A I R 1927 P C 2=99 I C 669=54 I A 33=6 Pat 259 (P C).
15. Suleman Hassan v. Sheikh Chand, A I R 1927 Rang 125=101 I C 359=5 Bur L J 226.

ment was regarded as a valid transfer of property unless it was accompanied or followed by livery of seisin, and even in cases where the property to be transferred was such that it lay in grant and not in livery, nevertheless any one who took the grant found himself in a very precarious position unless he had taken care to get livery of seisin subsequently.

The view taken by Abu Yusuf appears to be more in accordance with modern conditions, and certainly more in accordance with modern legal principles which have found favour with advancing times. I have therefore no doubt that we should regard Abu Yusuf's view which has been accepted by the majority of the High Courts in India and also by most of the text book writers as the correct view of law, not only as regards the Mapillas, but also as regards all Mahomedans governed by Hanafi law. It follows therefore that the finding on this point by the learned Subordinate Judge must be set aside, and as there is no other objection to the validity of the wakf with which we are concerned in this case, the wakf must be declared to be a valid and completed one. It follows that the decree appealed from must be set aside and the suit dismissed with costs in this Court and in the Court below.

Varadachariar, J.—I concur, though not without some hesitation, in allowing the appeal. Once it is found that the wakf has been duly constituted, the plaintiff cannot certainly rely on the deed of cancellation, Ex. B, either as affecting the operation of the wakf deed or as supporting a plea of estoppel. But in deciding the question of the completeness of the dedication, the statements of fact in Ex. B to which some of the defendants are parties may be used as evidence ; and those statements, in the light of the other probabilities appearing in the case, seem to support the finding of the lower Court, on the point of fact, namely that the wakf deed had not been accompanied by a transfer of possession to the mutawalli. I find nothing in the evidence to suggest that the defendants intended to defraud the Bank in the matter of the creation of the mortgage in its favour, nor to suggest that the Bank acted negligently in taking the mortgage. The Bank seems to have acted on legal advice and though the lawyer's memorandum makes no reference to the deed of cancellation (because it was prepared before the date of Ex. B) or even to the wakf deed, both parties seem to have acted under the impression that on the facts stated in Ex. B it was open to defendant 5 to ignore the wakf and deal with the property as his own. It is this view of the conduct of the parties that inclined me at one stage to consider whether I might not adopt the course recognized by the Mahomedan authorities themselves, that where the Muslim jurists have expressed different opinions, the Court may take that view which is most in accordance with justice in the particular circumstances. If I am right in my opinion that the parties acted honestly in the matter, there can be very little doubt that the justice of the case would require me to uphold the validity of the mortgage. But a view of the above kind, though sanctioned by the Mahommedan authorities, would undoubtedly introduce an element of uncertainty in the law; and it is this consideration which has weighed with me in agreeing with my learned brother in the decree that he proposes to make. I agree with him that the weight of authority, both according to the text writers and according to the decisions, is in favour of accepting Abu Yusuf's view in the matter and that the decisions to the contrary effect in Allahabad seem to be based upon a misreading of the judgment in 20 Cal 116.[2]

C.R.K./T.M. *Appeal allowed.*

*** * A. I. R. 1937 Madras 735**

BEASLEY, C. J. AND CORNISH, J.

T. Rajagopala Ayyangar — Appellant.

v.

Collector of Salt-Revenue (Out Ports), Madras—Respondent.

O. S. Appeal No. 19 of 1937, Decided on 6th April 1937, from judgment of Gentle, J., D/- 26th February 1937.

*** * (a) Government of India Act (1915), S. 96-B—Civil Services (Classification, Control and Appeal) Rules, R. 55—Enquiry—Enquiry is to be held by some person other than the 'authority concerned' — Conduct of Asst. Commissioner of Salt and Custom — Enquiry by Collector of Customs — There is no injustice in this procedure.**

The words 'direct an oral enquiry' in Rule 55 of the Civil Services (Classification, Control and Appeal) Rules indicate that it is some one else than the authority concerned that is to hold the enquiry. Where therefore an enquiry is to be held into the conduct of a servant such as the Assistant Commissioner of Salt and Customs, the enquiry is to be held not by the Central Board of Revenue but by the Collector of Customs. There is nothi ng

unjust in this procedure. If the Collector with or without an enquiry imposes the penalties which he is empowered to inflict, e. g. suspension or censure, the servant has a right of appeal against such order to the Central Board. If there is an enquiry by him, the Board will have the necessary information before them to exercise such powers as are vested in them regarding penalties. They will have the finding upon the evidence of the officer who conducted the enquiry and from any order which they may pass, the person charged has a right of appeal to the Governor-General in Council, and Indian Legislation has recognized that there is no injustice in the procedure.

[P 737 C 1, 2]

**** (b) Government of India Act (1915), S. 96-B—Civil Services (Classification, Control and Appeal) Rules, R. 55—Enquiry—Government servant in enquiry under R. 55 has no right to appear by counsel.**

There is in British India no Common law right in a party to a proceeding to be represented by counsel. The right, wherever it exists, will be found to be given by enactment. On giving the words 'to be heard in person' in Rule 55 of the Civil Services (Classification, Control and Appeal) Rules their natural and ordinary meaning, it is clear that Government servant in an enquiry under Rule 55 has no right to appear by counsel.

[P 741 C 1]

K. S. Jayarama Aiyar, K. Venkataraghavachari and *V. K. Parthasarathi Ayyangar*—for Appellant.

Advocate-General—for Respondent.

Beasley, C. J.—This appeal is from an order passed by Gentle, J. on two applications under S. 45, Specific Relief Act, praying for an order restraining the Collector of Salt Revenue, Madras by a writ of prohibition from conducting or holding or proceeding with an enquiry into the conduct of the two applicants. The appellant was the applicant in No. 349 of 1937. The order passed by Gentle, J. covered the contentions of both of the applicants which were identical. An interim injunction had been granted on 8th February. Gentle, J. by his order dissolved that injunction, discharged the Rule nisi and dismissed the applications.

The appellant is an Assistant Commissioner of Salt and Customs, Central Division, Madras, to which office he was appointed on 16th March 1936 before which date he was Inspector of Salt and Customs, Negapatam. Certain charges had been made against the appellant and an enquiry under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, was proceeding on the date of the applications, the enquiry being conducted by the Collector of Salt Revenue, Madras, Mr. H. Greenfield. Previously, on 5th November 1936, Mr. Greenfield ordered the suspension of the appellant pending investigation of his conduct and that of the other applicant before Gentle, J. whilst in charge of Karaikkal frontier, Negapatam circle. The applicants, as already stated, sought to restrain the Collector by writ of prohibition from proceeding with the enquiry. The applicants alleged that the enquiry was irregular and contrary to law in the following respects, viz. (a) the body which has authority to remove, dismiss or reduce the applicants was the Central Board of Revenue and the enquiry should be held by them and not by the Collector of Customs; (b) the applicants are entitled to be represented at the enquiry by an advocate and this having been denied to them, the enquiry is not in conformity with the provisions of the law; and (c) they have not had communicated to them in respect of the charges made against them a statement of the allegations on which each charge was based. In the appeal, ground (c) was not pressed by the appellants. I do not propose to set out in this judgment in detail all the facts or all the relevant rules of the Civil Service (Classification, Control and Appeal) Rules, because they have been fully set out in the judgment of the learned trial Judge. I will only refer to those which are absolutely necessary for the disposal of the questions before us.

With regard to ground (a), S. 96-B (1), Government of India Act, says that no person in the service of the Crown in India may be dismissed by any authority subordinate to that by which he was appointed; and it is common ground that the appellant was appointed by the Central Board of Revenue. Therefore he can only be dismissed by that authority and not by the Collector of Customs, and the Central Board of Revenue cannot delegate that power to the Collector of Customs. The Central Board of Revenue has by delegation by the Governor-General in Council the power to impose the penalties contained in Rule 49, Civil Services (Classification, Control and Appeal) Rules. They are seven in number including dismissal and only two of them, viz. (i) and (v)—censure and suspension—may be imposed by the Collector of Customs. It follows, therefore, that if charges of a sufficiently grave nature as to justify dismissal are proved, only the Central Board of Revenue has the power to order it and this is the foundation for the argument in support of point (a) which

is that it is only the authority having the power to dismiss the servant that can hold the enquiry under Rule 55 and upon this point we have had addressed to us a very careful and learned argument by Mr. Jayarama Iyer.

The learned trial Judge has to a large extent based his view upon the words of Rule 55, and it is that the rule contemplates an enquiry by some other authority than the Central Board of Revenue (the authority having the power of dismissal, removal or reduction). By Rule 55, Civil Services (Classification, Control and Appeal) Rules, the member of the service is to be given an adequate opportunity of defending himself and the grounds on which it is proposed to take action are to be reduced to the form of a definite charge or charges which must be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. The person charged is required within a reasonable time to put in a written statement of his defence and to state whether he desires to be heard in person. Here follow some words which the learned trial Judge considers have a very material bearing upon the question, viz., "If he so desires or if the authority concerned so direct, an oral enquiry shall be held." Gentle, J. considers "the authority concerned" to be the Central Board of Revenue and lays emphasis upon the fact that this authority can 'direct' an oral enquiry to be held and is of the opinion that if the rule contemplated that only the authority concerned should hold the enquiry, the wording of the rule would be different and it would have read "an oral enquiry shall be held by them" or "by the authority concerned".

In my opinion, the words "direct an oral enquiry" indicate that it is some one else that is to hold the enquiry although of course it may be argued, not unreasonably, that an authority may issue a direction that something is to be done and itself do it. For instance, a Court may direct an examination of certain witnesses and may and frequently does conduct such examination. But in my view the words indicate the former rather than the latter intention. They mean, I think, that the Central Board of Revenue may, even in cases where the person charged may not desire an oral enquiry, nevertheless direct, that there shall be one. Further light is thrown upon the meaning of the rule by the words which follow later

> provided that the officer conducting the enquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness.

Gentle, J. considers that this indicates that the enquiry is to be held by some person other than the authority concerned. I agree and think that had the latter body been in contemplation, the words "authority concerned" would have appeared instead of "the officer". Mr. K. S. Jayarama Ayyar has argued strenuously to the contrary on the ground that it is fundamentally wrong that any person should defend himself with his witnesses before one tribunal and be dismissed by another body of authority which has not had the advantage of hearing the witnesses or observing their demeanour, that when so grave a penalty as dismissal is involved, the dismissing authority should not exercise its powers merely on an examination of the record before them and the report of the officer conducting the enquiry and he also contends that the words of R. 55 are not either expressly or by implication clear enough to support the learned trial Judge's view and that if there is any ambiguity in the words, the benefit should be given rather to the person charged than to the respondent.

On the first point it seems to me that there is nothing repugnant to a sense of justice in the procedure objected to by Mr. Jayarama Ayyar. If the Collector with or without an enquiry imposes the penalties which he is empowered to inflict, e. g. suspension or censure, the servant has a right of appeal against such order to the Central Board. If there is an enquiry by him, the Board will have the necessary information before them to exercise such powers as are vested in them regarding penalties. They will have the finding upon the evidence of the officer who conducted the enquiry, and from any order which they may pass, the person charged has a right of appeal to the Governor-General in Council, and Indian Legislation has recognized that there is no injustice in the procedure so strongly criticised by Mr. Jayarama Iyer, and to give one instance of a statute which empowers one tribunal to conduct the enquiry and another to inflict the penalties, we have the Indian Bar Councils Act (S. 10)

and others were cited, but Mr. Jayarama Iyer refers to 12 C W N 842.[1] There it was held that before proceeding to declare a person to be a tout the District Magistrate should himself make an enquiry as to the person's antecedents and give him an opportunity to show cause. There a Subdivisional Officer called on a person to show cause why he should not be declared a tout and he showed cause and the Subdivisional Officer after recording evidence on both sides submitted the proceedings with his report to the District Magistrate and the latter after perusing them, passed orders declaring the person to be a tout and it was held that the order should be set aside. It must be observed however that that case was a decision on S. 36, Legal Practitioners' Act, as it then read, but by Act 15 of 1926 the words "or to the satisfaction of any subordinate Court" were added to the words as they stood before the amendment, i. e.:

> Every High Court, District Judge, Sessions Judge, District Magistrate and Presidency Magistrate, every Revenue Officer not being below the rank of a Collector of a District, and the Chief Judge of every Presidency Small Cause Court (each as regards their or his own Court and the Courts if any subordinate thereto) may frame and publish lists of persons proved to their or his satisfaction.

These are important words because at that date the case had to be proved to the satisfaction of the Court publishing the list of touts. Whereas by reason of the amendment referred to, a Court subordinate to the Court inflicting the penalty is empowered to find on the question of proof. 15 Cal 152[2] was also cited by Mr. Jayarama Ayyar. There a charge of unprofessional conduct brought against a practitioner holding a certificate under Act 18 of 1879 having been found to be established by a subordinate Court which also considered that he in consequence should be dismissed and the same having been reported in conformity with S. 14 of that Act to the principal Court in the province, such dismissal was ordered; and it was held however that the practitioner could not be dismissed or suspended under that section without his having been allowed under S. 40 an opportunity of defending himself before that Court. What happened there was that the practitioner was fully heard by the Commissioner of Coorg and adduced his evidence which was also heard and their Lordships expressed the opinion that :

> The petitioner had the opportunity of adducing such evidence as he might think fit and that his complaint on that head is not well founded. But upon the evidence so obtained being remitted to the Judicial Commissioner, he makes this report or order : 'I have gone very carefully again through all the papers connected with this case, and I have given them my best consideration. I regret that I am unable to modify the opinion expressed in my previous order or to alter the conclusion arrived at'. He, therefore, concludes : 'I confirm my former order striking petitioner off the rolls.' This order was made without the petitioner's having had the opportunity of being heard before the Acting Judicial Commissioner after the evidence had been taken and in that respect their Lordships are of opinion that there has been a plain irregularity.

This case, with all respect to Mr. Jayarama Ayyar's argument, is not at all helpful on this point. It is quite clear that one tribunal heard the evidence and that the higher tribunal on that evidence inflicted the penalty which is the very procedure objected to by Mr. Jayarama Ayyar. Their Lordships do not criticise that procedure in the least. What they do say is that after the evidence had been taken, the practitioner was not given an opportunity of being heard by the higher tribunal and they refer to the words of S. 40 of the Act which reads as follows :

> Notwithstanding anyting hereinbefore contained no pleader shall be suspended or dismissed under this Act unless he has been allowed an opportunity of defending himself before the authorities suspending or dismissing him.

That makes the position quite plain. Rule 55 however says that :

> No order of dismissal, removal or reduction shall be passed on a member of a service . . . . . unless . . . . . he has been afforded an adequate opportunity of defending himself,

and the words "before the authority suspending or dismissing him" are significantly absent. Mr. Jayarama Iyer has also referred to the Public Servants (Inquiries) Act 37 of 1850. It is conceded of course by him that that Act does not apply to the present case. He relies upon that Act however in support of his argument that unless there is an express power to delegate to some other body or person the holding of an enquiry into the conduct of a person or persons such as there is in S. 3 of that Act, then it is the right of every person to defend himself before the authority dismissing him and of placing his evidence before that body. There is

1. *In re* Chandi Charan Dey, (1908) 12 C W N 842.
2. *In the matter of* Southekal Krishna Rao, (1888) 15 Cal 152=14 I A 154 (P C).

however no statutory provision to that effect and in none of the authorities cited by him is it laid down that in the absence of an express power of delegation the enquiry must be held by the authority imposing the penalty, and as regards the words of R. 55, I think that the learned trial Judge's view is correct. I should also add, although this is not a guiding test, that it has not been the practice for such enquiries to be conducted by the Central Board of Revenue which is in Delhi, and the inconvenience of enquiry by such an authority is manifest. In the present case a member or members of the Board—and we are told that there are only two—would either have to come to Madras in order to hold the enquiry or the appellant would have to go to Delhi with all his witnesses.

With regard to point (b), namely the right of the appellant to be represented by counsel, Mr. Jayarama Ayyar relies upon S. 14 (1) (b), Bar Councils Act, which reads as follows:

> An advocate shall be entitled as of right to practise . . . .
>
> (b) save as otherwise provided by sub-s. (2) or by or under any other law for the time being in force, in any other Court in British India and before any other tribunal or person legally authorised to take evidence.

Under R. 55, the person holding the enquiry is legally authorised to take evidence and hence he argues that an advocate is entitled as of right to appear at such an enquiry. But the Advocate-General argues that the real question is not whether an advocate has a right to appear but whether his client has a right to be represented by him, that is to say, is the enquiry one at which the person charged is entitled to appear at all, or to appear in person only, or by himself or by his agent. Mr. Jayarama Ayyar has conceded that there is no right at common law to appear by an agent and the Advocate-General argues that there is no such general right and that the scheme of the Indian Legislature is to confer only a special right to be represented by an advocate or agent such as that given by S. 340, Criminal P. C. Such a statutory right is also given under O. 3, R. 1, Civil P. C. Also O. 33, R. 3 enables a person to present an application through an authorized agent if he is exempted from appearing in Court. S. 31, Native Converts Marriage Dissolution Act, entitles a person to appear by his advocate in cases under that Act. S. 76, Patents and Designs Act, is another instance in point. So also S. 30 of Railways Act of 1890, S. 14 of Trade Disputes Act, and S. 24 of Workmen's Compensation Act. There is very little authority in the shape of decision, but the Advocate-General cites a case where the Court denied the right of a person to appear except by himself, viz. (1931) 2 Ch 70.[3] By S. 16, sub-s. 1, Bankruptcy Act 1914, where a debtor intends to make a proposal for a scheme of composition in satisfaction of his debts, he shall within the time thereby limited lodge with the Official Receiver a proposal in writing signed by him, etc. In that case the debtor was unable through serious illness to sign the proposal which was signed on his behalf by his solicitors and nevertheless it was held that the words "signed by him" were explicit and consequently no proposal for a composition had been lodged within S. 16, sub-s. 1 of the Act. He distinguishes the case in (1891) 1 Q B 378,[4] cited in the trial Court, on the ground that there the Statute, namely the Union Assessment Committee Act of 1862, provides that the Assessment Committee ought to hear and determine the objections of any person aggrieved by a valuation list, not that they are to hear the objections only. Lord Esher, M. R. on p. 382, speaking of the Assessment Committee, says:

> The question here is whether, being such as they are, they have a right to say that a person may not appoint any agent he pleases to appear in support of an objection made by him to the list. There is, in my opinion, nothing in law which authorizes them to limit, as they have done, the rights of persons to whom the Legislature has given the right of making objection to the list. I think such persons have a right to appear themselves or by any agent authorized by them.

Another case referred to by the Advocate-General is (1889) 23 Q B D 29.[5] The decision there turned upon the words of the Statute, namely S. 38, Corrupt and Illegal Practices Prevention Act, 1883. There, before a person not being a party to an election petition nor a candidate on behalf of whom the seat is claimed is reported by an Election Court to have been guilty of any corrupt or illegal practice,

3. *In re* Prince Blucher, (1931) 2 Ch 70=100 L J Ch 292=(1931) D & C R 1=144 L T 152 =74 S J 735=47 T L R 19.
4. Reg. v. Saint Mary Abbotts Kensington, (1891) 1 Q B 378=60 L J M C 52=64 L T 240=39 W R 278=55 J P 502.
5. Reg. v. Mansel Jones, (1889) 23 Q B D 29=60 L T 860=37 W R 508=53 J P 739.

the Court shall cause notice to be given to him and if he appears
shall give him an opportunity of being heard by himself, and of calling evidence in his defence to show why he should not be so reported.

It was held that this section excluded the person's right to be heard by his counsel or solicitor. On p. 32, Lord Coleridge, C. J. says:

As I have often said in this Court, I prefer that mode of construing a statute by which you look at the words used, and, if they are plain, give effect to them to the mode of construction by which you first satisfy yourself what Parliament ought to have meant and then interpret the statute by saying that it has so said. Here the Act has said as plainly as possible that the person shall be heard "by himself". I am of opinion that those words exclude him from being heard either by counsel or solicitor.

There being no common law right to be represented by counsel, and if there are statutes directing how a person is to be heard as in the case referred to, then the words of the statute alone afford a solution of the question. Are there any words in R. 55 which sufficiently clearly show how the person charged may appear at the enquiry? The rule provides that the person charged shall be required within a reasonable time to put in a written statement of his defence and to state whether he desires to be heard in person and that he is entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish. In my view the words "to be heard in person" must be given their natural and ordinary meaning; and the other provisions already referred to appear to me to be consistent with an appearance in person and not by agent or counsel and adopting the method of construing a statute preferred by Lord Coleridge, C. J. in (1889) 23 Q B D 29.[5] I look at the words used which appear to me to be sufficiently plain to give effect to them. That being so, in my view they exclude the appellant from being heard by counsel or otherwise than in person. I agree with the Advocate General's contention and the view of the learned trial Judge that this question has to be determined not by counsel's right of audience in inferior Courts but by the right of the client to be represented by him, and any argument based on S. 14 (1) (b), Bar Councils Act, therefore does not assist the appellant. If there is any hardship caused to the appellant by his being deprived of the assistance of counsel, though I do not think that there is in the present case, the construction of a statute is not to be governed by any such consideration. In my view the appeal fails and must be dismissed. No costs.

Cornish, J.—I am of the same opinion. R. 55, Civil Service Rules, provides for the case of a departmental inquiry into charges against a Government servant who is subject to the rule independently of the formal and public inquiry which might be held under the Public Servants Inquiry Act. The rule contains a safeguard. None of the graver penalties — dismissal, removal or reduction—which the Central Board of Revenue in this instance is alone empowered to inflict, can be imposed upon the person charged unless he has been given an adequate opportunity of defending himself. He may be content to put in a written statement by way of defence to the charges; or if he so desires or if the authority concerned, which must mean the Central Board, so directs, there is to be an oral inquiry at which evidence can be called and witnesses examined and cross-examined. But the rule does not state that the Central Board shall conduct the inquiry. Neither is there to be found in the rule any provision similar to that contained in S. 36 (1), Legal Practitioners' Act, from which it is to be implied that the Board must itself have held the inquiry to enable it to inflict one of the penalties referred to. On the contrary the allusion in the rule to "the officer conducting the inquiries" denotes that the Board is competent to depute some subordinate officer such as the present respondent, the Collector of Salt-Revenue, to hold the inquiry. In short the purpose of the rule is to enable a Government servant to defend himself when his conduct is the subject of a charge which can be departmentally investigated; and so long as the conditions of the rule are followed, there seems to be nothing prejudicial to the Government servant in the circumstance that the inquiry is held not by the Board itself or by one of its members but by some subordinate officer deputed by the Board for that purpose. The officer conducting the inquiry is required by the rule to record the evidence and to state his findings and grounds thereof. The Board has therefore all the necessary material before it to come to a decision regarding the penalty to be imposed if it is satisfied that the charge against the Government servant is established, though the Board is not bound to

accept the findings of the officer who conducted the inquiry.

With regard to the only other subject of this appeal, I agree that the Government servant in an inquiry under R. 55 has no right to appear by counsel and having no such right, no case for mandamus to the respondent to admit the appellant to have the assistance of counsel at the inquiry has been made out. There is in British India no common law right in a party to a proceeding to be represented by counsel. The right wherever it exists will be found to be given by enactment. The advocate's right of audience since the Bar Council's Act depends on S. 14 of the Act. This right "save as otherwise provided by any other law for the time being in force" includes the right of audience before any tribunal or person legally authorized to take evidence. The officer conducting an inquiry under R. 55 is clearly a person legally authorized to take evidence. The statutory rule confers on him this authority. But the advocate's right of audience is necessarily inseparable from his client's right to appear by advocate before a particular tribunal. If the client is expressly denied the privilege of being heard by counsel, it is obvious that the Bar Council's Act will not save him from the disability. R. 55 limits the Government servant's right to be heard "in person". In (1889) 23 Q B D 29[5] it was held that a right given by statute to a person to be heard "by himself" meant that he had no right to be heard by anybody but himself; and I cannot but think that the right given by R. 55 to be heard "in person" is similarly restricted to the person of the Government servant. It may be that there is no apparent reason in justice or expediency why a Government servant who has undoubtedly the right to appear by counsel in an inquiry into his conduct under the Public Servants Inquiry Act should be deprived of this privilege in an inquiry under R. 55 when the consequences may be equally serious to him. But this is a consideration which cannot be allowed to affect the plain language of the rule.

C.R.K./T.M. *Appeal dismissed.*

A. I. R. 1937 Madras 741

VENKATASUBBA RAO AND CORNISH, JJ.

Swaminatha Odayar—Appellant.

v.

T. S. Gopalaswami Odayar and *others*—Respondents.

Appeal No. 60 of 1933, Decided on 16th March 1937, against decree of Sub-Judge, Kumbakonam, D/- 26th September 1932.

(a) Appeal—Parties—Partition suit—Defendants representing their families but their sons formally on record—Their separate existence not recognized during whole conduct of suit — Decree in such suit not even recognizing their existence — Such sons though proper are not necessary parties to appeal against such decree.

In a partition suit, certain defendants represented their branches but their sons were formally brought on record. The sons were however treated during the conduct of the case as if their individuality had become merged in that of their fathers and their separate existence was not even recognized or noticed. On the question of apportionment all the parties assumed without hesitation that the defendants represented adequately and properly the interests of the sub-family as a whole. Not a single point was put forward in the case as affecting the interests of the sons as distinct from those of their fathers. The sons had no separate entity so much so that the decree passed did not recognize their existence. On appeal against the decree to which the sons were not impleaded as parties:

Held : that the sons were proper but not necessary parties to the appeal. [P 743 C 1]

(b) Civil P. C. (1908), O. 41, R. 20—"Interested in the result of the appeal" — Defendants representing their branches — Their sons made parties to suit formally—Existence of such sons neither recognized in conduct of suit nor in decree — Sons not impleaded in appeal against such decree—Sons likely to be prejudiced by modification in their father's shares in appellate decree if made — Sons therefore held interested in result of appeal and could be joined as parties to appeal under O. 41, R. 20.

In a partition suit the defendants represented their sub-families but their sons were formally brought on record. Their existence was not recognized either in the whole conduct of the suit or in the decree apportioning the shares to each branch. The sons were not impleaded as parties to the appeal against such decree:

Held : that though the appellate decree would not directly affect their sons as they were not parties to it, the result of any diminution of their father's assets would ipso facto be to diminish the extent of their own assets and as such they would be prejudiced by the modifications made behind their back in the decree under appeal. Such sons therefore being "interested in the result of the appeal" could be added as parties to the appeal under O. 41, R. 20, Civil P. C. even, if they were regarded as the necessary parties to the appeal the effect of whose inclusion would be fatal to it : *31 Mad 442, Applied; A I R 1932 Rang 16, Expl.*

and *Disting.*; *A I R 1927 P C 252, Expl.*; *A I R 1925 Rang 108, Ref.* [P 744 C 1, 2]

(c) Civil P. C. (1908), O. 41, R. 20 — Even person against whom right of appeal is barred can be added as respondent.

Even a person against whom the right of appeal has become barred can be added as a respondent under O. 41, R. 20, Civil P. C. [P 744 C 2]

V. Radhakrishnayya and *S. Ramanuja Iyengar*—for Appellant.

T. R. Venkatarama Sastri and *K. S. Desikan*—for Respondents.

Venkatasubba Rao, J. — An objection which ought to have been taken in limine has been raised at the closing stage of a long argument to the effect that the appeal is incompetent on account of certain parties not having been added as respondents. We do not at present propose to set out the history of this long-drawn litigation, for it is sufficient to state just a few facts in order to deal with the contention raised. This was a partition suit commenced nearly two decades ago and the members of the family to which the action relates owned considerable properties when it started, but they have since been reduced, with the exception of defendant 6, to such straits that some are represented by the assignees in insolvency and the others by the trustees under a composition deed. The only solvent member now of the family is defendant 6 and he is the appellant before us. There are several memoranda of objections in the nature of cross-appeals which have been filed. The principal contesting respondent is defendant 3 represented by the receiver in insolvency and the preliminary objection referred to above has been raised by his counsel, Mr. Venkatarama Sastri. In the action originally the family was divided into three branches, the first consisting of the plaintiff, the second of defendants 1 and 2 and the third of defendants 3 to 8. The preliminary decree of the trial Court passed in 1924 separately allotted to defendant 6 of the third branch a distinct share, the integrity of this branch not having been otherwise disturbed. We must observe that defendants 3, 4, 5, 7 and 8 form two sub-families : (1) defendant 3 and his sons defendants 5 and 7, and (2) defendant 4 and his son defendant 8. An appeal from the preliminary decree was filed here and during its pendency defendant 3 was adjudicated insolvent in 1925 and defendant 4 in 1927. With only one aspect of the appellate decree passed by the High Court we are now concerned, namely that it effected a further sub-division of shares as between defendants 3 and 4. The ultimate position as settled by the High Court's decree so far as the shares were concerned was this :

(1) Plaintiff ... ... 1/5th share.
(2) Defendants 1 and 2 ... 4/15th share.
(3) Defendant 6 ... ... 4/15th share.
(4) Defendant 3 and his sons, defendants 5 and 7 ... 2/15th share.
(5) Defendant 4 and his son defendant 8 ... 2/15th share.

The case went back to the trial Court which in due course passed a final decree which defendant 6 as the appellant now attacks. The preliminary decree which was confirmed by the High Court has held defendants 3 to 8 jointly accountable to the other branches of the family in respect of certain matters, that is to say the question as between defendants 3 to 8 on the one hand and the plaintiff and defendants 1 and 3 on the other, is concluded by the judgment already pronounced by the High Court; but the point yet remained to be decided, namely as among themselves (i. e. defendants 3 to 8) how much of this common burden was each of the sub-groups to bear ?—in other words, how much was to be born by third defendant's sub-group consisting of himself and his sons defendants 5 and 7, how much by defendant 4's sub-group consisting of himself and his son defendant 8 and how much by defendant 6 ? The learned Subordinate Judge, after dealing under various heads with sums of money amounting to several lakhs, passed a final decree containing in the result inter alia the following directions: (i) Defendant 6 shall pay Rs. 2,177-9-0 to the plaintiff's branch, Rs. 10,515-7-6 to defendants 1 and 2 and Rs. 18,385-1-6 to defendant 4's branch. (ii) Defendant 3's branch shall pay defendant 4's branch Rs. 10,932-2-3.

Defendant 6 complains that the Subordinate Judge has wrongly apportioned the liability, his contention being that had the learned Judge given effect to correct legal principles, a large amount would have been found payable to him by defendant 3's branch. The preliminary objection arises thus: While defendants 3 and 4 (through the Official Receiver of West Tanjore and the Official Assignee of

Madras respectively) have been impleaded as respondents to the present appeal, their sons have not been and it is argued that their non-joinder is fatal to the appeal. Mr. Radhakrishnayya, the appellant's learned counsel, in answer contends that the sons of defendants 3 and 4, though proper parties and might have been joined as a matter of convenience, are not necessary parties. This argument, in our opinion, is well-founded. The lower Court throughout refers to the entities known as defendant 3's branch and defendant 4's branch; nowhere does it in its long judgment refer to their sons as possessing any individual or distinct interest. Indeed, they have been so treated as if their individuality has become merged in that of their fathers and their separate existence has not been recognized or even noticed. This is not suprising as the judgment of the High Court did not direct an inter se division notwithstanding that their fathers had been adjudicated insolvents. What is more, when the various points bearing on the question of the apportionment were being considered in the lower Court, all the parties concerned assumed without hesitation that the Official Receiver in each case represented adequately and properly the interest of the sub-family as a whole; not a single point seems to have been put forward as affecting the interests of the sons as distinct from those of their fathers. In fact, if the sub-group gained, each member of it gained also; if it lost, it was equally patent that every member likewise lost. This being so, the learned Subordinate Judge in the decretal portion of his judgment directs defendant 3's branch to pay and defendant 4's branch to receive. Though therefore in the lower Court the sons were formally on the record, they had no separate entity and the decree passed does not recognize their existence. They are in our view therefore proper but not necessary parties to this appeal. The appellant's counsel, however, as a matter of expediency and convenience, now applies that they should be added as respondents. So much time and money has already been wasted; and every step should be taken, if possible, to prevent the remnant of this estate from being wrecked. We therefore comply with his request and direct the sons or their representatives to be joined. Granting however that the parties sought to be added are not merely proper but necessary parties, the effect of whose non-inclusion is fatal to the appeal, the question arises whether the defect can be cured under O. 41, R. 20, Civil P. C., which runs thus:

> Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

Mr. Venkatarama Sastri broadly argues, relying upon the decision of the Judicial Committee in 55 I A 7[1], that no person against whom the right of appeal has become barred can ever be added as a respondent under this provision. We are unable to agree that this is the effect of the decision cited above. It must be remembered that their Lordships' judgment delivered by Sir John Wallis confirmed the judgment of the Rangoon High Court in 2 Rang 541[2] and that the Judges of the Rangoon Court in their judgment followed the Madras decision in 31 Mad 442,[3] to which Sir John Wallis was himself a party. The point is fully and clearly dealt with in the Madras case and to understand the Privy Council decision, we must turn to the exposition of the law contained in the judgment of the Madras High Court. Now let us turn to the facts in 55 I A 7[1] to appreciate the real import of that decision. There were two suits, but for the present purpose it is sufficient to advert to one of them. The plaintiff there challenged the transfer made by the insolvent to defendant 1 and by defendant 1 to defendant 2, Singaram Chetty, the defendant in possession. The District Judge dismissed the suit, holding that the sales were perfectly valid and not benami as alleged. The plaintiff filed an appeal to the High Court at Rangoon, but did not implead defendant 1 as a respondent. The constitution of the appeal was impeached on the ground that defendant 1, a necessary party, had not been impleaded. An application was then made under O. 41, R. 20, but the learned Judges rejected it, holding that defendant 1, who was sought to be newly added was not 'a person interested

1. Chokkalingam Chetty v. Seethai Achi, A I R 1927 P C 252=107 I C 237=6 Rang 29=55 I A 7 (P C).
2. Chockalingam Chetty v. Singaram Chetty, A I R 1925 Rang 103=84 I C 522=2 Rang 541=3 Bur L J 259.
3. Subramaniams Chetty v. Veerabhadran Chetty, (1908) 31 Mad 442=18 M L J 452.

in the result of the appeal' within the meaning of the decision in 31 Mad 442[3] which they were prepared to follow. In the last mentioned case the learned Judges (Sir Arnold White, C. J. and Wallis, J.) explain that the section was inserted

to protect parties to the suit who had not been made respondents in the appeal from being prejudiced by modifications made behind their backs in the decree under appeal.

Then turning to the words 'interested in the result of the appeal', the learned Judges observe that they imply that the party whom it is sought to bring on record must be shown to be interested in the result of the appeal before he is brought on for, "once he is brought on, he may be said to acquire an interest as a result of being brought on". Now, applying that test, it is perfectly clear that in the Rangoon case defendant 1, whom it was sought to bring on the record newly, was not a person 'interested in the result of the appeal'. Supposing the appeal had gone on, and as a result the sale in favour of defendant 2, Singaram Chetty, had been set aside by the Appellate Court, how could it be said that the absent defendant 1 was 'interested in the result of the appeal'? The decision of the High Court could not in the slightest degree affect the trial Court's finding (which had become res judicata) that as between the plaintiff and defendant 1 the sale was perfectly valid. In that case therefore, defendant 1 had no possible interest in the result of the appeal; it mattered little to him whether it succeeded or failed. It is unnecessary to refer at any length to the facts of 31 Mad 442,[3] but it will be seen that there, as in the Rangoon case, the parties newly sought to be added were not interested in the result of the appeal; in other words to them it was a matter of perfect indifference whether the appeal was allowed or rejected.

The test in each case therefore is, as put in the Madras case, would the parties not impleaded be prejudiced 'by modifications made behind their backs in the decree under appeal'? Let that test be applied here. Supposing the appellate decree modifies the trial Court's decree by imposing a larger burden upon defendant 3, what happens? The sons are not directly affected by the appellate decree, they not being parties to it. That is undoubtedly so, but yet the result of any diminution of their father's assets will ipso facto be to diminish the extent of their own assets; in other words, in the language of 31 Mad 442[3] they will be "prejudiced by modifications made behind their backs in the decree under appeal". 9 Rang 624,[4] upon which defendant 3's counsel relies, does not, if properly understood, help him. There, defendant 2 who was sought to be impleaded does not answer the description of a person 'interested in the result of the appeal'. He had obtained a certain right under the trial Court's decree and that right, whatever might happen to the appeal, could not have been affected by its result. Thus the actual decision in 9 Rang 624[4] does not conflict with the view we have taken. Granting therefore that the parties sought to be added are necessary, as distinguished from proper parties, we have no doubt whatever that O. 41, R. 20, applies. A little reflection will show that Mr. Venkatrama Sastri's contention cannot be correct, for, as already observed, according to him no person against whom the right of appeal has become barred can ever be added as a respondent under this provision. If this argument be sound, O. 41, R. 20 can never be brought into play; it must for all practical purposes remain a dead letter. It is difficult to conceive a case where the right of appeal does not become barred as against a party not impleaded by the time the appeal comes on for hearing: for, under the Rule be it noted, the action to be taken is at the hearing of the appeal.

Lastly, it remains to observe that the power given to the Court is discretionary under the Rule in question. The point then is, in view of all the circumstances of the case, is the discretion to be exercised in favour of the appellant or not? In the first place, it is significant that although defendant 5 had died about two years previous to the judgment under appeal, no one thought it necessary to bring his representatives on the record in the lower Court. So much for defendant 5. Now turning to defendant 7, it is not a little strange that even in the decree passed by the lower Court in 1932 he was described as "minor male child not named". That was the way in which he was originally described in the plaint filed in 1919; he still remained in 1932 a 'minor not named'. That shows what little importance

4. Ma Than May v. Mohamed Eusoof, A I R 1932 Rang 16=135 I C 645=9 Rang 624.

was attached to his presence on the record. Secondly, the same advocate, curiously enough, represented in the lower Court the appellant and defendant 7 although their interests directly conflicted. Now turning to defendant 8 (defendant 4's son), it is inexplicable how he came to be represented by the same advocate as represented respondent 27 (?). A glance at the decree will show how their interests conflicted. Our object in referring to these facts is to point out that in the lower Court no one thought that the sons possessed any interest whatsoever which required a separate representation. Thirdly, as already observed under the lower Court's judgment, the sons had no separate entity, which fact might well have misled the appellant. Strong grounds exist therefore in our opinion to induce us to exercise our discretion in favour of the appellant.

The question then is, what is the proper order to make? Defendant 5, as already observed, had died during the pendency of the suit in the lower Court. In this case, from the previous judgment of the High Court there was an appeal filed to the Privy Council by defendant 9 with whom we are not concerned at this stage. In that appeal defendant 5's sons (two in number) were brought on the record as his legal representatives. It has been held in 44 I A 218[5] that the substitution of a new party for one stage of a suit is effective for all future stages of that suit: we may therefore regard defendant 5's sons as having been constructive parties to the suit in the lower Court. We learn that one of these two sons has since died. We therefore direct the surviving son of defendant 5, defendant 7 and defendant 8 to be added as respondents. Notice will be issued to them immediately and the further hearing of the appeal is adjourned to 30th March 1937.

C.R.K./W.D. *Order accordingly.*

5. Brij Indar Singh v. Kanshi Ram, A I R 1917 P C 156=42 I C 43=44 I A 218=104 P R 1917=45 Cal 94 (P C).

* * **A. I. R. 1937 Madras 745**

FULL BENCH

BEASLEY, C. J., VARADACHARIAR AND KING, JJ

Commissioner of Income-tax, Madras.

v.

Dewan Bahadur S. L. Mathias —

Assessee.

O. P. No. 181 of 1936, Decided on 29th April 1937.

* * **(a) Income-tax Act (1922), S. 4 (2), Proviso 2 — Assessee owning coffee plantations in State — Harvested crops brought in British India to be dried and cleaned in factories and sold in British India by assessee's agents — Sale proceeds received and retained in British India — Income held accrued or arose in State within meaning of Proviso 2 to S. 4 (2).**

Receipt of produce in kind may well be spoken of as receipt or accrual of income at the place where the produce is received. [P 747 C 2]

The assessee owned coffee plantations in a State outside British India. While maintaining an office in the State to supervise the cultivation work, all the labour required for cultivation was received from British India and materials required for the estate, like manure, tools, etc., were purchased in British India. The harvested crops were brought to British India in their raw state to be dried and cleaned in the factories and sold there by the agents of the assessee. All the sale proceeds were received and retained in British India. A separate staff was maintained in British India to attend to all these operations :

Held: that the income arose or accrued in the State within the meaning of Proviso 2 to S. 4 (2), Income-tax Act, and the whole income derived by the assessee by the sale in British India of the produce of his coffee estates was exempt from taxation : *Commissioners of Taxation* v. *Kirk*, *(1900) A C 588, Rel. on; 5 I T R 116, Dissent.; Case law discussed.* [P 749 C 2]

(b) Income-tax Act (1922), S. 4 (1) and (2)— Clauses 1 and 2 are not mutually exclusive.

It is not reasonable to read Clauses (1) and (2) of S. 4, Income-tax Act, as mutually exclusive. Cl. 1 comprises 'receipts' falling under Cl. 2 as well, and when the facts of a case clearly bring it within the terms of Proviso 2 to Cl. 2, it is obviously a case which on the grounds of policy the Legislature intended to exempt. [P 748 C 2]

(c) Income-tax Act (1922), S. 42(3)—Clause 3 does not refer to person who sells produce of his own land.

Reading Cl. (3) of S. 42, Income-tax Act, as a whole, it is evident that it refers to a person who sells goods purchased by him and not to one who sells the produce of his own lands. [P 748 C 2; P 749 C 1]

* **(d) Income-tax Act (1922), S. 2 (1) — 'Agricultural income'—Scope of definition.**

The statutory definition of 'agricultural income' involves no artificial extension but merely embodies the significance attaching in a business sense to the word 'income' when applied to agriculture. [P 749 C 2]

M. Patanjali Sastri — for Commissioner of Income-tax.

T. R. Venkatarama Sastri and *M. Subbaraya Aiyar* — for Assessee.

Varadachariar, J.—The question referred to this Court for decision is whether, on the facts set out in the Commissioner's statement, any part of the income derived by the assessee from the produce of his coffee estates in Mysore is exempt from taxation under Proviso 2 to Cl. (2), S. 4, Income-tax Act.

The assessee who owns coffee plantations in the Mysore State is a resident of British India (Mangalore); and the case states that, while he maintains an office in the Mysore territory to supervise the cultivation work there, the labour required for the cultivation is recruited in Mangalore, materials required for the estate like manure, tools, spray materials, crop-bags, etc., are purchased at Mangalore, the harvested crops are brought to Mangalore in their raw state to be dried and cleaned there in the factories of Pierce Leslie & Co., and sold there by Pierce Leslie & Co., the selling agents of the assessee. As the sale proceeds are received and retained at Mangalore and a separate staff is maintained by the assessee at Mangalore to attend to the above operations, the Commissioner was of opinion that the assessee was liable to be taxed as one carrying on 'business' and receiving the income or profits thereof in Mangalore. As both S. 4 and S. 6 of Income-tax Act are qualified by the opening words "save as hereinafter (otherwise) provided", the point for determination is whether the assessee can claim exemption under Proviso 2 to S. 4 (2) and if so, to what extent. The Commissioner has expressed the opinion that Proviso 2 to S. 4 (2) has no application here, because the profits of the business are received in Mangalore and 'the agricultural processes carried on in Mysore' are not in themselves a source of income but merely 'an element in the business which produces the income'. In support of this view, he has relied on the decisions in 3 I T C 378[1] and 8 T C 193[2] at p. 204, but it must be observed that even in 3 I T C 378,[1] the Proviso now to be interpreted did not come up and could not have come up for consideration and there can be little doubt that but for that Proviso the assessee in the present case will be liable to be assessed in respect of the profits to the extent determined by the authorities. After this reference had been made, the scope and effect of the Proviso was considered by a Division Bench of the Calcutta High Court in 5 I T R 118,[3] and the judgment is a direct authority in favour of the Commissioner's view. We have carefully considered the reasoning in that judgment but, with all respect to the learned Judges, we are unable to follow that decision.

The basis of the Calcutta decision and of the Commissioner's opinion is that when a person who owns lands outside British India sells the produce of those lands in British India, no income, profits or gains can be said to arise or accrue until the produce is sold and that in such cases there is accordingly no room for the application of the Proviso which only relates to 'income . . . . . arising or accruing' in an Indian State. The learned Judges emphasize the distinction between the place where the income accrues and the source from which it accrues and point out that the Proviso is not concerned with the source. As a corrollary, they think that if the sale also had taken place outside British India, the income thus realized, even if subsequently received in British India, would be exempt as income from agriculture that had arisen or accrued in the State, within the meaning of the Proviso. Whatever may be said as to 'profits' or 'gains,' the view that 'income from agriculture' can be said to arise or accrue only when and where the produce is sold and converted into money seems to us, with all respect, difficult to reconcile with the reasoning in (1900) A C 588.[4]

Reliance was placed before us in this connexion, on the observation of the Judicial Committee in 59 Cal 1343,[5] that the term 'income' in the Income-tax Act connotes a 'periodical monetary return coming in with some sort of regularity or expected regularity from definite sources; but their Lordships were then laying

1. Ponnuswami Pillai v. Commissioner of Income-tax, Madras, (1929) 3 I T C 378.
2. Smith & Co. v. Greenwood, (1922) 8 T C 193.
3. *In re* Mohanpura Tea Co. Ltd., (1937) 5 I T R 118.
4. Commissioners of Taxation v. Kirk, (1900) A C 588=69 L J P C 87=83 L T 4.
5. Commissioner of Income-tax, Bengal v. Shaw Wallace & Co., A I R 1932 P C 138=136 I C 742=59 I A 206=59 Cal 1343 (P C).

emphasis not on the distinction between receipt in money and receipt in kind but between recurring receipts from a business continuously carried on and an occasional receipt of the kind then in question. On the other hand, they refer in the course of their judgment to income being likened to the 'crop of a field.' In 12 Pat 318[6] at p. 336, the Privy Council affirms that "a receipt in kind may be taxable income"; they only add that what is received in kind should be money's worth. It was admitted before us by Mr. Patanjali Sastri that in respect of the produce of land in British India, the Income-tax Act recognizes the receipt of income or rent in kind as receipt or accrual of income; it is difficult to see why as a matter of language, the expression 'receipt' or 'accrual' of income should not have the same significance when used in connexion with the receipt of produce from lands outside British India.

In (1900) A C 588,[4] the question arose as to the assessment to be levied in New South Wales on a company which extracted ore from mines owned by it in New South Wales and converted it into a merchantable product there but carried the product to Victoria for sale, the sale proceeds being received either in London or in Melbourne. The Judicial Committee overruled the view taken by the New South Wales Court that "the income was not earned in New South Wales because the finished products were sold exclusively outside the colony." Referring to the several steps which had to be gone through, from the extraction of the ore to the receipt of moneys on the sale of the merchantable product, their Lordships held that to the extent of two of the steps, viz. extraction of the ore from the soil and conversion thereof into a merchantable product, "the income was earned and arising and accruing in New South Wales". In the Calcutta case, the learned Judges distinguish this decision as turning on the language of the particular statute and take it as only relating to the source from which the income accrued and not to the place where it accrued. With all respect, it seems to us that this way of distinguishing (1900) A C 588,[4] fails to take note of certain portions of the argument as well as of the judgment. In the New South Wales Act there was an exemption [S. 27 (3)] to the effect that no tax shall be payable in respect of income earned outside the colony of New South Wales. On the strength of this provision it was contended before their Lordships, on behalf of the assessee, that 'the income was derived from the sales, that is from the business carried on outside the colony.' This argument they repel with the remark that it is fallacious as 'leaving out of sight the initial stages and fastening attention exclusively on the final stage in the production of the income.' These relevant parts of that judgment do not seem to us to turn on any peculiarity of the New South Wales Act but to recognize that as a matter both of language and of business, receipt of produce in kind may well be spoken of as receipt or accrual of income at the place where the produce is received.

Mr. Patanjali Sastri had to concede that on the principle of the decision in (1900) A C 588,[4] the assessee in this case might well be held by the Mysore State to have received the income within that state, but he contended that the remedy for any hardship arising from that possibility must be had by invoking the provisions of the Act relating to double taxation. We are not concerned here with any question of double taxation or hardship caused thereby, but we refer to this aspect of the matter only to point out that if for assessment in Mysore, the assessee can in the ordinary sense of words (and not by any fiction of law) be held to have received the income in Mysore, there is no reason why for purposes of the second Proviso to S. 4 (2) the income should not in this case be held to have arisen or accrued in Mysore. The decision in 59 Cal 1226[7] does not materially help the referring officer in this connexion. The learned Judges recognized in that case that part of the profits might have been 'earned' elsewhere, but they held that if the whole is 'received' in British India, no portion could escape taxation unless there be a convention to limit the claim of one State against the nationals of others. The second Proviso is in a sense the result of such a convention; the case cannot throw light on the interpretation of the scope of that convention.

6. Commissioner of Income-tax, Bihar and Orissa v. Kameshwar Singh of Darbhangha, A I R 1933 P C 108=142 I C 437=60 I A 146=12 Pat 318 (P C).

7. *In re* Port Said Salt Association Ltd., A I R 1932 Cal 626=137 I C 340=59 Cal 1226=55 C L J 182=36 C W N 563 (S B).

Reliance was also placed by Mr. Sastri on the observation in 4 I T C 40,[8] to the effect that the place where the sale is effected and the price realised is the principal place, if not the place, of the accrual of profits. That statement must be understood in the light of the fact that the case then under consideration related to the liability of a British Indian assessee who only purchased goods in British India but sold them outside and never received or brought the proceeds into British India. Following 2 T C 149,[9] the learned Judges held that the mere purchase of goods will not amount to the carrying on of trade (except in the cases provided for in S. 42) and in the circumstances there was nothing like the receipt of income or gains or profits in British India. There was no question in that case of the receipt of produce from one's own estate; but the way the learned Judges deal with (1900) A C 588[4] shows that if the facts before them had been similar to those in (1900) A C 588,[4] or to those in the present, they would have held that the receipt of the produce would amount to receipt of income.

Accepting our interpretation of the decision in (1900) A C 588,[4] Mr. Patanjali Sastri advanced an alternative argument. Assuming that the income might be held to have 'accrued' or 'arisen' to the assessee in Mysore, he maintained that it might nevertheless be held to have been 'received' by the assessee in British India not merely within the meaning of Cl. (2) of S. 4, but even within the meaning of the first part of Cl. (1). The purpose of this argument was in any event to exclude the operation of the second Proviso which is worded as a Proviso only to sub-s. (2) and not to sub-s. (1). The first clause deals with two kinds of receipt in British India; one, receipt in the ordinary sense of that word and the other in an artificial or extended sense, and the second clause defines the artificial or extended meaning. If the second Proviso qualifies only this 'artificial' sense of receipt, it would have no operation in cases where the receipt of income in British India can be held to amount to 'receipt' in its natural or ordinary sense. In support of the contention that income may 'accrue' or 'arise' in one place and yet be held to have been 'received' in another place, he relied on the decision of the Judicial Committee in 54 Mad 691.[10] We may observe at the outset that in 54 Mad 691[10] their Lordships were not called upon to decide whether the 'receipt' of income by the company was a receipt in the grammatical sense or in the extended or artificial sense, because the company's contention was that there was no receipt at all by or in their behalf, in British India and that they received the income only in London. If that decision gives us any guidance at all in the present case, it may well be held that on the facts here, the receipt of the produce in Mysore itself by the assessee's men on the spot will correspond to the receipt by Mr. Rothera in 54 Mad 691,[10] and the assessee's receipt of income in British India can only be a receipt in the secondary stage, just like the receipt by any Nattukottai Chetty here of profits earned by a business carried on on his behalf in foreign countries. Even apart from this view of the facts, it does not seem to us necessary or reasonable to read Cls. (1) and (2) of S. 4 as mutually exclusive. The first clause comprises 'receipts' falling under Cl. 2 as well and when the facts of a case clearly bring it within the terms of Proviso 2, it is obviously a case which on the grounds of policy the Legislature intended to exempt, and it does not seem to us right to deprive the subject of this exemption by holding that the 'receipt' in British India is in the primary sense and not in the secondary sense, especially when Cl. 2, as well as Proviso 2 speak only of 'accruing' or 'arising' outside British India and not also of being 'received' outside British India. There can be no doubt that in this case the income 'accrued or arose' without British India and was 'received or brought into British India'. We would give the same answer to the argument founded on Cl. (3) of S. 42 which provides for the taxability in British India of profits or gains from the sale in British India of merchandise exported to British India from outside. Reading the clause as a whole, it is evident that it refers to a person who sells goods purchased by him and not to one

8. Jiwan Das v. Commissioner of Income-tax, Punjab, A I R 1929 Lah 609=117 I C 657=10 Lah 657=30 P L R 489=4 I T C 40 (FB).

9. Sulley v. Attorney General, (1860) 2 T C 149=5 H & N 711=29 L J Ex 464=6 Jur N S 1018=8 W R 422=2 L T N S 439=120 R R 793.

10. Pondicherry Railway Co. v. Commr. of Income Tax Madras, A I R 1931 P C 165=132 I C 619=58 I A 239=54 Mad 691 (P C).

who sells the produce of his own lands. It is significant that the clause deals only with 'profits' or 'gains' and not with income generally.

The circumstances in which Proviso 2 came to be inserted do not suggest any intention to make the kind of differentiation now insisted on by the referring officer. Prior to 1933, it was only 'profits or gains of business' outside British India that were taxed when brought into British India. The amending Bill of 1932 sought to make all income (not merely profits from business) accrued outside British India taxable if and when brought into British India ; the bill therefore sought to amend only Cl. (2) of S. 4. The kind of income exempted by Proviso 2 is undoubtedly foreign income and when the Legislature resolved to exempt foregin income of the particular kind dealt with in that proviso, it seems to have been thought sufficient to enact the exemption as a Proviso to Cl. 2 which was then being amended for the very purpose of including 'foreign income' generally. We are accordingly of opinion that the assessee in this case is entitled to claim the benefit of Proviso 2 to S. 4 (2). It remains to determine the extent of the exemption which the assessee can claim. It was contended on his behalf that the whole of the price realised by him by the sale of the Mysore coffee in Mangalore should be excluded, but it was maintained on behalf of the referring officer that the assessee is at best only entitled to a deduction of the value of the coffee beans in a raw state in Mysore. The statement of the Commissioner and an affidavit of Mr. Kirkbride, Manager of Pierce Leslie & Co. set out in detail what happens to the beans between the time when they are picked and the time they are actually sold. If the processes subsequent to the picking can be regarded as in the nature of manufacture, the assessee will, on the analogy of the rule applicable to tea (*see* 48 Cal 161[11] and R. 24 of the rules framed under S. 59 of the Act), be entitled to deduct only the agricultural part of the income. But the affidavit states that in the case of coffee, the process is not in the nature of a 'manufacturing' process, but only a process 'ordinarily employed' by the cultivator to render the produce fit to be taken to the market : *see* S. 2 (1) (b) (ii). The learned counsel appearing for the assessee definitely asserted that in respect of coffee grown on assessed lands in British India, this is the view adopted in practice by the Income-tax authorities and we have been shown nothing to the contrary. We have accordingly come to the conclusion that if the assessee can claim to be treated as on the same footing with one selling coffee grown on one's own land in British India, he is entitled to exemption in respect of the whole price realised by the sale of his coffee. This leads us to the consideration of the question whether the exemption under Proviso 2 to S. 4 (2) is of the same scope as the exemption applicable to 'agricultural income' as defined in S. 2 (1) of the Act.

Mr. Patanjali Sastri is certainly right in his contention that the statutory definition of 'agricultural income' does not in terms apply to cases falling within the proviso now in question. If the definition in the Act is one which is intended to include what will not otherwise be ordinarily comprehended in the meaning of the expression 'agricultural income', the assessee in the present case cannot claim the benefit of the full scope of the definition, because it applies only to income derived from lands in British India. But we are inclined to agree with the learned counsel for the assessee that the statutory definition involves no artificial extension, but merely embodies the significance attaching in a business sense to the word 'income' when applied to agriculture. As pointed out by Rowlatt, J. in (1924) 2 K B 432,[12] if a farmer is entitled to sell his produce in the village, he is equally entitled to take it to a market town and it cannot be said that he is 'commencing a new business from the time when he took his crops from the farm on the way to market.' The same principle must apply to what he may do to make it fit for the market unless it involves such a distinct process as to justify its being regarded as in the nature of a manufacturing process. In the Court of Appeal, Scrutton, L. J. took the view that even if cultivation of land to grow produce for the purpose of sale is to be regarded as a trade, the State, by its separate system of taxing land, may

11. Killing Valley Tea Co. v. Secretary of State, A I R 1921 Cal 40=61 I C 107=48 Cal 161=32 C L J 421.

12. Back v. Daniels, (1924) 2 K B 432=93 L J K B 929.

reasonably be taken not to have intended to deal with it as a trade: (1925) 1 K B 526[13] at p. 543. Mr. Sastri pointed out that our conclusion would practically amount to reading the proviso in S. 4 into the definition of 'agricultural income' when the Legislature had not (as it might well have done) included in that definition income from assessed lands in Indian States. Having regard to the manner in which amendments have been from time to time inserted in the Act, the argument founded on the particular place where an amendment is inserted cannot have the same force here as in the case of a provision which formed part of the original scheme of the Act. As we have already explained, S. 4 (2) might well have been thought to be the proper place for the insertion of the proviso. On the other hand, we have not been shown any reason why the proviso was inserted at all, and why it should have been limited to lands paying assessment to an Indian State if it was not the intention to treat the owners of such lands as on the same footing as owners of assessed lands in British India. The policy clearly was to avoid double taxation ; not double taxation in the sense of payment of income-tax in two places, but of taxing a person who in respect of the same subject matter has already paid a reasonably heavy land tax, whether in British India or in an Indian State. Our answer to the question referred is that the whole income derived by the assessee by the sale in Mangalore of the produce of his coffee estates in Mysore is exempt from taxation. The assessee will be entitled to Rs. 250 for his costs and also to refund of the deposit of Rs. 100.

C.R.K./V.B.B. *Reference answered in the affirmative.*

13. Back v. Daniels, (1925) 1 K B 526=132 L T 455=9 Tax cas 183=69 S J 160=41 T L R 162=94 L J K B 304.

A. I. R. 1937 Madras 750

CORNISH AND VARADACHARIAR, JJ.

Board of Commissioners for the Hindu Religious Endowments, Madras — Appellant.

v.

Parasaram Veeraraghavacharlu and *others* — Respondents.

Appeal No. 254 of 1934, Decided on 19th February 1937, against decree of Dist. Judge, Guntur, in O. S. No. 8 of 1932.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 57 (3)—Suit under—Devadayam inam — Temple ceasing to exist but another deity worshipped — Inam confirmed to existing temple — Scheme for proper administration of temple and vesting properties in trustees—Suit by Archakas under S. 57 (3) for modification or cancellation of such scheme claiming inam lands as their own—Civil Court held had power to decide questions of title to inams—Destruction of old temple or old idol held did not put an end to Devadayam character of inam — Archakas held could not disannex suit inams from religious purposes for which they were intended.

The Hindu Religious Endowments Board framed a scheme in 1929 for the proper administration of the affairs of a Vishnu temple. The scheme purported to deal with the temple as the temple of Sri Gopalaswami and it vested certain properties in trustees to be appointed for the temple. The Archakas, who were in possession of these properties, contended even before the scheme was framed that the temple of Gopalaswami in that village had fallen into ruins before 1819, that there was no such temple now in existence and that the Board was confusing it with the temple built by villagers between 1819 and 1847 and dedicated to a different deity named Chennakesavaswami. They further contended that the Board had no jurisdiction to frame a scheme for a temple which had ceased to exist or to deal with endowments alleged to belong to such a temple. As regards the properties in question they contended that they were entitled thereto in their own right, that the existing temple had no right to these properties and the inam should not be held to be the property of the temple. They then filed a suit under S. 57 (3), Madras Hindu Religious Endowments Act, praying for the cancellations of the scheme or its modification. It was found that instead of resuming the inam when the old temple ceased to exist, the inam was confirmed to the existing temple :

Held : that the civil Court had power to decide questions of title to the inams and could not in any view decline to adjudicate on the question of title when it was raised before it. There was a temple admittedly in existence in the village and there could be no doubt that it was the management of this temple that the Board intended to regulate by the proposed scheme. The description of the temple as that of Gopalaswami could have been overlooked or rectified as at best a mere misdescription : *A I R 1932 Mad 470, Disting.*; *A I R 1936 Mad 449* and *A I R 1937 Mad 106, Ref.* [P 752 C 1, 2]

Held further : that the destruction of old idol or of the old temple had not the effect in law of putting an end to the Devadayam character of the inam : *37 Cal 128, Rel. on.* [P 753 C 1]

Held also : there was evidence sufficient enough to prove that in 1860 these inams were being enjoyed by the archakas as being attached to the suit temple and that the worship therein was described as the worship of Sri Gopalaswami. The archakas could not disannex the suit inams from the religious purposes for which they were intended. [P 753 C 2; P 754 C 2]

(b) Hindu Law — Religious endowment — Temple and its endowments — Purpose of making gift to temple mentioned.

The principle of legal personality of an idol and of the vesting of property in such personality cannot be taken quite literally. The purpose of making a gift to a temple is not to confer a benefit on God but to confer a benefit on those who worship in that temple, by making it possible for them to have the worship conducted in a proper and impressive manner. This is the sense in which a temple and its endowments are regarded as a public trust : *12 Bom 137, Ref.; 37 Cal 128 (FB), Rel. on.* [P 754 C 1, 2]

K. Subba Rao — for Appellant.

V. Rangachari — for Respondents.

Varadachariar, J.—This is an appeal by the Madras Hindu Religious Endowments Board against a decree of the District Court of Guntur cancelling a scheme framed by the Board in 1929 for the proper administration of the affairs of a Vishnu temple at Manthena, a village in the Gannavaram taluk of the Kistna District. The scheme purported to deal with the temple as the temple of Sri Gopalaswami (or Venugopalaswami) and it vested certain properties in trustees to be appointed for the temple. The plaintiffs (respondents 1-3) who were in possession of these properties raised a contention, even before the scheme was framed, that the temple of Gopalaswami in that village had fallen into ruins before 1819, that there is no such temple now in existence and that the Board was confusing it with the temple now in existence which was built by the villagers between 1819 and 1847 and dedicated to a different deity named Chennakesavaswami. Relying on the decision in 55 Mad 636,[1] they contended that the Board had no jurisdiction to frame a scheme for a temple which had ceased to exist or to deal with endowments alleged to belong to such a temple. As regards the properties in question, they contended that they were or had become absolutely entitled thereto in their own right, that the existing temple had no manner of right to these properties, and that in any event the inam (which according to them comprised only the melwaram) should not be held to be the property of the temple as it was their own service inam held on condition of Archakatvam service. As the Board framed a scheme, ignoring the above contentions, the plaintiffs filed this suit under S. 57 (3), Madras Hindu Religious Endowments Act of 1927, praying for the cancellation of the scheme or its modification by the omission of all the provisions therein relating to the A, B and C scheduled lands and for an injunction restraining the Board and the Temple Committee from putting the scheme into force.

The plaint repeated the contentions above summarized. The written statement filed by the Board denied that 'the suit temple became extinct before Fasli 1229' and added that 'its existence was recognized by the Inam Commissioner and it exists even today'; neither the denial nor the averment about the 'suit temple' is very informing. It was not the case of the plaintiffs that there was no Vishnu temple in existence in the village, but they contended that the temple of Gopalaswami with which the Board purported to deal had long ago ceased to exist and that the newly built temple now found in the village belonged to another deity known as Chennakesavaswami. Relying on references made in some documents even to the existing temple as Gopalaswami temple, the Board at one stage of this litigation maintained that such description of the temple was right; but it was later on conceded on its behalf, that the suit might be proceeded with on the footing that the idol now found in the temple is that of Sri Chennakesavaswami. This difference in the embodiment of the deity has all along been insisted on by the plaintiffs as involving important legal consequences. The allegations in the plaint as to the plaintiffs' title to the suit properties and as to the nature of their interest in the said properties were also traversed by the written statement.

A large number of issues were framed by the District Judge of Kistna when this suit was pending on his file with a number of similar suits. Later, the suit went to the District Court of Guntur where the issues seem to have undergone revision. One District Judge (Mr. P. C. Lobo), before whom the case came on for trial ruled that questions of title to the inams are foreign to the scope of the suit under S. 57 (3), Religious Endowments Act, because the Board itself could not adjudicate on such questions under the guise of settling schemes. Mr. Chandrasekhara Iyer who finally heard the suits accordingly restricted himself to the issues numbered by him as XX (a), (b) and (c). We may observe in passing that even sub-heads (b)

1. Board of Commissioners for Hindu Religious Endowments, Madras v. Rukmini, A I R 1932 Mad 470=137 I C 758=55 Mad 636=62 M L J 504.

and (c) do raise the question of the title to the properties; further, the discussion of sub-head (a), though it purports to raise only a question of jurisdiction, involves, as will presently appear, a consideration of the title to the suit lands. Once it was found that the old temple of Gopalaswami had ceased to exist and that the idol in the present temple was that of Chennakesavaswami, the learned District Judge came to the conclusion that the existing temple is a 'new institution' one 'entirely different from the old temple' and on that footing he held that the principle of the decision in 55 Mad 636[1] would come into operation. "The scheme must go" he said "as having been framed to govern a non-existing temple". Towards the end of the judgment, he also recorded findings to the effect that the subsequently constructed temple of Sri Chennakesawaswami 'has nothing to do with the suit inams' and that the plaintiffs were not estopped from denying the continuance of Gopalaswami temple or the continuance of their services in a temple of that name.

We are not able to concur in the view taken by the lower Court that the principle of 55 Mad 636[1] is applicable to the circumstances of the present case. There was in that case no temple in existence at the time the Board tried to exercise its powers and this Court held that the Board could not claim to exercise control over certain properties merely on the ground that they were attached to a temple once upon a time. It will be noticed that the learned Chief Justice took care to restrict his observations to a case where the temple had permanently ceased to exist and there was no apparent intention of bringing it into existence again. Here, we have a Vishnu temple admittedly in existence in the village and there can be no doubt that it is the management of this temple that the Board intended to regulate by the proposed scheme. The description of the temple as that of 'Gopalaswami' could in other circumstances have been overlooked or rectified as at best a mere misdescription; the real matter in controversy between the parties is as to whether the Board was entitled to treat the suit inams as belonging to the existing temple when framing a scheme for the administration of the temple and its endowments. This way of stating the point for decision must itself suffice to show the inappropriateness of wholly excluding questions of title from the purview of proceedings before the Board or before the Court in relation to schemes for the management of temples; indeed it seems to us impossible to exclude questions of title. The allegations in the plaint and the issues framed in this case raise intricate points bearing upon the question of title; and unless the Court is to avoid deciding the real point in controversy between the parties, we do not see how these issues can be struck out. The suit is after all one filed in a Court of plenary jurisdiction and though its institution became necessary because of the framing of a scheme by the Board, we do not see in that circumstance sufficient justification for the view that the trial of the suit must be limited in the manner laid down in the judgment of the lower Court. Even as regards the power of the Board, it seems to us incorrect to say that it cannot deal with a question of disputed title. As observed in 43 M L W 409[2], it may not always be possible to frame a scheme without coming to some conclusion as to the income available or as to the properties to be managed: *See also* 24 Bom 50[3] at p. 54 and A I R 1937 Mad 106.[4] Any view taken by the Endowments Board cannot of course affect third parties in hostile possession of the properties nor can it always be final even as against parties appearing before the Board. The civil Court cannot in any view decline to adjudicate on the question of title when it is raised before it. We have accordingly heard arguments on the question whether the suit inams can be held to belong to the existing temple of Sri Chennakesavaswami.

We may briefly dispose of the plaintiffs' claim of absolute private right, based on the alleged grant from the Zamindar or from Mr. Russell. The lower Court has rightly declined to accept the story of a recognition by Mr. Russell of a private right to the property in the plaintiffs' predecessors, after the destruction of the old temple. No such claim was put forward during the inam inquiry and the confir-

2. Anjaneya Sastri v. Kothandapani Chettiar, A I R 1936 Mad 449 = 164 I C 615 = 43 M L W 409.
3. Chotalal v. Manohar Ganesh, (1900) 24 Bom 50=2 Bom L R 516.
4. Sitaram Dass Bavaji v. Madras Hindu Religious Endowments Board, A I R 1937 Mad 106=167 I C 426=I L R (1937) Mad 197=(1937) 1 M L J 475.

mation of the inam to the temple negatives the truth of this basis of claim. Any documents obtained by the plaintiffs' predecessors from the zamindar's officials after the date of the permanent settlement (e. g. Exs. E, K and L), whether on some representation as to the alleged order of Mr. Russell or otherwise, cannot affect the right of the temple to the inam. Though the inam was granted by Raja Appa Row, the grant was made by the Raja at a time when he represented the sovereign power; after the permanent settlement, his successors had no power to interfere with pre-settlement Devadayam Inams. The plaintiffs' claim of prescriptive title is equally untenable. They and their predecessors-in-title have admittedly been all along archakas in charge of the existing temple and there have been no other trustees; the result is that if the inams could otherwise be regarded as belonging to this temple, it is not open to them to plead that their possession was adverse to the temple.

The contention mainly pressed before us on behalf of the plaintiffs accordingly was that the suit inams were not granted or confirmed to Chennakesvaswami and as this idol is a different juridical person from the old idol (of Gopalaswami) which had disappeared, this idol cannot claim to be the owner of properties which once belonged to the other idol. It has not been suggested that the distruction of the old idol or of the old temple had the effect in law of putting an end to the Devadayam character of the inam (37 Cal 128[5] at pp. 131 and 167), but it has been argued that property belonging to one idol cannot be claimed by a new idol unless it has been consecrated with the same name. This contention seems to us to ignore the effet of the inam proceedings and to rest on a too literal interpretation of the observation of the Judicial Committee to the effect that the endowments of a temple are in an 'ideal' sense vested in the idol.

While it is fairly certain that the old temple ceased to exist somewhere about 1819, the evidence does not enable us to find definitely when the old idol, that of Venugopalaswami ceased to be worshipped. Ex. C of 1847 mentions that in the newly constructed temple the "image of Chennakesawaswamy Varu has been installed". But in the inam papers of 1859 and 1860 reference continues to be made to Gopalaswami Varu even while the destruction of the old temple and the construction of a new one are noted. Some of the inam papers purport to be signed by one Vuppuluri Anthayya who has also signed Ex. C. It cannot therefore be said that the statement in the inam papers must be the result of ignorance; nor do we see sufficient reason for attributing any fraudulent purpose to anybody and assuming that a false statement must have been made. In Ex. XIV, Column (ii) the person then in enjoyment of the inam (admittedly a predecessor-in-title of the plaintiffs) is described as "Archaka of Sri Gopalaswami Varu". It was suggested by respondent's learned counsel that this might be read as merely meaning that he was formerly the archaka of that deity when that deity was in existence. We do not think that that will be a fair reading of the document, because Col. (5) clearly implies that Gopalaswami Varu was regarded as the present enjoyer. Ex. 4 mentions in Col. (8) that the pagoda was then well kept up and there again it is referred to as Gopalaswami Pagoda. The recommendation of the inam authorities was that the inam might be confirmed to the pagoda and that was accordingly done. This can only mean that the authorities confirmed it in favour of the existing pagoda. In Ex. C there is a reference among the heads of remuneration to be received by the archaka, to 'income arranged in the village'. We cannot agree with the contention that this merely refers to the two heads next described. We rather think that it is an independent head, and in all probability refers to the suit inams. There can thus be no reasonable doubt that in 1860 these inams were being enjoyed by the archakas as being attached to the suit temple and that the worship therein was described as the worship of Sri Venugopalaswami. The learned District Judge found it difficult to say when the idol of Venugopalaswami ceased to be worshipped in the village. Referring to the existence of a broken image of Venugopalaswami at a distance of a furlong or a furlong and a half from the temple, he observes that :

> It is possible that this image gave the original name to the temple and it may be that this idol was the presiding deity at one time in the premises occupied by the present temple and that it had to be cast away as it happened to become mutilated by accident or design.

5. Bhupathi Nath v. Ram Lal, (1910) 37 Cal 128=3 I C 642=10 C L J 355=14 C W N 18 (F B).

He is however unable to fix the time when this might have happened; nor does he feel sure whether the present temple was built on the site of the old temple or in another place. But, as already stated, he was of opinion that the case could be decided on the footing that with the disappearance of the old temple and the old idol, the old institution ceased and that the present temple must be regarded as a new institution. He strongly condemned the attempts of the plaintiffs and their predecessors to disannex the suit inams from the religious purposes for which they were intended; but he felt reluctantly obliged to come to the conclusion that the new temple could not claim title to the suit inams. In this state of the record, we propose to deal with the question of title on both hypotheses, namely that the idol of Gopalaswami might have ceased to be worshipped even prior to the inam enquiry (indeed prior to the construction of the inam enquiry), or its worship might have come to an end only after 1860. This latter alternative would in the light of Ex. C imply that both the idols, namely that of Gopalaswami and of Chennakesavaswami must for some time have been worshipped in the existing temple.

Turning now to the contention advanced on behalf of the plaintiffs that, as Sri Chennakesavaswami was according to the Agama Sastras a different manifestation of the deity from Sri Venugopalaswami, the two idols must be regarded as different juridical persons and that no claim could be made by or on behalf of Sri Chennakesavaswami to the inams which had been granted for the worship of Sri Venugopalaswami, we may state that we are prepared to assume that according to the Agamas there are well recognized distinctions based on "murti-bheda" (difference of form) with corresponding difference in the "dhyana-sloka" (the manner of contemplation). But we are not prepared to hold that from this difference the legal result contended for on behalf of the plaintiffs necessarily follows. The principle of the legal personality of an idol and of the vesting of property in such personality cannot be taken quite literally. Observations to that effect were made by the Judicial Committee in some cases only with a view to emphasise the idea that the endowments of a temple are not vested in the trustees but are only managed by him. The judgments delivered by the Full Bench in 37 Cal 128[5] (*see* particularly pp. 140, 153, 155, 161 and 168), point out the limitations to that theory of vesting and the incongruities to which a literal adherence to it must lead. As explained in that case, the purpose of making a gift to a temple is not to confer a benefit on God but to confer a benefit on those who worship in that temple, by making it possible for them to have the worship conducted in a proper and impressive manner. This is the sense in which a temple and its endowments are regarded as a public trust (*see* 12 Bom 137[6] at p. 147.)

Looking at the facts of this case from that point of view, the true position is that as the inams in question were granted by the then sovereign authority for the conduct of 'Nitya Naivedya and Deeparathana' in the Vishnu temple then in existence in the suit village, the grant was in substance one intended to afford facilities for the residents of the village to carry on the worship of Vishnu. As the inam was by its terms one to enure only so long as the temple existed (*see* Col. 10 of Ex. F), it was open to the State to resume it when the old temple ceased to exist. But, by the date of the inam commission enquiry, a new temple had been built and the worship of Vishnu (under whatever name) was being carried on there. The authorities did not therefore think it right to resume the inam but preferred to allow it to be used for the conduct of the worship in the newly built temple and accordingly confirmed the inam. It seems to us an unnecessary importation of legal fiction to ignore these broad facts and to hold that the disappearance of a particular image from the temple (whether before or after the inam proceedings) had the effect of disannexing the inams from the existing temple, though worship continued to be carried on in it for the benefit of the villagers. We set aside the finding of the lower Court on this point. In the result, the appeal is allowed, the decree of the District Court is set aside and the suit is remanded to that Court for trial and disposal, in the light of the foregoing observations. Costs to abide. Refund of stamp duty on the memorandum of appeal.

C. M. A. No. 321 of 1932.

We understand that in view of the pendency of A. S. No. 254 of 1934, this C. M. A. was not remanded when the rest

6. DeSouza v. Vaz, (1888) 12 Bom 137.

of the connected batch were remanded: *See* 58 Mad 764.[7] Now that we are remanding the main suit itself, this miscellaneous appeal will also be remanded to the lower Court to be dealt with in the light of the decision in 58 Mad 764[7] and of our observations in the judgment just delivered in A. S. No. 254 of 1934. Costs to abide. At the request of the respondents' learned counsel, we wish to make it clear that we have not decided or even heard arguments on the question whether the inam was granted to the temple or to the archaka. That is raised by one of the issues in the case and will be dealt with by the lower Court in due course. We have only dealt with so much of the case as raised the question whether the present temple can claim the inams at all, even if it be assumed that the inams had been granted to the old temple.

C.R.K./R.W. *Appeal allowed.*

7. Ramiah v. President, Hindu Religious Endowments Boards, Madras, A I R 1935 Mad 396=157 I C 818=58 Mad 764=68 M L J 494.

A. I. R. 1937 Madras 755

MOCKETT AND HORWILL, JJ.

Kamsala Muneyya and *another*
Accused.
v.
Emperor.

Criminal Appeals Nos. 670 and 671 of 1936 and Referred Trial No. 149 of 1936, Decided on 8th April 1937.

(a) Criminal Trial—Confession — Object of questions set out in R. 85 of Criminal Rules of Practice stated—Other questions to and statements made by accused showing that confession was voluntary—Confession cannot be rejected merely because formal question was not asked.

The object of putting the questions set out in R. 85 of the Criminal Rules of Practice is to enable the Sub-Magistrate to be quite sure that the statement was a voluntary one; and if one can be sure from the other questions and statements made by the accused that the confession was voluntary and was not brought about by coercion and inducement, the confession cannot be rejected merely because a formal question was not asked. [P 757 C 2]

(b) Criminal Trial—Confession—Magistrate removing accused from police influence and after warning him that he is not bound to make confession, satisfying himself that confession was voluntary — Mere fact that some police officer at or soon after arrest of accused told him to make confession before Magistrate is no proof that he was forced to make confession.

It is most unlikely that any accused person of his own accord would ask that his confessional statement should be recorded by a Magistrate. When an accused person makes a statement to the police, one would expect the police, as a general rule, to suggest to the accused person that he should make that statement before a Magistrate, and it is only after he expresses his willingness to make a statement before the Magistrate that a request is made by the police to the Magistrate to record the confession. It is then the duty of the Magistrate to remove the accused person from all police influence, to warn him that his statement will be used against him, to give him time to think over the consequences of such a confession, and to satisfy himself that the statement made was a voluntary one. Where this is done, the mere fact that some police officer, at or soon after the arrest of the accused, told him to make a confession to the Magistrate is no proof that he was forced to make the statement. [P 758 C 2]

(c) Criminal Trial—Confession—Retracted confession—Considerable circumstantial evidence connecting accused with murder—Judge is entitled to use retracted confession of co-accused to remove any doubts regarding guilt of accused.

Obviously, a retracted confession has little evidentiary value against a co-accused when compared with the evidence of an accomplice given on oath which can be tested by cross-examination; but when there is considerable circumstantial evidence connecting the accused with the murder, the Court is entitled to use the confession of a co-accused to remove any doubts that might still linger in its mind whether, in spite of the fact that the accused has been identified, that he was seen both before and after the offence under suspicious circumstances, yet by some chance he may not have taken part in the murder: *28 Cal 689, Foll.; Case law discussed.* [P 760 C 1]

K. S. Jayarama Ayyar for *G. Gopalaswami* and *V. L. Ethiraj* for *V. Sankaran* — for Accused Nos. 1 and 2.

Parakat Govinda Menon for *Public Prosecutor* — for the Crown.

Horwill, J.—The two appellants have been convicted of the murder of Pedda Konda Reddi, a member of the Cuddapah District Board, at about 7 P. M. on 11th October 1935, at a spot just east of Cuddapah town and within a short distance of the Kondayapalli Kunta, the Government Hospital, the High School, and the Cuddapah-Rachinnayapalli Road. P. W. 2 was with Pedda Konda Reddi when the murder was committed. On that day he had come to Cuddapah to make some purchases and on his way home called at the house of a friend of his, Mr. C. L. Narasimha Reddi, who was a District Board member, and there met the deceased. They remained at the house of Narasimha Reddi until about 6 P. M. and then left together for Pakirpalli which is about 1½ miles from Cuddapah and is the

village of Pedda Konda Reddi. The way to Pakirpalli lies along a footpath through Kondayapalli Kunta. Just as they were approaching the spot where the tank bund meets the footpath, they met two men, one of whom was dressed in the ordinary garb of a Hindu and the other in the tarbush and pyjamas of a Mahomedan. P. W. 2 was then about four yards behind the deceased. Just as these two men passed Pedda Konda Reddi, they turned and attacked him with billhooks and hacked him mercilessly to death. The witness remonstrated but the man in Mahomedan costume advanced to attack him. He pleaded for his life and when the man in Mahomedan dress returned to give some final blows to the deceased, the witness availed himself of the opportunity to run away. Some voices from a well near by in the bed of the tank incited the assailants to attack this witness also; but he ran in the direction of the town, and before his pursuers could catch him, others called out enquiring what had happened; and so his pursuers turned back before he actually reached the town. Panic-stricken, the witness ran towards the hospital, accompanied on the last part of his flight by P. W. 3 who was asking him what had happened. At the hospital he gave out his story to P. W. 3 and to an ayah of the Government Head quarters Hospital (P. W. 4). Soon afterwards he made a formal complaint, Ex. B, to the police.

In his complaint he described one of the assailants of the deceased as wearing trousers with a Mahomedan cap, of dark complexion, of quick movements, and of medium size. Of the other man he had nothing to say except that he was wearing a cloth. Two days later, on 13th October, this witness was examined under S. 164, Criminal P. C., by the local Sub-Magistrate to whom he gave a very detailed statement (Ex. C) of what had occurred; and that statement agrees very closely with his evidence in the Sessions Court. Both in Ex. B and in Ex. C he said that he could identify the two persons who attacked the deceased and threatened him, adding in Ex. C that it was a full moon night. The calendar shows that the 11th was the day before the full moon and so, unless there were any clouds at the time when the offence was committed, there was a considerable amount of moonlight. There can be no doubt at all that P. W. 2 was an eye-witness of the murder, and in this Court the presence of P. W. 2 at the scene of offence when the murder was committed has not been disputed. He fled panic stricken to the town from the tank bund, although an elderly and corpulent man, and P. Ws. 3 and 4 who saw him immediately afterwards speak to his state of mind when they first saw him. Immediately afterwards he gave an outline of the attack to the police.

It was not known for many days who the murderers of Pedda Konda Reddi were. Accused 1 was not arrested until the 21st and accused 2 until the 24th. Nothing more than a few circumstantial facts pointing to the complicity of accused 1 came to light. P. Ws. 5 and 6 on the day after the murder had given information to the police, as had P. W. 3. On the 13th the Stationary Sub-Magistrate recorded a number of statements under S. 164, Criminal P. C., and among those examined were P. Ws. 2 to 4. The statement of P. W. 2 (Ex. C) has already been referred to. P. W. 3 deposed that he was coming along the path from Pakirpalli to Cuddappah and saw accused 1 to the north of the footpath wearing white pyjamas, a white shirt and a tarbush. He said that he was unable to identify him at once because he was in Muslim dress. He said to him "who are you" and accused 1 replied: "What is it?" Then P. W. 3 knew from his voice that it was accused 1, and so he asked him what he was doing in Muslim costume, to which accused 1 replied that he had put it on for fun. P. W. 3 also saw four persons at a well 20 yards away, who were presumably the persons referred to by P. W. 2, as having egged on the assailants. P. W. 3 then speaks to the incidents referred to by P. W. 2 after the offence was committed. P. W. 3 at the time when the murder was committed was of course not far away, and he heard the shouts of the deceased and P. W. 2 and saw the latter running back to the town. Apparently from that day onwards search was being made for accused 1 and he was eventually arrested by P. W. 30 on the 21st at the village of Rajampet, which is about 30 miles from Cuddappah. An identification parade was held on the 22nd, at which P. W. 2 pointed out this accused as the man who was wearing Mahomedan costume and had participated in the murder. A search was then made for accused 2, against whom there had been

apparently little or no information. He was arrested on the 24th at about 1-30 P. M. in a field on the outskirts of Cuddappah, and produced before P. W. 30, who had been put on special duty in connexion with this case. Accused 2 was at once questioned, and he gave certain information regarding the whereabouts of the clothes worn by accused 1 and the weapons used by him and by accused 1 in committing the murder. Panchayatdars were secured and the party proceeded to the tank, where accused 2 pointed out the place where these articles had been thrown. A search was made there and two billhooks and a tarbush were recovered.

As accused 2 was willing to make a confession, the Sub-Inspector wrote to the Sub-Magistrate and asked him to make arrangements for the confessional statement of accused 2 to be recorded, either by himself or by the Sub-Magistrate of Kamalapuram. Accused 2 having in the meanwhile been transferred to his jurisdiction, the Sub-Magistrate of Kamalapuram was ordered to make (take?) the confessional statement and he had accused 2 brought before him on the 28th. He then informed accused 2 that he had received a requisition from the police to record his confessional statement and warned him that he was not bound to make a confession and that if he did so, any statement that he made might be used in evidence against him. He then sent him back to the sub-jail, telling him that he should think over the matter and that his statement would be recorded on the 30th. On the 30th accused 2 was again brought before the Sub-Magistrate and a number of questions put to him. When the Sub-Magistrate was satisfied that accused 2 was prepared to make a confessional statement, he recorded it. Accused 2 made a very detailed statement of the deliberations which led him to take part in the murder. (After giving an account of the confession, their Lordships proceeded.) This confession is the most important evidence in the case and has been attacked principally on two grounds: (1) that it was not a voluntary confession, and (2) that in any case it is not true.

With regard to the first argument, the principal point made is that the Sub-Magistrate, P. W. 25, did not ask accused 2 whether it was intended to take him as an approver. This is unfortunately true, and the Sub-Magistrate's excuse is that he did not know the Telugu word for approver. This does not seem to be either a true or a proper explanation. Obviously, the Sub-Magistrate had forgotten to ask the question. There is no single word in Telugu for approver and if there were, the word would probably be so technical that accused 2, who is a cooly, would not have understood it. It would have been easy enough for the Sub-Magistrate, if he had really remembered that that question should have been asked, to have conveyed to the accused the purport of the question laid down in the Criminal Rules of Practice. However, the question is whether the omission to ask this question invalidates the confession. The object of putting the questions set out in R. 85 of the Criminal Rules of Practice is to enable the Sub-Magistrate to be quite sure that the statement was a voluntary one; and if one can be sure from the other questions and statements made by the accused that the confession was voluntary and was not brought about by coercion and inducement, then the confession cannot be rejected merely because a formal question was not asked.

There is no evidence that there was ever any intention to take accused 2 as an approver. P. W. 30, the Sub-Inspector in charge of this case, states, on the contrary, that no attempt was made to take this accused as an approver while he had anything to do with the case. It has already been mentioned that on the 28th, two days before the confession was recorded, the Sub-Magistrate warned the accused that if he made a statement it would be used in evidence against him and advised him to think over the matter before giving his confession. On the 30th, P. W. 25 first ascertained from accused 2 how long he had been in police custody, when the police first questioned him, and how many times the police had questioned him about this case. He was then asked if he had been forced to make a confession, to which he replied that he was making it of his own free will. In answer to a question, accused 2 also stated that he knew that the statement would be used in evidence against him and he assured the Sub-Magistrate that during the five days that he had been in the sub-jail, nobody had asked him to make any statement and that he was making the statement of his own free will and not on

account of any fear that he would be beaten. The Sub-Magistrate then gave his reasons for believing that the statement was a voluntary one and asked the accused to state what he knew about the murder. After the confession had been recorded, he appended the usual certificate that accused 2 was told that he was not bound to make a confession, that if he did so it would be used against him, and that he believed the statement of the accused to be a voluntary one.

In his evidence he states that he told the accused that he need have no hope that he would escape by making such a statement and indicated to him that he would be hanged as a result of making the statement. The questions put by the Sub-Magistrate make it quite clear to us that he did explain carefully to the accused that far from his confession having the effect of getting him off, it would get him hanged ; and if the accused knew this, he also knew that being taken as an approver would not help him. We have been referred to the cases reported in 1937 M W N 178[1] and 71 M L J 476,[2] but these cases do not help us, as in every case it is a question of fact whether the Court is satisfied that the statement made was a voluntary one. There may be cases, such as in 1937 M W N 178,[1] where the omission to ask the accused whether he was aware that it was not intended to make him an approver might, taken with other circumstances of the case, make one strongly suspicious that the confession was not voluntarily made. But there may be other cases, such as the present one, in which such an omission might not lead to that conclusion. One question and answer in Ex. M. has been brought to our notice as suggesting that this accused was forced to make a statement. The question was : "Did the police force you to make a confessional statement?" to which the answer was : "Head Constable Venkatayya asked me to make a confessional statement". The Sub-Magistrate followed this up, of course, with another question :

Are you giving the statement which you are now going to make voluntarily, or is it as a result of anyone beating you and forcing you to make such a statement ?

the reply to which was, "I am going to make (it) of my own free will". The question and the first answer of the accused show of course that the police suggested to the accused that he should make a formal confession ; but presumably this is so in every case. It is most unlikely that any accused person of his own accord would ask that his confessional statement should be recorded by a Magistrate. When an accused person makes a statement to the police, one would expect the police, as a general rule, to suggest to the accused person that he should make that statement before a Magistrate and it is only after he expresses his willingness to make a statement before the Magistrate that a request is made by the police to the Magistrate to record the confession. It is then the duty of the Magistrate to remove the accused person from all police influence, to warn him that his statement will be used against him, to give him time to think over the consequences of such a confession and to satisfy himself that the statement made was a voluntary one. We think that that was done in this case ; and the mere fact that some police officer, at or soon after the arrest of the accused, told him to make a confession to the Magistrate, is no proof that he was forced to make the statement. It is noteworthy that not a single question was put to the Head Constable with regard to the circumstances under which he told accused 2 to make a confession to the Magistrate. Accused 2 was arrested on the 24th and transferred to the Kamalapuram sub-jail on the 26th. Certainly from that date onwards he was free from police influence and the Magistrate had given him two whole days to think over the matter, after warning him of the consequences of his confession, before the confession was actually recorded. We are therefore satisfied that the confession was a voluntary one.

Not much need be said with regard to the argument that the confession was not a true one. (Their Lordships after discussing the confessional statement of accused 2 admitted under S. 27, Evidence Act, and the injuries on the deceased, proceeded.) It will therefore be seen that there is nothing in the confession of accused 2 to suggest that part of it is false. On the contrary, the nature of the story and the

1. Govindu Subbaramayya v. Emperor, A I R 1937 Mad 321=169 I C 372=38 Cr L J 753=(1937) 1 M L J 750=1937 M W N 178.
2. Nazir Ahmed v. Emperor, A I R 1936 P C 253=1936 Cr C 752=163 I C 881=63 I A 372=37 Cr L J 897=17 Lah 629=71 M L J 476 (P C).

manner in which it was given, leave no doubts in our minds that the confession was a true one. With regard to the confessional statement of accused 2, rendered admissible by S. 27, we unfortunately do not know the exact words used by the accused; so that we are unable to divide up his statement literally and say that such and such a portion of it is admissible and such and such a portion inadmissible. However, we do know fairly accurately from the accounts given of the statement in Ex. P and in the depositions of P. Ws. 26, 27 and 30 the form that this confession took. The purport of the statement is certain. He was undoubtedly questioned about the bill-hooks with which the murder was committed and the disguise worn by accused 1 and the information given by accused 2 was as to the whereabouts of those articles. The statement made by him is therefore at least admissible as showing the knowledge of accused 2 that the weapons with which the murder was committed and the disguise worn by accused 1 were lying in a particular place in the Kondayapalli Kunta. The only other evidence against accused 2 is that of his identification by P. W. 2 as one of the men who had committed the murder. Although P. W. 2 did not describe accused 2 in Ex. B, beyond saying that he wore a cloth, he probably saw him both in Court and at the identification parade in very much the same dress as he was wearing at the time of the murder. But however little weight one attaches to the identification of this accused by P. W. 2, the evidence of the confession, Ex. M, corroborated by the fact that he was able to point out the place where the weapons used in the murder and the clothes worn by the assailant who was in Muslim attire were concealed, is amply sufficient to bring home the offence to accused 2.

The evidence against accused 1 is the oral testimony of P. Ws. 5 to 8, who depose that they saw him just before or after the offence was committed, the identification of this accused by P. W. 2 as the man who played the principal part in the murder, and the confessional statement of accused 2, in so far as it can be taken into account against a co-accused. The principal evidence against accused 1 is, of course, his identification by P. W. 2, and the learned counsel for the defence has spared no pains to attack this evidence. We may say at the outset that there can be no doubt at all that P. W. 2 had ample opportunity of observing the features of accused 1. (After discussing the evidence regarding the identification parade and the identification of the accused by P. W. 2, their Lordships said that they would not rely on the evidence of the identification alone were it not corroborated by other circumstances or facts. Their Lordships then discussed the evidence of P. Ws. 3 and 5 to 7 and concluded that they were not prepared to reject their evidence and the judgment proceeded). There remains for consideration the effect of the confessional statement of accused 2 against accused 1. It is contended that the value of this piece of evidence is so little that it should not be taken into consideration at all ; but if that were so, S. 30, Evidence Act, would have no practical application whatever. Confessional statements are invariably retracted as soon as the accused is re-presented, which in this particular case was very soon after the confession was made. The strongest case quoted on behalf of the accused is A I R 1927 Lah 765,[3] where it is said :

> The rule is now firmly established that ordinarily it is improper to use the retracted confession of an accused person against his co-accused.

The whole legal aspect of the case is summed up in this terse statement, the rest of the judgment discussing the facts of that particular case. The learned Judges do not say how that rule has been firmly established and what tribunals have laid down that rule. In 33 Mad 46,[4] there was no evidence at all except the confession of the co-accused. Under such circumstances no co-accused could, of course, be convicted ; for S. 30 says only that the confession may be taken into account, which presupposes the existence of other evidence. 54 Mad 75[5] has no application to the point now under consideration ; for, the question there was whether the confession of an offence other than that for which the accused was tried could be considered against the co-accused. In 28 Cal 689[6] it is pointed out that a

3. Sher Muhammad v. Emperor, A I R 1927 Lah 765=104 I C 630 = 28 Cr L J 854 = 28 P L R 583.
4. Giddigadu v. Emperor, (1909) 33 Mad 46 = 1 I C 867=9 Cr L J 404.
5. Periyaswami Moopan v. Emperor, A I R 1931 Mad 177=1931 Cr C 281=129 I C 645 = 32 Cr L J 448=54 Mad 75=59 M L J 471.
6. Yasin v. Emperor, (1901) 28 Cal 689 = 5 C W N 670.

retracted confession is of little value against a co-accused and the fullest corroboration is necessary—far more than would be demanded for the sworn testimony of an accomplice on oath. With this statement we of course agree. Obviously, a retracted confesssion has little evidentiary value against a co-accused when compared with the evidence of an accomplice given on oath, which can be tested by cross-examination; but when, as in the present case, there is considerable circumstantial evidence connecting the accused with the murder, the Court is entitled to use the confession of a co-accused to remove any doubts that might still linger in its mind whether, in spite of the fact that the accused has been identified, that he was seen both before and after the offence under suspicious circumstances, yet by some chance he may not have taken part in the murder. If we doubted the other evidence, which we do not, the confessional statement of accused 2 would assure us that we were not mistaken in accepting the identification of accused 1 by P. W. 2, that accused 1 not merely stood in Muslim dress a few yards away from the path when seen by P. W. 3, but that he soon afterwards took part in the murder ; and that when P. Ws. 5 and 6 say that they met the accused coming from Nabikote just after the murder was committed, they were speaking the truth.

We are therefore satisfied that the offence has been brought home, not only to accused 2, but to accused 1 also. No discussion of the cases put forward by the two accused in their statements is necessary : because they consist merely of denials and imputations against the prosecution witnesses. For a shocking and cold blooded murder, such as has been committed on the person of Pedda Konda Reddi, the sentence passed was clearly the proper one. We therefore confirm the convictions and sentences of both the accused and dismiss their appeals.

C.R K./D.S. *Appeals dismissed.*

A. I. R. 1937 Madras 760

HORWILL, J.

Appaji Chetti — Petitioner.

v.

Govindasami Reddi and *others* — Opposite Parties.

Civil Revn. Petn. No. 1329 of 1934, Decided on 3rd November 1936, from order of Dist. Munsif, Tindivanam, D/- 2-2.1934.

Limitation Act (1908), Ss. 14, 19 ; Art. 182 (5)—Execution petition filed neither by party nor by duly authorized vakil — On subsequent application Court discovering defect in previous application — Previous application not being in accordance with law under Art. 182 (5) held did not save limitation—S. 14 held not applicable and part payment recorded by Court on previous petition held did not save limitation — Judgment-debtor held not estopped by constructive res judicata from pleading previous applications not in accordance with law.

A decree was passed on 28th July 1928. An execution petition was filed on 24th July 1931, which was not presented either by the party or by a vakil duly authorized on his behalf. A notice went on the petition and the judgment-debtor pleaded a payment of Rs. 50 which was recorded by the Court on 18th September 1931. Thereupon three months' time was granted and the petition struck off. On 22nd January 1932 another E. P. was filed in which the judgment-debtor, without notice, was arrested. He paid Rs. 25, part satisfaction was recorded, and he was released. When the present E. P. was filed on 25th November 1933, the Court discovered that the gentleman who had been conducting the two prior execution petitions was not in possession of a vakalat :

Held: that under O. 3, R. 1 and O. 21, R. 10, Civil P.C., read together, an application, i.e. the moving of the Court to do an act, must be either by the party himself or by a recognized agent or a pleader and the execution applications having been made by none of these persons were not in accordance with law under Art. 182 (5), Lim. Act, and therefore did not save limitation, whether the subsequent acts of the Court were void or not : *A I R 1937 Mad 239, Rel. on ; A I R 1936 Mad 284, Ref.* [P 761 C 2 ; P 762 C 1, 2]

Held also : that S. 14, Lim. Act, had no application to such cases and the payment of Rs. 50 recorded by the Court on 18th September 1931 was merely a record of an admission made by the Court and not an admission made within the meaning of S. 19, Lim. Act, and in any event such record having been made three years after the decree, did not save limitation : *A I R 1921 Mad 704, Disting.* [P 762 C 2 ; P 763 C 1]

Held further : that the judgment-debtor was not estopped by the principles of constructive res judicata from raising the objection that the earlier applications were not in accordance with law. [P 762 C 2]

S. Narasimha Ayyangar — for Petitioner.

T. E. Ramabhadrachariar — for Opposite Parties.

Order —The decree was passed on 28th July 1928. An execution petition was filed on 24th July 1931, which was not presented either by the party or by a vakil duly authorized on his behalf. A notice went on the petition and the judgment-debtor pleaded a payment of Rs. 50. Thereupon three months' time was granted and the petition struck off. On 22nd January 1932 another E. P. was filed in which

the judgment-debtor, without notice, was arrested. He paid Rs. 25, part satisfaction was recorded and he was released. When the present E. P. was filed on 25th November 1933, the Court discovered that the gentleman who had been conducting the two prior execution petitions was not in possession of a vakalat and it therefore held that the two former petitions were not in accordance with law and that as the present execution petition was filed more than three years after the decree, it was out of time. It was accordingly dismissed. In revision it is argued (1) that all these three petitions should be considered as one which was interrupted by the District Munsif for statistical purposes and that the vakalat filed in the present application must be deemed to validate all the earlier proceedings ; (2) that although the vakil, Mr. Narasimhachari, who had not been given a proper vakalat, was not therefore authorized to conduct the proceedings, yet nevertheless he was a person who, within the meaning of O. 21, R. 11 (2), was a person acquainted with the facts of the case and entitled to make those applications; (3) that on 18th September 1931, in the first E. P. the judgment-debtor acknowledged a payment of 2nd September 1929, within three years of the decree, and that this therefore saves time ; and (4) that the judgment-debtor is precluded by the principle of constructive res judicata from raising any objection to the validity of the earlier proceedings as he did not do so during the currency of those proceedings.

With regard to certain questions of limitation, especially as to whether execution petitions could be filed more than 12 years after the decree, it has been held that where previous execution applications of the same nature have been struck off and time given to the judgment-debtor, such acts are merely for statistical purposes and that it must be presumed that the petitions struck off were in law left pending until a fresh application to continue the same proceedings was filed. If however the first presentation was not one in fact and the order of the Judge was not made in pursuance of an application made in accordance with law and was therefore void, I do not see how a vakalat filed at a later time can validate the earlier proceedings. Whether or no the application was one in accordance with law and whether the acts of the Judge were in pursuance of an application made in accordance with law, will be presently considered. If all these points are decided against the decree-holder, the subsequent filing of a vakalat will not be of any avail.

It is contended that an execution application need not be presented by the decree-holder or by any person specially authorized on his behalf and that the presentation by any person acquainted with the facts is sufficient. It has been contended that the presentation is not an act contemplated by the Civil Procedure Code and is a mere formality. This argument is based upon the wording of O. 21, R. 11 (2) ; but that rule only describes the form of the application. It is necessary to distinguish between an application proper, which is a request to the Court to take certain proceedings, and the form in which that request is framed in a document which, although very different, is also spoken of as an application. O. 21, R 10 says : "Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree" whereas O. 21, R. 11 (2) merely sets out the forms in which the application is to be drafted. Any person acquainted with the facts can sign or verify the written application ; but only the holder of the decree can apply to the Court under O. 21, R. 10. O. 3, R. 1 however permits acts to be done by persons who are not parties if they are the recognized agents or pleaders acting on behalf of the party ; so that, reading O. 3, R. 1 and O. 21, R. 10 together, it is clear that an application, i. e the moving of the Court to do an act, must be either by the party himself, by a recognized agent or by a pleader. None of these persons made the present application. The application was made by a person who had no authority at all and was therefore, as stated by the learned Judges in 44 M L W 528,[1] no application at all. In that case the proceedings before the Court ended by the execution petitions being struck off without anything fruitful having been done ; but in this case, in both the earlier proceedings, some act was done during the course of the invalid proceedings. For example, the defendant came into Court and pleaded a payment of Rs. 50 and he was granted three months' time for pay-

1. Ananga Bhima Deo v. Modono Mahono Deo, A I R 1937 Mad 239 = 165 I C 659 = I L R (1937) Mad 520=44 M L W 528 = 71 M L J. 604.

ment of the remainder. In the second execution application he was arrested and he deposited a sum of Rs. 25 into Court. Certain expressions used by Burn, J. in his judgment in 44 M L W 528 [1] have given rise to the contention that as the executing Court took action, it is a matter of little or no consequence that the proceedings were not properly initiated. They are :

> Mr. Jagannadha Das has contended that since upon the applications of 1923 the executing Court took action, issuing notices to the judgment-debtors, posting the case for the various dates of hearing, on some dates ordering costs to be paid and the like, therefore the execution petitions cannot, after all that has been done, be treated as mere waste paper or as if they had not been presented at all. This argument we think would have great force if anything had really been done upon these execution petitions. . . . .

The question whether the proceedings of a Court would be valid in case something substantial was done, did not of course arise in that case and so the above quoted sentences are obiter. In a case heard by the same Judges in A I R 1936 Mad 284 [2], an execution petition was filed against the insolvent without the permission of the insolvency Court. It was held that the execution proceedings could not have been legally instituted and the subsequent orders of the Judge in the executing Court were void. No doubt some distinction can be made between that case and the present, in that those proceedings were instituted in direct contravention of the law, whereas in the present case all that can be said is that they were not properly instituted. It is not however necessary to decide whether the acts of the executing Court have become null and void because we are merely considering the question of limitation, and in deciding whether this application is in time it is necessary to refer only to the provisions of the Limitation Act. Cl. 5 of Art. 182 states that the time from which limitation begins to run in an execution application is the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order. The present execution application was filed on 25th November 1933. I have already pointed out that the prior applications were not made in accordance with law and therefore whether the subsequent acts of the Court were void or not, the present application is out of time, in that it was not filed within three years of a final order passed on an application made in accordance with law.

It has been argued that S. 14, Limitation Act, prevents this application from being time-barred if the time occupied in conducting the previous applications be excluded. S. 14 excludes, in computing the period of limitation, the time taken in prosecuting with due diligence another civil proceeding where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it. The executing Court in this case was not one that did not have jurisdiction to execute this decree. It had jurisdiction ; but the decree-holder failed to move the Court in accordance with law. S. 14 therefore has no application to a case like the present. It is next argued that the judgment-debtor, because of his having failed to raise any objection in either of the earlier proceedings to the continuance of the proceedings, is estopped by the principle of constructive res judicata from contending in the present application that the earlier applications were not made in accordance with law. It is contended that a duty was cast upon the judgment-debtor of ascertaining by an examination of the records and otherwise whether the application was in proper form. But I am certainly of opinion that that duty is not cast upon the judgment-debtor, nor upon any party to any proceeding. The execution of a vakalat is necessary for the initiation of proceedings, and it is the duty of the Court to see that the person who presents the petition is a person who is entitled under the law to do so. When another party appears in these proceedings, he is entitled to assume that the Court has done its duty and assured itself that the application was properly made by a person authorized to make it. In execution proceedings one is even more reluctant to apply the principles of constructive res judicata, because these principles are applied to such proceedings only by analogy.

The last argument is that the writing by the executing Court on 18th September 1931 of "Rs. 50 pleaded is admitted. N. Ramachandra Ayyar wants time," was

2. Jagadisan Pillai v. Narayanan Chettiar, A I R 1936 Mad 284=162 I C 376=59 Mad 759=71 M L J 180.

an admission which, by virtue of section 19, Limitation Act, saves time—it being argued that in recording this the Court acted as the agent of the judgment-debtor. I cannot however agree that the Court was making an admission on behalf of the judgment-debtor. It was merely recording an admission made by the judgment-debtor or somebody appearing on his behalf. In this particular case the admission was presumably not made by the party at all, but by somebody who may not have been authorized on his behalf; but even if the person who made that statement was authorized to do so, it was he who made the admission on the judgment-debtor's behalf and not the Court. The Court only recorded the admission and S. 19, Limitation Act, requires that the admission in order to save limitation, must be made in writing by the party or some person or agent duly authorized on his behalf (*See* Expln. 2). 44 Mad 971[3] was quoted in support of this argument. There, Coutts-Trotter, J. pointed out that:

> Where money is paid by the person who is bound to pay, requesting the Court to do so, the Court must be deemed to be acting on behalf of the person who is to make the payment.

I am unable to draw any analogy between the case of payment of money by the Court, where the payment by the Court is the only method of payment, and the recording of an admission. S. 20 requires a writing to be made by the person who makes the payment, and if the Court, acting as the agent of the person bound to pay, records that the money had been paid by him, the provisions of S. 20 are complied with. In any event, this admission was made on 18th September 1931, which was more than three years after the decree. As I have held that in any case this is not an admission which would save time, it is unnecessary to consider whether the request of the learned counsel for the petitioner should be complied with that this petition should be referred back for a finding whether there was an acknowledgment; but I am certainly of opinion that when he filed the present execution petition, or at any rate as soon as the objection was raised, he should have drawn the attention of the Court to this earlier admission and asked for an opportunity of showing how his petition was in time. I would certainly not be willing to give him an opportunity in a revision application. In the result this petition is therefore dismissed with costs.

C.R.K./V.B.B. *Petition dismissed.*

3. Govindasami Pillai v. Dasai Goundan, A I R 1921 Mad 704=68 I C 100=44 Mad 971=41 M L J 423.

A. I. R. 1937 Madras 763

VENKATARAMANA RAO, J.

Chunduri Panakala Rao — Petitioner.

v.

Penugonda Kumaraswami — Opposite Party.

Civil Revn. Petns. Nos. 329 of 1935 and 1543 of 1936, Decided on 12th March 1937, from decree of Dist. Munsif, Narasapur, in S. C. S. No. 93 of 1934 and decree of Sub-Judge, Narasapur, in S. C. S. No. 173 of 1932.

(a) Stamp Act (1899), Ss. 29 and 44—Document produced and tendered in evidence — Right to recover penalty is only under S. 44 and not S. 29— Amount can be recovered only if included in costs of decree.

Section 29, Stamp Act, will only be applicable to a case where the document is not produced before the Court; but when once the document has been produced before the Court and tendered in evidence, the right of recovery of the duty or penalty is only by virtue of S. 44, Stamp Act. But in order to entitle the plaintiff to recover under that section, the amount must have been included in the costs at the time of the passing of the decree; or else he has no right to institute any proceeding in regard thereto. [P 764 C 1]

(b) Stamp Act (1899), Ss. 33 and 61— Document tendered in evidence and judgment delivered — Court cannot re-open and impound document—Admission may be questioned in S. 61 proceeding.

When an instrument has been admitted in evidence and judgment delivered, the Court becomes functus officio, and it is not therefore open to the Court to re-open the matter and impound the document. Its admission may be called in question in a proceeding under S. 61, Stamp Act: *A I R 1927 Cal 472* and *8 Mad 564 (F B)*, *Rel. on.* [P 764 C 1, 2]

M. Appa Rao — for Petitioner.

G. Lakshmanna and *G. Chandrasekara Sastry* — for Opposite Party.

Order. — These two revision petitions arise out of an order made by the learned Subordinate Judge of Narasapur impounding a document, Ex.A., which was filed in S. C. S. No. 173 of 1932 on the file of the Sub-Court, Narasapur. The suit was upon a promissory note and the document was tendered in evidence, filed and proved in proof of the consideration for the note on

21st October 1932, and on the very same day the learned Judge delivered judgment decreeing the suit. On 15th February 1933, the office of the Subordinate Judge brought to his notice that Ex. A was not properly stamped and thereupon he impounded the document, and sent it to the Collector with a letter bearing date 24th February 1933. Thereupon the Collector levied a penalty of Rs. 185 and recovered it from the plaintiff in that case. This was on 29th March 1933 and the document was returned to the Court on 23rd April 1933. The plaintiff thereupon instituted a suit out of which C. R. P. No. 329 of 1935 arises for the recovery of the said sum of Rs. 185 with interest thereon. The District Munsif gave a decree in favour of the plaintiff on the ground that under S. 29, Stamp Act, the penalty was payable by the defendant who executed the bond. It seems to me that this order of the District Munsif is unsustainable. S. 29, Stamp Act, will only be applicable to a case where the document is not produced before the Court; but when once the document has been produced before the Court and tendered in evidence, the right of recovery is only by virtue of S. 44, Stamp Act. But in order to entitle the plaintiff to recover under that section, the amount must have been included in the costs at the time of the passing of the decree; or else he has no right to institute any proceeding in regard thereto. The Civil revision petition is therefore allowed and the order of the lower Court set aside but in the circumstances each party will bear his own costs.

During the hearing of C. R. P. No. 329 of 1935, it struck me that the order of the learned Subordinate Judge impounding the document is illegal. I therefore admitted the Civil Revision Petition against the said order and directed notice to the Sub-Collector of Narasapur and notice was served upon him. He has not chosen to appear before me in support of the said order. As has been already pointed out by me, the document was filed and proved in Court on 21st October 1932, admitted in evidence and acted upon by the learned Subordinate Judge. At the time of the admission of the document, he has not chosen to levy any penalty. Having failed to do so and the judgment having been delivered in the suit, he has become functus officio and it is not therefore open to him to re-open the matter and impound the document : *vide* 54 Cal 445.[1] The only remedy of the Collector, if any, is to move under S. 61, Stamp Act, and he has not done so. This is clearly pointed out in the Full Bench decision reported in 8 Mad 564[2], where under exactly similar circumstances their Lordships considered the levy to be illegal. In the course of the judgment their Lordships observed as follows :

He had admitted the document in evidence and proceeded to judgment on 18th September and he was functus officio. When an instrument has been admitted in evidence and judgment delivered, its admission can only be called in question in a proceeding under S. 50 (corresponding to S. 61, Stamp Act). We accordingly quash the order of 26th September.

It seems to me therefore that the order of the learned Subordinate Judge impounding the document is illegal and ought to be set aside. I make no order as to costs. It is open to the petitioner to apply to the revenue authorities for the refund of the said amount.

C.R.K./V.B.B. *Order set aside.*

1. Khetra Mohan Saha v. Jamini Kanta, A I R 1927 Cal 472=100 I C 630=54 Cal 445.
2. Reference under Stamp Act, S. 46, (1885) 8 Mad 564 (F B).

A. I. R. 1937 Madras 764

VENKATARAMANA RAO, J.

Manapalli Krishnayya — Appellant.

v.

Kaza Seetharamayya and *another* — Respondents.

Second Appeal No. 704 of 1935, Decided on 19th March 1937, against decree of Sub-Judge, Ellore, in A. S. Nos. 29 and 33 of 1934.

Receiver — Powers of — Partner appointed as receiver with powers for realizing assets of firm and paying off debts and to do other acts — Such partner has power to make valid acknowledgment of debt for and on behalf of partners of firm.

In a suit for dissolution of partnership, a partner was appointed as receiver for collecting the assets of the partnership and for payment of the debts due to others and to do other acts. During his office the partner wrote a letter signed by him, thereby acknowledging liability of the firm in respect of a certain debt, with a view to prevent the creditor from filing a suit and to avoid unnecessary expense to the partnership :

Held : that as the receiver was authorized to make part payment of debts due by the firm, which had the effect of stopping the statute of limitation from running, he must be deemed to be acting within his power in acknowledging a

debt for and on behalf of the partners of the firm. The acknowledgment of liability was therefore operative even as against the other partners : *In re Hale—Lilley* v. *Foad*, *(1899) 2 Ch 107* ; *A I R 1919 P C 120* and *A I R 1919 Mad 816*, *Rel. on* ; *Kilgour* v. *Finlyson*, *1 H B L 155* and *Abel* v. *Sutton*, *3 Esp 109*, *Disting* ; *A I R 1916 Bom 119*, *Ref.* [P 765 C 2 ; P 766 C 1]

P. Somasundaram — for Appellant.

V. Suryanarayana, *V. Govindarajachari* and *M. Srinivasa Rao* — for Respondents.

Judgment.—The main question argued in this second appeal is one of limitation. The suit is to recover a sum of Rs. 709-7-0 due in respect of dealings had with defendants 1 and 2 who carried on business under the name of Seetharamanjaneya Rice Mill. The claim would be admittedly barred by limitation but for an acknowledgment of liability contained in the letter, Ex. F, executed by defendant 1 on 28th October 1926. Defendant 2, who is the appellant in this second appeal, resists the claim on the ground that Ex. F is not binding on him on two grounds : (1) The letter was intended to be executed by both the defendants but it is only signed by defendant 1 and therefore inoperative as against him (defendant 2); (2) On the date of Ex. F there was a decree for dissolution of partnership made in O. S. No. 244 of 1923 and defendant 1 could no longer act for him.

The first contention can be easily disposed of. Though the document was intended to be executed by two persons, at the time of the execution it was agreed that it would be enough if defendant 1 executed it as he was the receiver appointed in the said suit and the letter was signed by him as receiver. The view taken by the lower Court in this behalf is correct and I see no reason to differ from it.

To appreciate the second contention a few facts may be necessary. O. S. No. 244 of 1923 was a suit for dissolution of partnership of the said Seetharamanjaneya Rice Mill and in that suit an application was made on 5th September 1923 for the appointment of a receiver by defendant 2 who was the plaintiff in the said action. The petition ran thus :

> For the reasons set forth in the affidavit filed herewith, the plaintiff prays for the appointment of a receiver for collecting the assets due to the suit rice mill from others and for payment of the debts due to others and do other acts.

Defendant 1 in para. 3 of his counter affidavit filed therein stated that in the matter of recovery of the assets due to the firm and in the matter of the payment of the debts due by the firm, he would carefully attend to them without allowing them to be barred by time and he would recover the debt by filing suits, etc. On the strength of the undertaking given by defendant 1 the plaintiff agreed to the appointment of defendant 1 as receiver. The order of the Court was: "defendant 1 appointed receiver accordingly," i. e. in accordance with the terms of the petition. Therefore the effect of this appointment was that defendant 1 was appointed receiver for collecting the assets due to the suit rice mill from others and for payment of the debts due to others and to do other acts, which I interpret as meaning all acts necessary and incidental for the realization of the assets and for the payment of debts due by the firm. This was on 5th October 1923. Defendant 1 was discharged from the office of the receiver on 19th February 1929. It was during this interval that Ex. F came into existence. The recitals in Ex. F are to the effect that the plaintiff pressed for payment of the debt on the ground that it would be barred by limitation but as defendant 1 had not the account books before him, he could not verify the amount due and as soon as the account books were received from Court he would pay the principal and interest which may be found due in accordance with the account without having any regard to limitation. There can be no doubt that this letter operates as an acknowledgment of liability. The question is whether defendant 1 as receiver is entitled to acknowledge this debt, and if so, would it save the suit from being barred by limitation even as against defendant 2 ? The order appointing receiver distinctly authorises the receiver to make payments of the debts due to others by the firm. If the receiver had made a part payment, it would certainly be within the scope of his authority though the effect of it might be to stop the statute of limitation from running. In (1899) 2 Ch 107,[1] a question arose whether a part payment made by a receiver who was authorized to make payments under a statute towards the debt due in respect of the estate of a mortgagor would save an action to recover the debt from the bar of limitation. The

1. *In re* Hale ; Lilley v. Foad, (1899) 2 Ch 107 =68 L J Ch 517=80 L T 827=47 W R 579 =15 T L R 389.

Court of Appeal held in that case that it would and Sir F. H. Jeune, one of the learned Judges who took part in the appeal, remarked thus :

> It seems to me that this receiver, in making this payment, was acting properly, that is within the scope of his authority. Then the difficulty in the case vanishes. It is impossible to draw a distinction between a payment as a payment, and a payment as an act from which an inference of a promise is to be drawn—that is a legal inference. Payment of part of a debt is an acknowledgment that it is part of a debt which has to be paid. It is impossible to draw a distinction between a payment as a payment, and a payment with regard to which there arises the legal inference of a promise to pay the whole debt.

If the receiver can make a part payment and take the case out of the statute, I do not see any reason why he should not have power to acknowledge the debt. As observed by their Lordships of the Judicial Committee in 12 M L W 288,[2] where an agent was authorized to pay the amount of the claim, "he could plainly also arrange to prevent time from becoming a bar to it". In that case the agent executed a renewed promissory note which was held sufficient to save the suit from being barred by limitation. In this case, the receiver must therefore be deemed to have made the acknowledgment for and on behalf of the partners of the firm. In 35 M L J 571,[3] it was held that where a receiver in an action for dissolution of partnership had authority to do all things necessary for the preservation of the assets of the firm, an acknowledgment of liability made by him in respect of a claim against the partnership was held a sufficient acknowledgment within the meaning of S. 19, Lim. Act, to prevent the claim being barred against the partners. Their Lordships observe that in many cases an acknowledgment of a debt may be necessary to save the estate from loss and thus necessary for the preservation of the estate. The learned Subordinate Judge in this case finds that the acknowledgment was made to prevent the creditor from filing a suit and to avoid unnecessary expense to the partnership. Therefore I am of opinion that Ex. F would avail as an acknowledgment of liability even as against defendant 2.

I shall now deal with some of the cases relied on by Mr. Somasundaram. 1 H B L 155=126 E R 92[4] was one of the cases relied on by him. In that case on the dissolution of a partnership one of the partners was authorized to receive all debts owing to and pay those owing from the partnership. He indorsed a bill for exchange in the name of the partnership. It was held that he had not authority to do so and it was conceded in argument that the action on the bill could not be supported against the other partners. 3 Esp 108=170 E R 556[5] was a case where on the dissolution of a partnership, one of the partners was authorized to settle the affairs of the partnership but this power was held insufficient to negotiate a bill of exchange and the reason assigned was that no one might make another his debtor against his will. The distinction between these cases and the present is this : the partner in the said cases was incurring a fresh liability, whereas in the present case the receiver was acknowledging a liability already existing. This distinction was noticed in the case in 38 I C 873[6] at page 876, decided by the Bombay High Court. In (1893) A C 170,[7] an agent of a company who was authorized to make a contract of sale and purchase under the express terms of a power of attorney was held not to have the power to borrow money or bind the company by a contract of loan. This case only illustrates the general principle that a power to bind a principal by a particular act of an agent who was authorized to transact the affairs of the principal under a power of attorney must be derived from the instrument and where the power is not expressly conferred or would not arise by necessary implication, the principal would not be bound. In the present case under the order of appointment the receiver by necessary implication had the power to acknowledge the debt. The view of the lower Court that the claim against defendant 2 is not barred by limitation is correct. In the result, the second appeal fails and is dismissed with costs of respondent 1. Leave refused.

C.R.K./K.B. *Appeal dismissed.*

2. Raja Braja Sunder Deb v. Bhola Nath, A I R 1919 P C 120=12 M L W 288 (P C).
3. Lakshumanan Chetty v. Sadayappa Chetty, A I R 1919 Mad 816=48 I C 179=35 M L J 571.
4. Kilgour v. Finlyson, (1789) 1 H B L 155=126 E R 92.
5. Abel v. Sutton, 3 Esp 108=170 E R 556=6 R R 818.
6. Abdulalli Badruddin v. Ranchodlal Trikamlal, A I R 1916 Bom 119=38 I C 873=19 Bom L R 86.
7. Bryant Powis & Bryant Ltd. v. La Banque de Peuple, (1893) A C 170=62 L J P C 68=1 R 336=68 L T 546=41 W R 600.

A. I. R. 1937 Madras 767

HORWILL, J.

T. Varadarajulu Naidu and *others* — Petitioners.

v.

R. Rajamanika Mudaliar and *others* — Respondents.

Civil Revn. Petn. No. 510, of 1935, Decided on 9th March 1937, from decree of Sub-Judge, Chingleput, D/- 21st December 1934.

Partnership Act (1932), S. 69 (2)—Registration of firm subsequent to suit filed on its behalf—Suit should be allowed to proceed — Plaint should be treated valid from date of registration — Defendants not objecting to suit until a year elapsing after their written statement—Suit dismissed by lower Court on objection — Case held fit for interference in revision.

Section 69 (2), Partnership Act, embodies a principle of public policy intended to penalise partnerships which do not register. However, when the registration has been carried out, the requirements of the Legislature are fulfilled and there is no reason in equity why from the moment of registration a suit previously filed should not be allowed to go on. The subsequent act of registration does not validate the plaint from the date of its being filed; for no suit was maintainable before the date of registration. The most that the plaintiff can ask for is that his plaint should be treated as a valid one from the date of registration. [P 768 C 1, 2]

The lower Court admitted a plaint by an unregistered firm, not noticing the deficiency. The defendants too did not raise any objection until a year had elapsed after the filing of the written statement. Subsequently on such objection being raised the suit was dismissed, though the firm was registered subsequent to the filing of the suit. In revision:

Held: that it would be most inequitable for the firm to have its suit dismissed and be forced to file another after paying fresh court-fee as such. The case was fit for interference in revision: *A I R 1918 Mad 272*; *A I R 1918 Mad 143*; *A I R 1937 Mad 717*; *A I R 1926 Mad 6* and *A I R 1936 Mad 24*, *Rel. on*; *A I R 1936 Mad 991*, *Ref.* [P 769 C 2]

K. Rajah Ayyar — for Petitioners.

T. M Krishnaswami Iyer and *A. Balasubramania Iyer* — for Respondents.

Order.—The petitioners (partners in a firm) brought S. C. S. No. 719 of 1933 in the Court of the Subordinate Judge of Chingleput for the sum of Rs. 509.12-4, due to them by the respondents-debtors. They brought their suit on 30th October 1933 when the firm was unregistered. This apparently escaped the notice of the office of the Subordinate Judge and also of the defendants. This deficiency was however rectified by the plaintiffs in July 1934. The defendants filed their written statement on 15th December 1933, making no reference to the fact that the suit had been instituted without registration of the partnership. The suit was posted for hearing on 20th December 1934, more than a year after the filing of the written statement; and on the previous day, i. e. on 19th December 1934, the defendants applied to be allowed to raise a preliminary objection to the maintainability of the suit. They contended that the suit having been filed before the partnership was registered under S. 69 (2), Partnership Act, no suit could be instituted and that the suit not having been properly instituted should be dismissed. The learned Subordinate Judge upheld this objection and dismissed the suit. The petitioners have brought this petition, contending not that the suit was properly instituted, but that it should be deemed to have been properly instituted on the date that the partnership was registered. S. 69 (2), Partnership Act, runs thus :

> No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered, and the persons suing are or have been, shown in the register of firms as partners in the firm.

This means, as rightly contended by Mr. T. M. Krishnaswami Iyer for the respondent, that on 30th October 1933 the plaint filed in Court was not a plaint at all and no valid suit was pending before the Subordinate Judge; and that even after the registration in July 1934 nothing was done to the plaint by the plaintiffs to transform it from an invalid plaint into a valid one. His argument therefore is that the plaint continued as before to be an invalid one and that the mere fact of registration did not amount to an institution of the suit; so that at no time was there any valid institution of the suit. One cannot deny that this argument is logically correct; but the question is rather whether the Court, in order to do substantial justice to the parties without violating the principles of the Partnership Act, cannot deem the suit to have been instituted on the date of registration. It is a well-established principle that the Court can take notice of events that happen subsequent to the filing of the suit and that any irregularities or deficiencies in the cause of action that may exist on

the date of the filing of the plaint can be overlooked if on some date subsequent to the filing of the plaint and before the suit comes up for trial those irregularities or deficiencies are rectified by the plaintiff or by process of law. In 34 M L J 258 [1] the plaintiff, when he saw the written statement, became aware of the deficiencies in his title and perfected it by obtaining a conveyance from the next reversioner: and this act of the plaintiff was recognized by the Court. In 7 M L W 403 [2] a mortgage suit was premature, because on a proper interpretation of the bond it was seen that the money was not due. The date of maturity was some date after the filing of the suit and that date was prior to the hearing of the suit. It was held that the suit should not have been dismissed because when the suit came on for trial the cause of action came into being. In C. R. P. 1489 of 1935[3], an illegal transfer by an insolvent was recognized by the Court because of the fact that the adjudication was subsequently annulled. In 49 M L J 479 [4], a certain event happened after the filing of the suit which strengthened the plaintiff's title. He was allowed to amend the plaint, setting forth the additional cause of action. There, the principle governing the action of Courts in these matters was said to be that multiplicity of proceedings should be avoided. In all these cases, as in the present case, if the Courts had applied the wording of the statutes literally, they would have dealt with the plaints as they existed when the suits were filed and proceeded to dispose of the suits on the pleadings raised. The plaintiff would then have been entitled immediately to have brought a fresh suit on the new cause of action. Courts are naturally reluctant to dismiss a suit and cause loss to the plaintiff when the plaintiff has a cause of action for a similar suit which he could file at once.

I agree with Mr. Krishnaswami Iyer that the case of the plaintiffs is not as strong as in the cases just quoted, for S. 69 (2), Partnership Act, embodies a principle of public policy intended to penalise partnerships which do not register. However, when the registration has been carried out, the requirements of the Legislature are fulfilled and there is no reason in equity why from the moment of registration a suit previously filed should not be allowed to go on. This suit is not of course one in which the subsequent act of registration validated the plaint from the date of its being filed; for no suit was maintainable before the date of registration. The most that the plaintiff can ask for is that his plaint should be treated as a valid one from the date of registration. A very similar case was considered by a Bench of this Court in 69 M L J 791.[5] There, a person applied for leave to sue in forma pauperis, and his petition was dismissed. Under O. 33, R. 15, Civil P. C., a pauper is allowed to file a suit if he has paid the costs of the Government and of the respondents awarded in his application to sue in forma pauperis. The actual wording of the section is:

> An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

The wording of this section makes it quite clear that the paying of costs of the Government and the opposite party is a condition precedent to the institution of the suit, just as it is in S. 69 (2), Partnership Act. Varadachariar and Pandrang Row, JJ. in 69 M L J 791[5] distinguished certain Allahabad decisions as instances when the condition had never been fulfilled from the case before them where the condition was fulfilled after the institution of the suit. The learned Judges then say:

> We do not think the Court below need have dismissed the suit altogether. It is unnecessary to go through the formality of a dismissal and a re-institution the next moment after payment of costs ordered in O. P. No. 8 of 1931. We think it will be sufficient to say that the suit must be treated as one instituted on 2nd March 1932 (the date of fulfilment of condition) and dealt with on that basis.

The case that came before Menon, J. (71 M L J 663)[6] was very similar to the

1. Doraisami Pillai v. Chinniah Goundan, A I R 1918 Mad 272=43 I C 560=34 M L J 258.
2. Subbaraya Chetty v. Nachiar Ammal, A I R 1918 Mad 143=44 I C 863=7 M L W 403.
3. Lingappa v. Official Receiver, Bellary, *Reported in* A I R 1937 Mad 717.
4. Appalasuri v. Kannamma Nayuralu, A I R 1926 Mad 6=90 I C 881=49 M L J 479.
5. Ramakrishna Nadar v. Thirumalai Vandaya Thevan, A I R 1936 Mad 24=159 I C 1029 = 69 M L J 791.
6. Subramania Mudaliar v. East Asiatic Co., Ltd., A I R 1936 Mad 991 = 165 I C 939 = 71 M L J 663.

present one except that in that case the plaintiff had applied to the Court for an amendment of the plaint, which application was dismissed ; and it was because of that difference from the present case and from 69 M L J 791[5] that this learned Judge refused to interfere in revision. It would therefore appear that Menon, J. was not inclined to interfere in a matter of this kind in revision. I do not think that he intended to go further and to hold that if the Court had allowed the suit to continue—if the cause of action was not barred by limitation on the date of the registration—it would have been wrong. If he did, I would respectfully dissent. I see no difference in the effect of the words quoted above in O. 33, R. 15, and the material words in S. 69 (2), Partnership Act. The difference in the actual words used in the two sections was necessary because in O. 33, R. 15 the Legislature wished to point out that the dismissal of an application to sue in forma pauperis did not preclude the applicant from instituting a suit upon payment of court-fee. The section had therefore to be so framed as to bring out the fact that the applicant was at liberty to bring a suit provided that the condition of previously paying the costs of the Government and the other party was fulfilled. There was no need to frame S. 69 (2), Partnership Act in that way. The right of a partnership to sue was assumed ; but the Legislature wished to deprive a partnership which had not been registered of that right. Hence the form of the words: "No suit to enforce a right .... shall be instituted ...." I therefore hold on the analogy of 69 M L J 791[5] that the Court should have permitted the plaintiffs to go on with their suit.

The question still remains whether this Court should interfere in revision or, as Menon, J. did in 71 M L J 663,[6] should refuse to interfere with the discretion of the Court. In deciding this point I have been influenced by the fact that if the office of the Subordinate Judge had done its duty properly, this difficulty would never have arisen. When a suit is filed by a partnership, it is the duty of the office to see that the plaint is a proper one and that the suit is maintainable. It is for that reason that if the facts set out show that the suit is premature or that no suit lies, the plaintiff is called upon in the ordinary course to point out how the suit is maintainable. If the office had been alert, it certainly would have called upon the plaintiffs to state whether the partnership had been registered and if so when. If that had been done, the plaint would have been returned, the firm would have been registered, and a fresh plaint (which would have been the old plaint with the fact of registration and the date added) presented. The defendants did not raise any objection in their written statement or until a year had elapsed after the filing of the written statement. I therefore think it would be most inequitable for the plaintiffs to have their suit dismissed and be forced to file another after paying fresh court-fee. The duty of the Court is to administer justice according to the principles of equity and good conscience, and it cannot be said to do this when it dismisses a suit because the formality of withdrawing a plaint and filing a fresh one in the same terms was not complied with. I am satisfied therefore that the interests of justice require that this petition should be allowed and the suit remanded for fresh disposal. It is ordered accordingly. The suit will be deemed to have been instituted on the date of the registration. Under the circumstances of the case there will be no order as to costs in this Court. The costs in the lower Court will of course abide the result of the suit.

C.R.K./V.B.B. *Petition allowed.*

A. I. R. 1937 Madras 769

MADHAVAN NAIR AND STODART, JJ.

M. R. M. A. R. Natesa Chettiar — Appellant.

v.

T. A. Ramalingam Chettiar and *others* — Respondents.

Appeals Nos. 316 and 317 of 1934, 215 of 1935 and Civil Misc. Petn. No. 2243 of 1935, Decided on 29th January 1937, from decrees of Sub-Judge, Coimbatore, in O. S. Nos. 24 and 20 of 1934.

(a) Mortgage—Prior and puisne mortgagee—Purchaser in execution of mortgage decree put in possession of mortgaged property—Puisne mortgagee not impleaded in suit—Purchaser is entitled to priority only for amount on prior mortgage till date fixed for payment—Profits received by him should be credited towards this - Puisne mortgagee is entitled to be relieved against penal stipulation in prior mortgage.

N, in a Court auction held in pursuance of a mortgage decree, purchased the mortgaged property on 13th October 1924 and was put in possession by the Court on 16th October 1927. *R*, a puisne mortgagee, had not been impleaded in the suit and hence his interest remained unaffected by the decree. *N* instituted a suit claiming that the property comprised in the first mortgage be sold again and out of the sale proceeds he should be paid the amount due on that mortgage. *R* filed another suit praying for a decree on his mortgage:

Held : that *N* was entitled to priority in the amount of the prior mortgage calculated up to the date fixed for payment. The fact that the price *N* paid for the mortgaged property was more than the amount due on the mortgage sued on, did not take away *N*'s liability to account. He must account against that sum for profits of land from 16th October 1927 and that this amount was to be arrived at by calculating interest at 12 per cent. and not at the rate stipulated in bond since the latter was penal, usurious and excessive.

[P 770 C 2]

Held further : that in relation to the puisne mortgagee the decree on the first mortgage was to be treated as a nullity. The sale which took place in pursuance of that decree was thus a nullity and the purchaser at that sale could not acquire the rights of a mortgagor owner as against the puisne mortgagee. The only right he did acquire against the puisne mortgagee arose from the fact that the purchase money either wholly or in part went to discharge the prior mortgage, so that he was able to revive the prior mortgage and hold it as a shield against the puisne mortgagee when the latter sued to bring the property to sale. As for his possession and enjoyment of the land, that was not to be regarded as transferring ownership at all. The profits he made out of the land were deemed to be the money of the mortgagor in his hands, and liable to be credited in reduction of the prior mortgage : *A I R 1935 All 692, Rel. on* ; *A I R 1918 Mad 103, Foll.*

[P 772 C 2; P 773 C 1]

Held also : that even though the mortgagor did not seek to be relieved from the penal stipulation in the mortgage suit, the puisne mortgagee who was no party to the suit was entitled to put forward this defence and claim that the purchaser was entitled only to reasonable compensation and not to the full amount of interest at the enhanced rate. [P 774 C 2]

(b) Usurious Loans Act (1918)—No retrospective effect.

The Usurious Loans Act applies only to suits on loans contracted subsequent to the Act.

[P 774 C 1]

T. M. Krishnaswami Iyer and *N. Sivaramakrishna Iyer* — for Appellant.

C. S. Venkatachari and *D. Ramaswami Iyengar* — for Respondents.

Judgment.—The two suits against the decrees in which these two appeals are laid were disposed of in one judgment. Natesa Chetty, the appellant in both appeals, was the plaintiff in O. S. No. 20 of 1934. In O. S. No. 24 of 1934 he was defendant 7. His adversary Ramalingam Chetty was defendant 4 in O. S. No. 20 and the plaintiff in O. S. No. 24. He is the contesting respondent here. In a Court auction, held in pursuance of a mortgage decree, Natesa Chetty through a clerk purchased the mortgage property on 13th October 1924 and was put in possession by the Court on 16th October 1927. But Ramalingam Chetty was a puisne mortgagee of a major portion of the property and he had not been impleaded in the suit. His interest therefore remained unaffected by the decree. On 30th June 1932, Natesa Chetty filed what is now numbered as O. S. No. 20 of 1934 and on 10th August 1933 Ramalingam Chetty filed O. S. No. 24. Natesa Chetty's suit was that the property comprised in the first mortgage be sold again and out of the sale proceeds he should be paid the amount due on that mortgage at that date of the plaint. Ramalingam Chetty's suit proceeded on the assumption that the prior mortgage had been for the most part discharged and he prayed for a decree on foot of his mortgage. Implicit in these pleadings is the contention of the appellant that he is not liable to be debited with the profits of the land which accrued after 16th October 1927; and in his defence to the suit of the puisne mortgagee he alleged that on account of the threats of the mortgagors he had never got into possession. On the other hand, the case of the puisne mortgagee is that the profits so accruing have been nearly sufficient to wipe out the prior mortgage. The learned Subordinate Judge has found (1) that the appellant, Natesa Chetty, is entitled to priority in the amount of the prior mortgage calculated up to the date fixed for payment; (2) that this amount is to be arrived at by calculating interest at 12 per cent. and not at the penal rate stipulated in the bond since the latter was penal, usurious and excessive; (3) that the amount so found is to be reduced by the profits of the land from 16th October 1927 at the rate of Rs. 650 per annum. Natesa Chetty's appeal is (a) that he was not in possession of the land at all; (b) that even if he was, he is not liable to account for the profits; (c) that in any event, he is not liable to account for the profits in a sum more than the amount of interest that accrued due on the mortgage during the time he was in possession; (d) that the profits have been over-estimated by the lower Court; (e) that the amount

due to him should be calculated according to the mortgage deed.

The puisne mortgagee filed cross-objections in regard to the profits that the lower Court should have estimated them at at least Rs. 1000 per annum. We shall first take up the two questions of fact: Was the lower Court wrong in holding that Natesa Chetty got possession of the lands sold under the decree in the prior mortgage and is Rs. 650 per annum as an estimate of the average annual net profits too high or too low? On the question of possession, it is not denied that Nanjunda Iyer, the clerk of Natesa Chetty, took delivery of the land through Court on 16th October 1927. The case set up at the trial was that when Natesa Chetty tried to lease the land, he was prevented from doing so by the threats of the mortgagor and the mortgagor's sons. The learned Subordinate Judge has stated that appellant failed to show in what manner the mortgagor and his sons were influential enough to defy the orders of the Court; that appellant has had the patta for the lands transferred to his name and has been paying the revenue due to Government regularly; and that, since the date of the alleged dispossession he has never moved any authority with a view to being put into possession nor complained to any public authority. Moreover, in respect of other lands in the same village purchased by him in Court auction, the appellant has admittedly found no difficulty in enjoying them and reaping the profits from them. Then as regards the oral evidence, the learned Judge found that it was false. Out of seven witnesses only one, as pointed out by the learned Subordinate Judge, is not interested in appellant and this man is an agriculturist who has no lands near the suit lands. We have heard learned counsel on both sides at some length on the question of the value of the evidence adduced by the appellant at the trial and we see no sufficient reason to differ from the opinion of the Judge who saw the witnesses. We observe that in his plaint, although he must have known that the puisne mortgagee would raise the question of profits, the appellant did not declare that he had been dispossessed. We observe also that when in 1928, in a suit for partition coupled with a declaration that the mortgage decree was not binding on them, the sons of the mortgagor declared that the properties continued to be entirely in their possession, this appellant being defendant 5 in that suit replied that this averment was false and that the plaintiffs in that suit were not in possession of the plaint properties. What did the appellant mean by that statement if he did not mean that he the purchaser had got effective possession of the lands?

Next on the point of the quantum of profits. The learned Subordinate Judge has held that neither side adduced reliable evidence on this point; and for his estimate of Rs. 650 he employs several independent data. Fifteen times the land revenue he takes as the gross income and half of this he takes to be the net income. Again he makes an estimate of the net income as a percentage (in this case 6%) of the value of the lands and he estimates the value as Rs. 12,000, relying on the figures adopted by Ramalingam Chettiar, the respondent in his plaint in O. S. No. 24. We think the data used by the learned Subordinate Judge are reliable and further, in spite of arguments of learned counsel on both sides, we agree with him in his opinion of the evidence adduced at the trial. Appellant has himself stated that the profits are one-third of Rs. 2,000, the estimate made by the respondent as plaintiff in O. S. No. 24. Respondent on the other hand as defendant in O. S. No. 20 first entered Rs. 1,000 as the profits but later amended the figure to Rs. 2,000. The mortgagee's sons in their partition suit valued the profits of all family property including those compromised in the first mortgage at Rupees 1,000. We think that the learned Subordinate Judge's estimate of Rs. 650 is correct. This disposes of the main point in respondent's cross-objections. We now come to the main point of contest in the appeal, namely the accountability for profits accruing during the period that the appellant has been in possession, namely from 16th October 1927 up to date. Appellant as we have said takes up two positions: first that he is not accountable at all; secondly that at the most he is accountable only up to the extent that the profits are equal to the interest on the mortgage. We think that the question of accountability in cases like the present is settled beyond all doubt and that the decision taken by the learned Subordinate Judge is the correct decision. A very recent case decided by a Bench of the Allahabad High Court (Niamatullah and

Rachhpal Singh, JJ.) states the matter very clearly and we think it appropriate to cite the relevant passages from that judgment :

> The first question we have to decide is whether the plaintiff-appellants (the puisne mortgagee) are in law entitled to have the profits of the property purchased by the defendant-respondents in execution of their mortgage decree set off against the interest and, so far as it was in excess of the interest, against the principal. Where a prior mortgagee obtains a decree on foot of his mortgage and purchases the mortgaged property in execution of his own decree to which the puisne mortgagee was not a party, the sale cannot be considered to be of no effect at all. It effectively transfers the mortgagor's right to the prior mortgagee auction-purchaser . . . . though the sale is not binding on the subsequent mortgagee, who can in spite of it exercise his right of redemption . . . . Applying that rule to the facts of the present case, we have to accept the position that the mortgagor's rights were transferred to the defendant-respondents in 1886; but the plaintiff-appellants who were no party are entitled to redeem. In the exercise of their right of redemption, they are entitled to treat the prior mortgages as still subsisting. Not being bound by the decree, they can ignore it. The necessary corollary to this is that account of the mortgage money is to be made up on the basis of the stipulation contained in the mortgage deed. In redeeming the mortgages, they must pay the principal and interest calculated up-to-date. At the same time the prior mortgagees who have been in possession of the mortgaged property by virtue of the auction-sale held in execution of their own mortgage decree should account for the usufruct received by them. They have to do this not because their possession can be traced to anything in the mortgages in their favour, which were simple, but to the fact that the usufruct received by them should be considered to be tantamount to payments made by the mortgagors. In this connexion it should not be overlooked that as between the prior mortgagees and the mortgagors, the latter's rights were assigned to the prior mortgagees under the auction-sale in lieu of the mortgage money. The prior mortgagees have been in receipt of the usufruct as against the mortgagors in consideration of the whole or part of the mortgage money, which as against the mortgagors should be considered to have been wiped out. Any payments which the mortgagor makes to the prior mortgagee enures for the benefit of the puisne mortgagee also. If the prior mortgagees be considered to be in possession of the mortgaged property under an arrangement made by the Court in the auction-sale on behalf of the mortgagor to the effect that the prior mortgagees may take possession of the mortgaged property and retain it as the owners thereof in full or part satisfaction of the mortgage money subject to the right of the puisne mortgagee's right to redeem, there can be no doubt that the usufruct received by the prior mortgagees under such arrangement should, in relation to the puisne mortgagee, be considered to be payments made by the mortgagor. Otherwise the prior mortgagees would have it both ways. On the one hand they insist on payment of the mortgage money consisting in the principal and interest calculated up to date; and on the other hand they are allowed to appropriate the usufruct which but for this auction sale in their own suit would have been taken by the mortgagor (A I R 1935 All 692[1]).

See also the case 49 Cal 626[2] at p. 644 :

> In our opinion we must deal with the matter as if there had been no suit at all (on the first mortgage) . . . . The mortgagees are entitled to receive the whole of the principal sum with interest from the date of the bond . . . . As regards the actual profits realized since . . . . when the mortgagees obtained possession of the mortgaged property, the learned Judge has without taking any account, simply directed that such realisations be set off against interest payable. This is a rough and ready method which may be adopted with the consent of the parties. But here the respondents object to this course in their cross-objections which must be allowed. The amount of profits should not be taken as an equivalent of the interest due. We therefore direct that an account be taken of what is due to defendant 1 for the principal and interest on the mortgage . . . . allowing credit for all the sums paid to the mortgagees and the actual profits realised by them during the period they have been in possession of the mortgaged property.

To the same effect is the decision in 41 Mad 513,[3] although we shall have occasion presently to refer to some of the observations in that judgment which seem to be inconsistent with the general principle. What then is the foundation for the appellant's contentions? Take his first position that he is not accountable for the profits at all. It is first argued that as purchaser of the mortgagor's right in the land, he steps into the shoes of the mortgagor and the latter of course is not accountable to any one for the profits of the land. This argument is fallacious. It ignores the fact that the purchase was made behind the back of the puisne mortgagee, in pursuance of a decree to which the puisne mortgagee was no party though he ought to have been made a party, in which case the lands would have been sold for their full value and the puisne mortgagee would have been satisfied wholly or in part. In this connexion we observe that though the appellant declared in his plaint in O. S. No. 20 that when he bought the land at Court auction he knew nothing of the respondent's mortgage, as a matter of fact the existence of that mortgage was proclaimed at the time of the auction. The law as settled is that in relation to the puisne mortgagee, the decree on the first mortgage is to be treated as a nullity. The

1. Ramji Lal v. Roshan Singh, A I R 1935 All 692=155 I C 596=1935 A L J 587.
2. Jnanendra Nath v. Shorashi Charam Mitter, A I R 1922 Cal 23=69 I C 759=49 Cal 626.
3. Muthammal v. Razu Pillai, A I R 1918 Mad 103=44 I C 753=41 Mad 513.

sale which took place in pursuance of that decree is thus a nullity and the purchaser at that sale could not acquire the rights of a mortgagor owner as against the puisne mortgagee. The only right he did acquire against the puisne mortgagee arose from the fact that the purchase money either wholly or in part went to discharge the prior mortgage; so that he is able to revive the prior mortgage and hold it as a shield against the puisne mortgagee when the latter sues to bring the property to sale. As for his possession and enjoyment of the land, that is not to be regarded as transferring ownership at all. The profits he makes out of the land are deemed to be the money of the mortgagor in his hands, and liable to be credited in reduction of the prior mortgage. We do not think it is possible to assail this position by merely designating the Court sale a transfer both of the rights of the prior mortgagee and of the rights of the mortgagor. And that is the opinion of the Judges in the case of this Court last cited. In p. 518 of 41 Mad :

> That to our minds is conclusive to show that the mortgage which is revived against the puisne mortgagee though extinguished against the mortgagor is kept alive to the fullest extent as if no action had ever been brought on it ..... It is on this principle that the purchaser in the prior mortgagee's execution sale is required to account for the profits.

The second argument in support of the appellant's plea that he is not accountable at all is based on the fact that the price he paid for the mortgaged property was more than the amount due on the mortgage. He paid Rs. 7,000 and the amount due on the mortgage including costs of the suit and poundage was Rs. 6,660. It is contended on the strength of certain observations of the learned Judges in 41 Mad 513,[3] that when this is the case the purchaser is not accountable for the profits accruing during the time he is in possession. These observations are at p. 517 of 41 Mad. The exact words are :

> If the purchaser obtains possession on sale from the owner, he must account for the profits at least in cases where the price he pays is not more than sufficient to pay the mortgage sued on ; for in such a case the purchaser pays nothing for the equity of redemption and the profits of the land are to be regarded as the money of the mortgagor placed in the hand of the purchaser to discharge the mortgage pro tanto. If beyond the value of the mortgages a price is paid for the equity of redemption and the purchaser gets possession from the owner of the equity of redemption ..... it may be the purchaser would not be bound to account for the profits [Jones on Mortgages, Vol. 2, S. 1118 (a)], but we think that justice requires that there should be an apportionment of the profits between the value of the mortgage and of the equity of redemption.

With all respect, we must confess ourselves unable to follow the argument in this passage from the judgment in 41 Mad 513.[3] We do not think it necessary to discuss it as the opinions expressed there were not necessary for a decision of the case. Coming to the next position contended for by the appellant that in any case he is not liable to account for profits to an extent greater than the interest which accrued on the prior mortgage during the time the profits were earned, we do not think we need add anything to the decision in 41 Mad 513[3] on p. 519 and following pages. It is clear from that decision that the point is concluded by the highest authority. *See also* the later and very recent decision of the Allahabad High Court, the relevant portions of which we have set out above. Though we must record an appreciation of the skill and learning with which Mr. Krishnaswami Iyer has pressed the appellant's case, we must hold that the appellant is accountable for the profits to the full extent.

The decision in 68 M L J 717[4] has been much relied on by Mr. Krishnaswami Iyer and much canvassed in the arguments. But we do not think it is useful in the present connexion, since the facts it deals with are quite different. There, in execution of a money decree property was purchased which was subject to three mortgages. The purchaser subsequently discharged some part of the two first mortgages. The suit was by the third mortgagee and the question debated was whether the purchaser was entitled to be reimbursed in what he had paid towards the prior mortgagee with interest and if so whether he was liable to account for the profits. The fact which distinguishes the case from the present is that the purchaser came into possession of the mortgaged property by virtue of a sale which the mortgagees were not entitled to ignore, while here the possession of the purchaser derived from a sale which the puisne mortgagee is entitled to treat as a nullity. The appellant's case on this point depends on the assumption that if the purchaser is accountable for the profits at all, he is

4. Ramachandra Naidu v. Pavalayammal, A I R 1935 Mad 360=159 I C 478=68 M L J 717.

accountable because the profits of the mortgaged land which he purchased at Court auction are substituted for the interest on the mortgage money; so that, if the purchaser receives the interest from a puisne mortgagee or other person entitled to discharge the mortgagor, he is bound to restore the profits that he has earned but only so much of them as is equivalent to the interest. This method of reasoning ignores the puisne mortgagee's right to be put in the same position as he would have occupied if the sale had never taken place. In order that that may be done, the purchaser must restore the benefit he got by sale. He can stand on the mortgage which was discharged by the sale and can get all that is due on that but he is not entitled to anything else as against the puisne mortgagee. The authorities have all been referred to and explained in 41 Mad 513,[3] and it is unnecessary for us to cite them again. We say again that we respectfully agree with the conclusion arrived at in that case.

We have come to the last main point in these appeals, namely whether the lower Court was wrong in departing from the stipulations in the prior mortgage bond in calculating the amount of the mortgage payable to the appellant. The bond provides an initial rate of interest at 10½ per cent. per annum. But it is stipulated that if there is failure to pay the interest or principal on the due dates, the interest shall be at 18 per cent. The appellant's claim included interest at 10½ per cent. for the first year and 18 per cent. for the subsequent period. The learned Subordinate Judge held that this contract was unconscionable for reasons which he has set out at length and re-opened the contract, purporting to act under the Usurious Loans Act 1918, and awarded interest at a uniform rate of 12 per cent. It is objected that the Usurious Loans Act applies only to suits on loans contracted subsequent to the Act and this mortgage was in 1914. We think that this objection must prevail. But the learned Subordinate Judge's procedure may be supported on other grounds. The stipulation for increased interest from the date of default may be considered to be a stipulation by way of penalty. It is so enacted in the Explanation of S. 74, Contract Act. If we regard it as such, then the enhanced interest cannot be levied directly under the contract. The lender is only entitled to receive reasonable compensation. It is urged that in the suit upon the mortgage the mortgagors did not seek to be relieved from the penal stipulation and that the puisne mortgagee should not be allowed to seek that indulgence now. But we think that the puisne mortgagee who was no party to the suit may be allowed to put forward such defences now as would have been available to him if he had been a party to the suit. In other words, he can claim that the prior mortgagee to whose rights the appellant is subrogated is only entitled to reasonable compensation and not to the full amount of interest at the enhanced rate. Such being the case, are we justified in holding that the stipulation for increased interest was a stipulation by way of penalty? And if so, is the appellant reasonably compensated by the rate of 12 per cent. awarded by the learned Subordinate Judge? We think both questions should be answered in the affirmative. The learned Subordinate Judge held that the security for the loan—which was only Rs. 3,000—was excellent and that the borrowers were induced to consent to the high rate of interest because they were hard pressed by creditors. In his opinion the stipulation of interest at 18 per cent. on a mortgage of this kind was itself sufficient evidence that the transaction was substantially unfair; and the learned Subordinate Judge must be held to speak with knowledge of local conditions. In this view we think that the stipulation for increased interest from the date of default was a stipulation by way of penalty and that the rate of 12 per cent. awarded by the learned Subordinate Judge is fair compensation. The appeal and cross objections are dismissed with costs.

C. M. A. No. 215 of 1935.

Judgment.—C. M. A. No. 215 of 1935 is against the order of the lower Court passed after decree refusing to appoint a receiver of the property at the instance of the appellant. Following our decision that the appellant is in possession of the property, that appeal is dismissed with costs. No orders are necessary in C. M. P. 2243 of 1935.

C.R.K./R.W. *Appeal dismissed.*

A. I. R. 1937 Madras 775

BEASLEY, C. J. AND CORNISH, J.

Mrs. Evelyn Popaly — Appellant.

v.

Official Assignee of Madras — Respondent.

O. S. Appeal No. 13 of 1937, Decided on 6th April 1937, from order of Wadsworth, J., D/- 12th February 1937.

Presidency Towns Insolvency Act (1909), Ss. 36 (5) and 7—S. 36 (5) does not relate to property, ownership of which is in dispute — Examination of person in possession of such property does not bar proceedings under S. 7.

Sub-section (5) to S. 36, Presidency Towns Insolvency Act, relates only to property admittedly belonging to the insolvent and not property the ownership of which is in dispute. The proceedings under S. 7 of the Act are therefore not barred by reason of the examination under S. 36 of the Act of a person in possession of property with disputed ownership : *A I R 1915 Mad 107, Rel. on; A I R 1929 Mad 705* and *A I R 1932 Mad 167, Ref.* [P 776 C 2]

V. Rajagopala Iyer and *K. G. Srinivasa Iyer* — for Appellant.

K. S. Krishnaswamy Iyengar — for Respondent.

Beasley, C. J.—The Official Assignee applied to the Insolvency Court under S. 7, Presidency Towns Insolvency Act, for a declaration that certain houses are the property of the insolvent purchased in the name of his wife, respondent 2, or in the alternative that the insolvent has a half interest in those houses. At the hearing before Wadsworth, J., respondent 2 raised the preliminary objection that as respondent 2 had been examined under S. 36 of the Act, the proceedings against her under S. 7 were barred. That objection the trial Judge overruled holding that the previous examination under S. 36 of the Act was no bar to the proceedings before him. The hearing of the application has been stayed pending this appeal. The point before us is to what extent this case is covered by the Full Bench decision in 52 Mad 717,[1] and for its determination depends upon whether the subject matter of the application is one which falls within sub-s. (5) of S. 36 of the Act. The summons under S. 36 reads as follows :

Take notice that you are hereby required to appear before the Master in Chambers on Thursday 20th August 1936 at 3 p. m., and to give evidence touching the insolvent, his dealings and property and regarding the properties standing in your name and suspected to be his properties and to produce any documents in your possession or control relating to the said properties standing in your name and acquired by you since 1928 and the pass books of all the banks in which you have had accounts from the commencement up-to-date and also all documents relating to the fixed deposit and chit transactions had by you.

From the questions put in the examination of respondent 2, it is perfectly clear that the sole object of the examination was to establish the fact that the houses had been purchased by the insolvent in her name, that is to say, that the purchases were benami. Respondent 2 denied that the property had been purchased with her husband's money, and asserted that she had herself purchased the house out of her own funds. The appellant's case is that this was an examination to establish that respondent 2 had in her possession property belonging to the insolvent and that no admission to that effect having been got from her, proceedings under S. 7 of the Act could not be taken against her without her consent by reason of the amendment of S. 7 by S. 2 of the Amending Act 19 of 1927, which adds the following Proviso :

Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under S. 36, be exercised only in the manner and to the extent provided in that section.

In 52 Mad 717,[1] which was a case of a simple money claim, it was held that when once the Official Assignee has summoned a witness under S. 36 of the Act and that witness disputes his indebtedness, the Official Assignee has no option but to proceed by way of suit unless the witness agrees to the disposal of the matter in the Insolvency Court. In a later decision, namely 55 Mad 385,[2] it was held that the amendment of S. 7 of the Act by S. 2 of the Amending Act (19 of 1927) refers only to such proceedings under S. 36 of the Act as come under sub-s. (4) which deals with simple money claims and sub-s. (5) which deals with the examination of persons supposed to be in possession of some property of the insolvent and to no other matters and that sub-section 5 of S. 36 does not touch the case of a person who is examined for the purposes of ascertaining whether the status of joint family is subsisting between the insolvent and the other members of

1. Official Assignee of Madras v. Narasimha Mudaliar, A I R 1929 Mad 705=118 I C 506 =52 Mad 717=57 M L J 145 (F B).

2. Chinnappa Mudali v. Official Assignee of Madras, A I R 1932 Mad 167=135 I C 585= 55 Mad 385=62 M L J 103.

the family and whether a business is a joint family business. The Full Bench case was on the question of simple money claims and in 55 Mad 385[2] was distinguished on that ground. On p. 387 it is stated : "Throughout the decision in that case the only case in contemplation was the case of a simple money claim".

The appellant's endeavour, in consequence of these two decisions, has been to show that the matter is one under sub-s. (5) of S. 36 contending that the sub-section embraces not only cases where the property admittedly belongs to the insolvent but also where the Official Assignee contends that property admittedly in the possession of the person examined belongs to the insolvent and not to the person in whose possession it is and that if the person examined denies that the property belongs to the insolvent and asserts that it belongs to him or herself, it is a denial that that person is in possession of property belonging to the insolvent and therefore the sub-section applies. On the other hand, Mr. K. S. Krishnaswami Iyengar contends that the section has in contemplation only cases where it is conceded that the property belongs to the insolvent and its possession is alleged to be with the person examined and not cases where the title to property is in issue. It is for us to decide which of the two contentions is correct. The matter is singularly bare of authority and the two cases already referred to and the Calcutta decision to which reference is made in the Full Bench case, and an earlier decision of this High Court, namely 25 M L J 308,[3] appear to be the only ones relating to it. In the last-named case the scope of S. 36 was discussed and it is stated that the main object of S. 36 is discovery. There, the facts were that property had been transferred by the insolvent four months before the order of adjudication though under circumstances which might render the transfer voidable under S. 55, Presidency Towns Insolvency Act, and it was held not to be "property belonging to the debtor" within the meaning of S. 36 (5) of the Act and that it was not therefore open to the Court under that section on the examination of the transferee to declare the transaction bad under S. 55 and direct the delivery of property to the Official Assignee and that the object of S. 36 is to enable the Official Assignee or any creditor who has proved his debt to obtain information with reference to the property belonging to the insolvent on which proceedings might be taken for the purpose of impeaching transactions which are voidable under the sections of the Act relating to voluntary transfers, fraudulent preferences and cognate matters. On p. 310, Sir Arnold White, C. J. says :

> Now I do not think it can be held that the property in question in this case at the time that this examination was held can be said to be property belonging to the insolvent within the meaning of the sub-section. Prima facie, it belonged to the man in whose name the title deeds stood and who had taken a transfer of property in January 1912, i. e. about four months before the date of adjudication.

This case in my opinion strongly supports the contention of the respondent. It shows that the sub-section has in view only the case of property admittedly belonging to the insolvent at the time of the examination. The object of the sub-section is to enable the Official Assignee to discover its whereabouts. The procedure in sub-ss. 4 and 5 of S. 36 is of the most summary nature ; and before the amendment of those sub-sections, if the Court on the examination of the person was satisfied under sub-s. 4 that he was indebted to the insolvent and under sub-s. 5 that he had in his possession any property belonging to the insolvent, the Court could at once order the payment of the amount owing or the delivery up of the property to the Official Assignee. Clearly, sub-s. 5 at that date did not enable the Court to pass any such drastic order under this very summary procedure in cases where the title to property was in issue. The amendment substituted for "if on the examination of any such person the Court is satisfied" the words "if on his examination any such person admits". The amendment does not touch the words "property belonging to the insolvent". "Property belonging to the insolvent" both before and after the amendment has the same meaning. I am satisfied that sub-s. 5 to S. 36 relates only to property admittedly belonging to the insolvent and not property the ownership of which is in dispute. The proceedings under S. 7 of the Act are therefore not barred by reason of the examination of respondent 2 under S. 36 of the Act and this appeal fails and must be dismissed with taxed costs.

3. Abdul Khader Sahib v. Official Assignee of Madras, A I R 1915 Mad 107=20 I C 485=25 M L J 308.

Cornish, J.—I agree. In his application to have Mrs. Popaly examined, the Official Assignee stated that she had considerable properties in her name and that his information was that these properties were purchased with moneys belonging to her husband, the insolvent. Neither the application nor the summons indicates the character of these properties, but it appears from the examination of Mrs. Popaly that they are houses. The purpose of the examination was therefore to discover whether Mrs. Popaly or the insolvent was the owner of this immoveable property. This involved enquiry into the title to the property, which is a different thing from discovery whether Mrs. Popaly was in possession of property belonging to her husband. Indeed, property which prima facie belonged to Mrs. Popaly would not rightly be described as property belonging to her insolvent husband within the meaning of S. 36 (5) : 25 M L J 308.[3] There is nothing in the amended S. 7 of the Act to prevent the Insolvency Court from deciding a disputed question of title between the Official Assignee and some other person. It is open to the Court, if it thinks fit, to refer the question for determination in a suit. That is a matter within the Court's discretion. But whether the Official Assignee proceeds under S. 7 or by suit, he can only recover by the strength of the insolvent's title to the property which he is asserting and which he must establish. The jurisdiction given to the Insolvency Court by S. 7 to decide all questions arising in any case of insolvency is qualified only to the extent laid down in the proviso to the section. What exactly is intended by the words in the Proviso "any matter arising under S. 36" is not at all clear, but I do not think they necessarily mean any matter which has been the subject of examination under S. 36. If that had been the intention, the Act could easily have said so.

The result of the Full Bench ruling in 52 Mad 717[1] and the later Bench decision in 55 Mad 385[2] is that there are two matters arising under S. 36 which are subject to the special provision, namely the question under sub-s. 4 whether the person examined is indebted to the insolvent, and under sub-section 5, whether he is in possession of property belonging to the insolvent. If he admits indebtedness or possession, there is nothing for the Court to decide ; an order for payment or delivery may be made on the application of the Official Assignee. But if he denies indebtedness to the insolvent or possession of the insolvent's property, then unless the parties otherwise agree, the jurisdiction of the insolvency Court to decide the matter is excluded and the Official Assignee must proceed by suit to enforce his claim. The subject matter of of Mrs. Popaly's examination however is not a matter arising under S. 36, sub-s. 4, or sub-s. 5. It is a question of title which falls outside the scope of these sub-sections. I am accordingly of opinion that the objection raised to the Insolvency Court's power to decide it is ill-founded and that the appeal fails.

C.R.K./S.C. *Appeal dismissed.*

A. I. R. 1937 Madras 777

VARADACHARIAR AND PANDRANG ROW, JJ.

T. C. Nilamegham Pillai and *another* — Appellants.

v.

Secretary of State — Respondent.

Appeal No. 559 of 1930, Decided on 5th April 1937, against decree of Addl. Sub-Judge, Trichinopoly, in O. S. No. 119 of 1927.

(a) Master and Servant—Crown servants—Dismissal of Government officer, without observing prescribed rules—Failure does not furnish cause of action for civil suit.

While a solemn duty is laid upon the Government to observe the prescribed rules when dealing with the matter of the dismissal of an officer, the failure to do so will, nevertheless, not furnish a cause of action for a civil suit : *A I R 1937 P C 31, Rel. on.* [P 778 C 2]

(b) Government of India Act (1919), S. 96-B—Dismissal of Income-tax Officer by Commissioner of Income-tax — No illegality in Commissioner's order as authority appointing such Income-tax Officers is Commissioner himself.

The language of S. 5, Income-tax Act, as well as the language of the Devolution Rules, is consistent only with the view that the Commissioner is the appointing authority for Income-tax Officers, though his powers in that connexion may be interfered with by higher authority on various grounds. As regards dismissal, there is no specific section or rule providing for dismissal, but the rule which gives a right of appeal against order of dismissal (formerly to the Governor in Council) to the Governor-General in Council proceeds on the assumption that the dismissal of an Income-tax Officer is to be by the Commissioner of Income-tax. [P 779 C 1]

T. R. Venkatarama Sastri and *N. Rajagopala Iyengar* — for Appellants.

M. Patanjali Sastri — for Respondent.

Varadachariar, J.—The appellant who had been appointed Income-tax Officer in June 1922 was dismissed from service by an order of the Commissioner, dated 22nd June 1925. He filed this suit for damages, contending that this order of dismissal was illegal, void and ultra vires.

The validity of the order was challenged on two grounds : (1) that the Commissioner did not hold a proper enquiry before passing the order of dismissal and (2) that in view of the provisions of S. 96-B, Government of India Act, 1919, the Commissioner was not competent to pass the order of dismissal. Before the lower Court, the first of the above contentions was advanced on the assumption that the plaintiff would have been dismissed only after enquiry in the manner prescribed by R. 14 of the Civil Service Classification Rules. The learned Subordinate Judge was of opinion that that rule was not applicable to persons appointed under the Income-tax Act of 1922. This question has now become immaterial, because, even assuming that the procedure prescribed by that rule or any other rule has not been followed, a Civil Court is not competent to give redress to a person on that ground, after the decision of the Privy Council in 64 I A 55.[1] An argument was urged before us, on behalf of the appellant, that in that decision as well as in the connected case, their Lordships were only dealing with the nature of the tenure on which civil servants in India hold their office and did not decide the question as to the cause of action available to a civil servant on the ground that in the matter of his dismissal the prescribed procedure had not been followed. We are unable to agree with that contention. The first question dealt with by them was no doubt the nature of the tenure ; but having arrived at the conclusion that civil servants in this country hold their office at the pleasure of the Crown, their Lordships next did address themselves to the question of the effect of the reference in the opening part of S. 96-B to the rules made thereunder as qualifying the declaration of the tenure of the office. It is in dealing with this argument, that their Lordships say that while a solemn duty is laid upon the Government to observe these rules when dealing with the matter of the dismissal of an officer, the failure to do so will nevertheless not furnish a cause of action for a civil suit.

It was also contended before us, on the strength of a passage in Mr. Sundaram's book on the Law of Income-tax, that the Commissioner is subject to the control of the Local Government as much in the matter of dismissing an Income-tax Officer as in the matter of appointing one. It was accordingly suggested that as the dismissal in this case did not appear to have been made with the previous approval of the Local Government, the dismissal was void in law. We propose to deal at some length with a cognate argument when dealing with the next contention of the appellant. We may, however, observe here that in the Devolution Rules specific provision has been made in this connexion only in respect of the appointment of Assistant Commissioners and Income-tax Officers, delegating the power of the Governor-General in that behalf under S. 5, Income-tax Act, to the Governor in-Council. The only specific reference to the question of dismissal, in the Devolution Rules is by way of giving a right of appeal to the Governor-General in Council (formerly to the Governor in Council), to any Assistant Commissioner or Income-tax Officer who has been dismissed or removed from office by the Commissioner. The reference to a right of appeal is a clear indication that it could not have been contemplated that the dismissal should be with prior approval obtained from the same authority ; it is only in respect of 'appointment' that the previous approval is referred to in the Devolution Rules.

In dealing with the second contention urged on behalf of the appellant, we are prepared to assume that the appellant may, in view of the judgment of the Judicial Committee in *Rangachari* v. *Secretary of State*,[2] be entitled to some relief, if it could be said that the Commissioner who dismissed the appellant is within the meaning of S. 96-B, Government of India Act, an authority "subordinate to that by which he (the appellant) was appointed."

1. Venkata Rao v. Secretary of State, A I R 1937 P C 31=166 I C 516=64 I A 55=I L R 1937 Mad 532 (P C).

2. A I R 1937 P C 27=166 I C 513=64 I A 40=I L R 1937 Mad 517 (P C).

The determination of this question turns on the construction of S. 5, Income-tax Act, 1922. It is there provided that Assistant Commissioners and Income-tax Officers shall, subject to the control of the Governor-General in Council, be appointed by the Commissioner of Income-tax by order in writing. The natural meaning of the words used seems to us to be that the Commissioner of Income-tax is the appointing authority, though by way of appeal or by veto or even by an executive rule as to previous approval, his exercise of this power may be subject to interference by the Governor-General in Council. Under rules framed under S. 45-A, Government of India Act, the control of the Governor-General in Council (provided for in S. 5, Income-tax Act,) has been delegated to the Local Government by the following rule :

> The Governor-General in Council desires to utilise the agency of the Governor in Council of each Governor's Province in the following matters only in relation to Income-tax : (i) The appointment by a Commissioner of Income-tax of any person to the substantive post of Assistant Commissioner of Income-tax or Income-tax Officer shall be subject to the previous approval of the Governor in Council.

It has been contended on behalf of the appellant that the appointing authority in the case of Income-tax Officers is not the Commissioner of Income-tax, but either the Governor-General in Council or the Governor in Council and that therefore the Commissioner is a person subordinate to the appointing authority (within the meaning of S. 96-B, Government of India Act). We are not able to accede to this contention. The language of S. 5, Income-tax Act as well as the language of the Devolution Rules is consistent only with the view that the Commissioner is the appointing authority, though, as already indicated, his powers in that connexion may be interfered with by higher authority on various grounds. As regards dismissal, there is no specific section or rule providing for dismissal, but as we have already observed, the rule which gives a right of appeal against orders of dismissal formerly to the Governor in Council and now to the Governor-General in Council proceeds on the assumption that the dismissal of an Income-tax Officer is to be by the Commissioner of Income-tax. Both the grounds urged in support of the appeal accordingly fail and the appeal must be dismissed with costs. The court-fee payable on the memorandum of appeal shall be paid out of the estate of the deceased appellant if any, in the hands of the next friend.

C.R.K./V.B.B. *Appeal dismissed.*

✻ A. I. R. 1937 Madras 779

HORWILL, J.

Ramaswami Chettiar — Appellants.

v.

Meyyappan Servai — Respondents.

C. M. S. A. No. 132 of 1934 and C. R. P. No. 306 of 1933, Decided on 26th February 1937, against order of Sub-Judge, Tanjore, in A. S. No. 165 of 1933.

✻ (a) Civil P. C. (1908), S. 47 and O. 21, R. 93—Scope — Stranger auction-purchaser applying for refund of purchase money on setting aside of sale — Appeal and second appeal lie from order on such application.

There is a very strong tendency to give S. 47, Civil P. C., a wide application so as to bring within its scope questions arising between the parties to the suit and the auction purchaser. [P 781 C 2]

A stranger purchaser at a Court auction is entitled and bound to have any question relating to the satisfaction of the decree decided under S. 47, Civil P. C. [P 781 C 1]

Where on the setting aside of a sale, the auction-purchaser applies for a refund of the purchase money, there is a question relating to the discharge and satisfaction of the decree and, therefore, an appeal and second appeal lie from an order on such application : *A I R 1923 All 394 (F B), Foll.*; *Case law referred.* [P 781 C 2]

(b) Limitation Act (1908), Arts. 181 and 182—Applicability — Application for refund of purchase money is governed by Art. 181 and not by Art. 182—Application must be made within three years from date of first order setting aside sale.

An auction-purchaser who applies for the return of the purchase money is certainly not attempting to execute any decree or order. O. 21, R. 93, Civil P. C., merely gives the auction purchaser an equitable relief by way of returning to him the money that he has already paid into Court because of some order passed under O. 21, Rr. 89 to 92 depriving him of land for which he has already paid. An application under O. 21, R. 93 is, therefore, governed by Art. 181 and not by Art. 182, Limitation Act, and must be made within three years from the date of the first order setting aside sale : *Case law discussed.* [P 784 C 2]

K. V. Krishnaswami Iyer and *S. Venkataraman*—for Appellants.

K. S. Sankara Ayer—for Respondents.

Judgment.—In execution of a decree, a sale was held on 24th June 1922, which was confirmed on 25th July 1922. An application to set aside the sale was made and an order passed setting aside the sale

on 17th December 1923. There was an appeal to the District Judge, a second appeal to the High Court, and a Letters Patent Appeal from the judgment in second appeal. All these appeals to which the decree-holder and the auction-purchaser were parties were dismissed; the first appeal on 12th November 1924, the second appeal on 21st February 1928, and the Letters Patent Appeal on 13th September 1929. The present application was put in under O. 21, R. 93 by the auction purchaser for refund of the purchase money, as the sale had been set aside. This was on 29th August 1932. The question arises whether this application is barred by limitation, which would depend on whether, as contended by the decree-holder, three years are allowed from the date of setting aside the sale or, as contended by the auction-purchaser, three years from the dismissal of the Letters Patent Appeal on 13th September 1929. The District Munsif of Pattukottai held that the application was in time. Against that finding the decree-holder preferred a revision petition to this Court (C. R. P. No. 306 of 1933) and at the same time appealed to the District Judge. The District Judge transferred the appeal to the Subordinate Judge, who held that the application was barred and dismissed the application. Against that finding this appeal (C. M. S. A. No. 132 of 1934) has been preferred and this C. M. S. A. and C. R. P. No. 306 of 1933 have come on for hearing together.

One of the questions for decision is whether an appeal lay against the order passed under O. 21, R. 93 by the District Munsif ordering refund of the purchase money. On behalf of the appellant three cases have been quoted which directly bear on this question. The first is 3 M L W 105,[1] in which Sadasiva Iyer and Moore, JJ. held that in an application under O. 21, R. 93 no appeal lay. Another case of this Court referred to is 9 Mad 437,[2] which was decided similarly. In both these cases no argument was adduced and I doubt whether they are any longer good law; for, they seem to have been decided on the assumption that an auction-purchaser is a stranger to the suit and that any point that arises between him and the parties to the suit did not therefore fall within the scope of S. 47. There can be no doubt from a very large number of cases decided in this Court and in other High Courts that the auction-purchaser can be looked upon as a representative of a judgment-debtor or decree-holder and, further, that when there is a matter in dispute between the decree-holder and the judgment-debtor, it makes no difference that the actual application which raises the matter is made by a stranger. The third case referred to is 12 All 397,[3] which is to the same effect. There is very little discussion even in that judgment; and the many cases referred to therein show that there was a very considerable conflict of authority on this point before 12 All 397[3] was decided. That case is certainly no longer good law in Allahabad; for a Full Bench of the Allahabad High Court has given a definite finding to the contrary in 45 All 369.[4]

On the other side, there is no direct decision on this point excepting 45 All 369,[4] but a number of cases have been quoted in which it has been pointed out that matters in dispute between the auction-purchaser and the parties to the suit come properly under S. 47, Civil P. C., if they relate to the execution, discharge, and satisfaction of the decree. In 43 Mad 107,[5] there was a conflict between the auction-purchaser in execution of a money decree, who was a stranger and the auction-purchaser (decree-holder) in execution of a mortgage decree. The stranger auction-purchaser contended that he was a purchaser for value without knowledge of the mortgage, whereas the decree-holder purchaser contended that the purchase was made lis pendens and was therefore not binding on him. It was there held that the auction-purchaser was a representative of the judgment-debtor. The question whether the matter arose in execution was not decided by the Full Bench, as a definite finding that it did so arise had been given by the referring Judges. The scope of 43 Mad 107[5] was explained very fully in the judgment of Krishnan, J. in 41 M L J 120.[6] There, the judgment-

1. Krishna Bhupati v. Venkataswamy, A I R 1917 Mad 217=33 I C 235=3 M L W 105.
2. Kunhammad v. Chathu, (1886) 9 Mad 437.
3. Rahim Baksh v. Dhuri, (1890) 12 All 397=1890 A W N 135.
4. Bindeshri Prasad v. Badal Singh, A I R 1923 All 394=74 I C 873=45 All 369=21 A L J 228 (F B).
5. Veyindramuthu Pillai v. Maya Nadan, A I R 1920 Mad 324=54 I C 209=43 Mad 107=38 M L J 32 (F B).
6. Jainulabdin Sahib v. Krishna Chettiar, A I R 1921 Mad 420=63 I C 200=41 M L J 120.

debtor, in a separate suit, contended that the auction purchaser had trespassed on some of his lands which had not been sold: but the Court found that although the lands in question were not the subject matter of the mortgage or of the decree and were not even sold; yet the Amin had by mistake actually delivered them to the auction purchaser and that there was no trespass. It was held, following the Full Bench case, that this was a dispute in which the judgment-debtor and the decree-holder were adversely interested and that it did not matter that it was the auction purchaser with whom the judgment-debtor was actually contending. It was therefore held that the judgment-debtor should have raised this matter in execution and that a separate suit did not lie. In 65 M L J 253[7] there was a sale; but before confirmation had been ordered, the decree itself was set aside in appeal. The sale was confirmed and an application was then put in to set aside the sale under Ss. 47, 151 and O. 21, R. 89. It was held that O. 21, R. 89 did not apply; and the same test was applied by Madhavan Nair, J. in this case as was applied in 41 M L J 120,[6] whether the judgment-debtor and the decree-holder were adversely interested in the point in dispute. It was held that they were, and that therefore S. 47 did apply and the matter could be gone into in execution. It is not difficult, I think, to distinguish these three cases from the present case; for in all three of them it was very clear that the matters in dispute did arise in execution. It is however argued that in the present case the dispute is one relating to the discharge and satisfaction of the decree; because if the auction-purchaser succeeds, the decree would be unsatisfied; whereas if he fails the decree-holder will have retained possession of the money and the decree will be satisfied. This seems to be the view taken in 45 All 369.[4] After approving the decision of the Full Bench of the Madras High Court in 43 Mad 107[5] that a stranger purchaser at a Court auction is entitled and bound to have any question relating to the satisfaction of the decree decided under S. 47, Civil P. C., the judgment goes on to discuss the Privy Council case, 19 Cal 683,[8] in which their Lordships remarked that Courts in India were right in not placing too narrow a construction on the language of S. 244 (the present S. 47). It then refers to a recent decision of the same Court in 44 All 266,[9] with approval. The authority of this ruling is weakened by the fact that the Judges were undoubtedly influenced by the equities of the case before them; for they say:

> We are entitled to treat this application as coming within the provisions of that section. Even if we were not so satisfied, we should have been prepared to grant the relief asked for on the analogy of S. 144, in exercise of our inherent power under S. 151 of the Code. There is admittedly no question outstanding between the parties except that which has been decided in this appeal, and to require the question to be now tried out in a regular suit would be merely to put the parties to unnecessary expense.

However, a very definite finding has been given, and it is incumbent on me to give it the very greatest respect. Apart from 45 All 369,[4] this question does seem to have been left in some uncertainty; but on a general examination of the current of cases bearing on the interpretation of S. 47, there is certainly a very strong tendency to give it a wide application and to bring within its scope questions arising between the parties to the suit and the auction purchaser. As has been pointed above, the matter now in dispute does to some extent relate to the discharge and satisfaction of the decree. I therefore find that an appeal and second appeal do lie.

When this appeal first came up for hearing, it was admitted that the Article of the Limitation Act to be applied was 181; but the learned advocate for the auction-purchaser now suggests that the appropriate Article would be 182. There is no direct authority; but the matter has been argued on the analogy of an application under O. 21, R. 93, Civil P. C., to an application under S. 144, Civil P. C., for restitution. There has been a considerable conflict of authority whether applications for restitution are governed by Art. 181 or Art. 182; but the weight of authority is that they are governed by Art. 181. Full Benches of the Allahabad and Patna High Courts have said so and the question has been much discussed in Calcutta, where the same conclusion was reached.

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7. Sorimuthu Pillai v. Muthukrishna Pillai, A I R 1933 Mad 598=143 I C 854=56 Mad 808=65 M L J 253.
8. Prosonno Kumar Sanyal v. Kali Das Sanyal, (1892) 19 Cal 683=19 IA 166=6 Sar 209(PC).
9. Sitaram v. Janki Ram, A I R 1922 All 200=65 I C 813=44 All 266=20 A L J 105 (F B).

However, there is authority in Madras for the position that applications under S. 144 relate to execution and that Art. 182 therefore applies. The leading Madras case is 40 Mad 780,[10] and the reason given is this :

> The language of S. 583 of the old Code was not wide enough to cover all cases of benefits arising from the reversal of a decree being fully realized by the successful party. Apart from this change, we see no ground for holding that Legislature intended to make any departure in the procedure by which restitution is to be obtained. Under the old Code restitution was by way of execution: *see* 31 All 551,[11] The same rule applies to similar applications under the new Code. The language of S. 47 of the Code would cover all cases of restitution.

So that the reason why Courts in Madras have followed 40 Mad 780[10] is that restitution was considered to be by way of execution under the old Code and that no change was made in the new Code. Even apart from that, it is not difficult to see that restitution does arise by way of execution : for in executing the decree of the Court which reverses a decree of a lower Court, account has necessarily to be taken of any changes in the positions of the parties that have taken place since the passing of the decree that has been reversed. For example, if one Court states that *A* should hand over possession to *B* and he does so in execution and the Appellate Court states that possession should be with *A*, it is in execution of the Appellate Court decree that possession is given back to *A* by *B*. It is difficult to apply similar reasoning to an application under O. 21, R. 93. Art. 182 sets out the period of limitation for the execution of a decree or order ; but an auction purchaser who applies for the return of the purchase money is certainly not attempting to execute any decree or order. O. 21, R. 93 merely gives the auction-purchaser an equitable relief by way of returning to him the money that he has already paid into Court because of some order passed under O. 21, Rr. 89 to 92, depriving him of land for which he has already paid. Were it not for the provisions of O. 21, R. 93, he would be driven to a separate suit. In a recent case decided in this Court by Lakshmana Rao, J. (1931 M W N 1006)[12], an auction-purchaser claimed restitution under S. 144 (and not under O. 21, R, 93) by virtue of the fact that the sale was set aside because of a successful application under O. 21, R. 63. Lakshmana Rao, J. held that S. 144 does not apply only to cases where a decree or order is reversed in appeal, but also where an order is made of no effect by virtue of other proceedings, so that when a claimant became successful in a suit filed under O. 21, R. 63, the Court was empowered under S. 144 to put all the parties, including the auction-purchaser, in the same position as they would have been if the claim had been upheld in the first instance. This case is clearly distinguishable from the present one. There are no grounds for holding that Art. 182 applies to an application under O. 21, R. 93.

Assuming as was originally conceded that Art. 181 is the provision of the Limitation Act that governs this application, it would certainly follow from a plain reading of Art. 181 that time began to run from the date of the passing of the original order setting aside the sale. It is however argued, on the analogy of orders passed on applications under S. 144 or for the passing of a final decree, that it is from the date of the decree of the final Appellate Court confirming the decree of the first Court that time must be reckoned. That in the case of an application for a final decree time has to be reckoned from the preliminary decree of the final Appellate Court has certainly been established beyond all doubt. The Privy Council in 6 Pat 24[13] has approved the remarks made in 39 All 641[14] to the effect that :

> The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties and that
> when the Munsif passed the decree it was open to the plaintiff or the defendant to accept the decree or to appeal. If an appeal is preferred, the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final between the parties.

Similar reasoning was adopted by this Court in 44 Mad 714.[15] If there had been

10. Somasundaram v. Chockalingam, A I R 1917 Mad 185=38 I C 806=40 Mad 780.
11. Prag Narain v. Kamakhia Singh, (1909) 31 All 551=3 I C 798=13 O C 180=36 I A 197 (P C).
12. Muniah v. Gangamma, (1931) M W N 1006.
13. Jowad Hussain v. Gendan Singh, A I R 1926 P C 93=98 I C 499=53 I A 197=6 Pat 24 (P C).
14. Gajadhar Singh v. Kishen Jiwan Lal, A I R 1917 All 163=42 I C 93=39 All 641=15 A L J 734 (S B).
15. Venkayya v. Sathiraju, A I R 1921 Mad 414 =64 I C 470=44 Mad 714=41 M L J 117.

no decisions on applications other than those for final decrees, the position of the appellant would have been a strong one. Another group of applications, upon which there has been considerable authority, is that of applications for restitution under S. 144, which in the opinion of most of the High Courts comes within the scope of Art. 181. As has already been pointed out, an application for restitution can be looked upon as one arising in execution of a decree; and some Judges while holding that Art. 181 applied have nevertheless been of opinion that such an application was akin to one in execution and so held, on the analogy of Art. 182, that the Legislature must have intended that where there were appellate decrees, the decree of the final Appellate Court was the decree from which time should be calculated. In view of the fact that Art. 182 expressly lays down that time should be reckoned from the date of the last decree whereas Art. 181 does not say so, it is rather difficult to argue by analogy from Art. 182 to Art. 181. The main current of authority on this point is undoubtedly to the effect that time does run from the date of the first decree. The matter was very fully considered by a Full Bench of the Allahabad High Court in 57 All 26,[16] and the majority of the Judges found themselves unable to accept the argument that the proceedings were akin to execution proceedings and that the same principle that time should be reckoned from the date of the final Appellate Court decree should be followed. The Calcutta High Court has consistently held the same view. In 11 Rang 275[17] a contrary view was held. 7 Pat 794[18] was there referred to and the opinion was expressed that it was difficult to see in what way an application for the passing of a final decree differed in this respect in principle from an application for restitution. If it was the operative decree of the final Appellate Court that had to be taken into account in reckoning the time allowed for applying for a final decree, then for the same reason it would be the decree of the final Court of Appeal that should be taken into account in reckoning the time for restitution proceedings. Even if this reasoning is valid, it is very difficult to see how a mere application to return purchase money can be assimilated to an application for the passing of a final decree or even to one for restitution of the nature of an execution of a decree.

Cases dealing with certain other applications seem to me to be more analogous to the present application for a refund of purchase money. In 46 Cal 670[19] the provision of the Limitation Act applied was Art. 97 "for money paid upon an existing consideration which afterwards fails". There the same question arose as to whether time had to be reckoned from the date of the decree of the lower Court or from the date of the decree of the Appellate Court which confirmed the judgment of the lower Court. Their Lordships there pointed out that as in India an original decree is not suspended by the presentation of an appeal nor is its operation interrupted when the decree on appeal is one of dismissal, and that as consideration failed at the date of the first decree, the mere fact that an appeal had been filed did not suspend the cause of action and that throughout the pendency of the proceedings in the Appellate Courts time was running against the plaintiff. This case is of very great importance and has been discussed in all the cases relating to applications for restitution whichever way Courts have eventually decided. It has been taken as an authority by the Allahabad and Calcutta High Courts with regard to restitution proceedings on the ground that as the section clearly says that the period of limitation under Art. 181 is three years from the time when the right to apply accrues, time must be calculated from the date on which the right accrued, because the cause of action is not interrupted by the subsequent filing of an appeal. In A I R 1933 Cal 422[20] a sale was set aside and money refunded to the auction-purchaser. The decree-holder appealed but the sale was confirmed. A second appeal was filed which was also dismissed. Another judgment-debtor, who was not a party to the appeals, then filed a suit for the return of the money which had been drawn by the auction purchaser.

16. Parmeshwar Singh v. Sitladin Dube, A I R 1934 All 626=150 I C 1096=57 All 26=1934 A L J 503 (F B).
17. Muthukaruppan Chettiar v. Annamalai, A I R 1933 Rang 180=149 I C 889=11 Rang 275.
18. Rambujhavan Thakur v. Bankey Thakur, A I R 1928 Pat 598=114 I C 476=7 Pat 794 =10 P L T 49.
19. Juscurn Boid v. Pirthichand Lal, A I R 1918 P C 151=50 I C 444=46 I A 52=46 Cal 670 (P C).
20. Ashutosh v. Kumed Kamini, A I R 1933 Cal 422=144 I C 150.

The suit was filed more than three years from the date of the original decree but less than three years from the date of the appellate decree. In that case the Judges felt themselves bound by the Privy Council decision just referred to. They say that :

> In construing the provisions of the Limitation Act, equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide. In this view we are of opinion that the right to apply accrued as soon as the order of the District Judge was made in August 1925 confirming the sale and that as the present application was not made within three years from that date, it has been rightly held that the application was barred by limitation.

No doubt in that case the plaintiff was on a specially weak ground as he had not been a party to the appeals; and this was pointed out in the judgment in this case as being an *a fortiori* reason for dismissing the suit. There can be no doubt however that the case would have been decided against the plaintiff even if those special considerations had not existed. In 28 Cal 113[21] an ex parte decree was passed and execution took place. The ex parte decree was subsequently set aside and the judgment-debtor applied for a return of the money realized in execution. There, too, it was held that three years should be calculated from the date of setting aside the ex parte decree. In 16 M L W 285[22] it was found that a vendor had no saleable interest. That decree was appealed against but dismissed. A suit was then brought for damages for breach of covenant of title by the vendee and it was held, distinguishing 44 Mad 714,[15] which contained an obiter to the effect that 46 Cal 670[19] had no application to Art. 181 and that it would be strange if the basis for calculating the limitation under Art. 181 differed from that under Art. 182, that time began to run from the date of the first decree and not from the date of the appellate decree: 46 Cal 670[19] was there followed. The reason for distinguishing 44 Mad 714[15] was that applications under S. 144 were of the nature of applications in execution. Although none of the cases immediately referred to above (46 Cal 670;[19] A I R 1933 Cal 422;[20] 28 Cal 113[21] and 16 M L W 285[22]) deals with precisely the point raised in this application, yet it seems that the same principles have to be applied in this case as in those just quoted. The present application was a simple one under O. 21, R. 93 for the return of money and the right to make that application accrued immediately the order setting aside the sale was made. As the cause of action was not suspended by the filing of the second appeal and Letters Patent Appeal, time went on running against the appellant throughout the conduct of those proceedings. As pointed out in A I R 1933 Cal 422,[20] Courts are not entitled to import equitable considerations when the Legislature has made it clear what time should be allowed for filing applications. I therefore hold that the present application was out of time. I must mention before concluding a direct decision in favour of the appellant in 11 All 372.[23] That decision was by a Single Judge. It is moreover a very old one, and it was decided on purely equitable considerations. It seems never to have been quoted or cited before any other Court and its authority at present must be very little.

An alternative argument has been put forward on behalf of the appellant that as he joined with the decree-holder in preferring the appeals, he could not at the same time apply for a refund of the purchase money and that it could not be said that the right accrued to the applicant in pursuing the strictly alternative relief to have the sale upheld. The learned Subordinate Judge in appeal disposed of this argument very summarily by saying that he was unable to follow the reasoning and that if the appellant chose to take the matter in appeal, it was his own fault and he did so at his own risk. I quite agree with what the learned Subordinate Judge has said. The appellant had two remedies and there was no reason why he should not have adopted both at the same time, one being kept pending until the other was disposed of. He had a choice and must accept the consequences of having made the wrong one. In result the appeal is dismissed with costs.

The Civil Revision Petition was unnecessary and is dismissed without costs. (Leave granted).

C.R.K./K.B. *Appeal dismissed.*

21. Harish Chandra Shaha v. Chandra Mohan Dass, (1901) 28 Cal 113.

22. Pakuran v. Kandan Kutti, A I R 1923 Mad 23=70 I C 45=16 M L W 285.

23. Giridhari v. Sital Prasad, (1889) 11 All 372= 1889 A W N 113.

*** A. I. R. 1937 Madras 785**

LAKSHMANA RAO, J.

A. L. Meenakshi Achi and *another* — Appellants.

v.

S. T. L. Rm. alias *K. Rm. Ramaswami Chettiar* and *others* — Respondents.

Second Appeal No. 515 of 1935, Decided on 23rd March 1937, against decree of Sub-Judge, Devakotai, in A. S. No. 58 of 1934.

*** Administration — Suit for — Creditor can file administration suit against undivided son of Hindu debtor.**

Section 53, Civil P. C., extends the meaning of the term legal representative as defined in S. 2, Cl. (11), by expressly making the son or descendant of a Hindu, his legal representative in respect of the joint family property in his hands which is liable under Hindu law for the satisfaction of the debt of the deceased ancestor. The obligations of the son or other descendant in respect of the debts of the deceased ancestor which are not illegal or immoral are precisely those of an heir in view of S. 53. Hence a creditor should be allowed to bring an administration suit against the undivided son of the Hindu father who was debtor of the creditor : *A I R 1937 Mad 99* and *33 Mad 93 (F B)*, *Rel. on*; *A I R 1934 All 590 (F B)*, *Ref.* [P 785 C 2; P 786 C 1]

V. Ramaswamy Ayyar—for Appellants.

M. Patanjali Sastri and *T. M. Ramaswami Iyer* — for Respondents.

Judgment. — This second appeal arises out of a suit by respondent 1 for administration of the estate of the deceased Arunachala Chettiar, the undivided father of minor respondent 2, and the sole question for determination is whether, as contended by the appellants who have obtained decrees against the estate in the hands of respondent 2, a suit for administration is not maintainable. The locus standi of respondent 1, to institute a suit for the administration of the estate, if any, of the deceased Arunachala Chettiar was not disputed and it is common ground that the maintainability or otherwise of the suit depends upon whether or not the joint family properties are or can be deemed to be the estate of the deceased Arunachala Chettiar in the hands of his minor son, respondent 2. It is no doubt true that under the Hindu law, the undivided son or other descendant who succeeds to the joint family property on the death of the ancestor does so by right of survivorship and takes the property in his own right and not as heir of the ancestor, but he is liable under the Hindu law by reason of his pious obligation to pay the debts of the deceased not incurred for illegal or immoral purposes, to the extent of the joint family property which has come to his hands, and S. 53 of the present Civil P. C. provides that for the purpose of S. 50 and S. 52 which relate to execution of decrees on the death of a judgment-debtor and enforcement of decrees passed against a party as the legal representative of a deceased person, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of the deceased shall be deemed to be the property of the deceased which has come to the hands of the son or other descendant as his legal representative. That section was enacted in order to settle the conflict as to whether the liability of the son could be enforced only by way of a separate suit, and the words "for the purpose of S. 50 and S. 52" have to be understood in the light of the reason for the enactment of S. 53. That a suit instituted against a father can on his death be continued against the undivided son is undoubted, and the decree has then to be for the payment of the amount out of the property of the deceased.

The joint family property is for this purpose to be deemed to be the property of the deceased which has come to his hands as the legal representative, and as pointed out in 57 All 176[1], the pious obligation of a Hindu son to pay his father's debts is not affected by the fact that the joint family also comprises members other than the father and his sons. The undivided share of the son will then be deemed to be the property of the father which has come to the hands of the son as his legal representative and in effect S. 53 extends the meaning of the term legal representative as defined in S. 2, Cl. (11) by expressly making the son or descendant of a Hindu, his legal representative, in respect of the joint family property in his hands which is liable under Hindu law for the satisfaction of debt of the deceased ancestor. The obligations of the son or other descendant in respect of the debts of the deceased ancestor which are not illegal or immoral, are after the enactment of S. 53, Civil P. C., precisely those of an heir, and as observed by Horwill, J. in 44 M L W 836[2], the very reasons which would make it equitable and

1. Chottey Lal v. Ganpat Rai, A I R 1934 All 590=150 I C 411=57 All 176=1934 A L J 483 (F B).
2. Anjayya v. Ankamma, A I R 1937 Mad 99=166 I C 866=44 M L W 836.

desirable to enable a creditor to file a suit for administration of the assets of a deceased person in the hands of an heir or administrator or executor would make it equitable and desirable that a creditor should be allowed to bring an administration suit against the undivided son of the debtor. The decisions under the Succession Act have no direct bearing nor are the several High Courts agreed on the point. The Madras view is that letters of administration may be granted to an undivided son: *vide* 33 Mad 93,[3] and it follows that the suit is maintainable. The second appeal therefore fails and is dismissed with costs. Leave is granted.

C.R.K./K.B. *Appeal dismissed.*

3. *In the matter of* Dasu Manavelan Chetty, (1910) 33 Mad 93=4 I C 1064=19 M L J 591 (F B).

* A. I. R. 1937 Madras 786

VENKATASUBBA RAO AND VENKATARAMANA RAO, JJ.

In re N. Duraiswami Iyer, Receiver, Punganur Zamindari—Appellant.

Second Appeals Nos. 50 to 61 of 1937 and Stamp Register No. 12284, etc., of 1935, Decided on 25th January 1937, against decrees of Dist. Court, Chittoor, in A. S. Nos. 98 and 133, 134, 132, 111, 99, 135, 136, 137, 138, 139 and 140 of 1934.

*** Court-fees Act (1870), Sch. 2, Art. 17-B (Madras Amendment)—Suit by tenant under S. 112, Madras Estates Land Act—Second appeal by landholder — Value of subject-matter is annual rent, recovery of which is resisted—Court-fee payable on appeal is ad valorem:** *52 Mad 972=A I R 1930 Mad 43=121 I C 601, Overruled.*

In suits brought by tenants under S. 112, Madras Estates Land Act, they were successful in two Courts. The landholder preferred second appeals. The question as to what was the proper court-fee on such appeals having arisen:

Held: that the court-fee payable on each appeal was ad valorem. The value of the subject matter was the annual rent, the recovery of which was resisted by the tenants: *52 Mad 972=A I R 1930 Mad 43=121 I C 601*, **Overruled.**

[P 786 C 2; P 787 C 2]

N. C. Vijiaraghavachari — for Appellant.

Govt. Pleader — for the Crown.

Venkatasubba Rao, J.—The question raised in this batch of second appeals is, what is the right principle to be applied in regard to valuation of suits filed under S. 112, Madras Estates Land Act? Ch. VI of that Act deals inter alia with the sale of the ryots' holding for arrears of rents due. S. 111 provides that when an arrear is not paid within the revenue year in which it accrued due, it shall be lawful for the landholder to sell the holding or any part thereof in the prescribed manner. S. 112 then enacts that it shall be incumbent on the landholder intending to avail himself of this power, to serve a written notice on the defaulter, first, stating the amount due and secondly informing him that in default of his paying the amount or of his filing a suit contesting the landholder's right to sell within the time specified, the holding or a part thereof, as the case may be, will be sold. The present appeals arise out of suits filed by the tenants concerned under the last mentioned section. In both the Courts below, the tenants were successful and the second appeals here have been filed by the landholder. The question is, what is the proper court-fee payable on these appeals? The landholder contends in the words of the office note that "the value of the subject matter is not more than the annual rent, the recovery of which is resisted" and on that basis he has paid an ad valorem court-fee in each appeal. As however a different view prevailed in 52 Mad 972[1], the question was referred to one of us, Venkataramana Rao, J., who in view of the importance of the point raised, has directed the matter to be placed before a Bench. It is thus that these cases have come to be heard by us.

The only case in which this question directly arose is 52 Mad 972[1] decided by Ananthakrishna Iyer, J. The learned Judge there held that in the case of a suit under S. 112, "It is not possible to estimate at a money value the subject matter in dispute", and that therefore, Art. 17-B, Sch. 2 applies. In arriving at this decision, he relied by way of analogy, upon certain three classes of cases, where in the circumstances existing in them it was held that the subject matter was incapable of valuation. The reasoning of the learned Judge seems, with great respect, far from convincing; on the contrary, there is another case decided by Ananthakrishna Iyer, J. himself, which on account of its resemblance to the present case may be said to have a greater bearing on the point

1. Aiyaswami Iyer v. District Board, Tanjore, A I R 1930 Mad 43=121 I C 601=52 Mad 972=57 M L J 510.

raised. The question raised was, what was the proper court-fee payable in respect of suits filed under S. 95, Madras Estates Land Act? That section, like S. 112 (the provision with which we are dealing) also occurs in Ch. VI of the Act and refers to a suit by the ryot to contest the distraint effected by the landholder. It provides that a notice shall be served on the defaulter, requiring him either to pay the amount demanded or to institute a suit contesting the distraint within the specified period. It will be seen that these two Sections, 95 and 112, occur not only in the same chapter, but have been enacted to serve the same purpose and prescribe similar, if not identical, procedure. The learned Judge has held that where suits are filed under S. 95, it is possible to estimate the subject matter in dispute; if that conclusion is right (and in our opinion it is), it is reasonably clear that the same view should prevail in respect of suits under S. 112.

The notice mentioned in S. 112, is required to state, in the first place, the amount due for arrears which amount, it is obvious, represents both the extent of the tenant's alleged liability and the measure of his interest in the intended suit. The learned Judge observes that in a suit to be filed by the tenant, he may direct his attack not against the quantum of the rent claimed, but against the sufficiency of the service of notice and therefore concludes that the amount of rent cannot be the criterion. With great deference, there is some fallacy which seems to underlie this reasoning. From the tenant's point of view, what he contests is the landholder's right to sell for the arrear claimed, and if he succeeds, his opponent's right to proceed with the intended sale comes for the time being to an end—on what particular ground the tenant makes good his contention being for this purpose a matter of no consequence.

As observed in 13 C W N 815,[2] the word used in Art. 17-B is "estimate" which involves the "idea of approximation", that is to say all that is contemplated is that the subject matter is capable of being approximately, and by no means accurately, valued. Ananthakrishna Iyer, J. observes as a further argument in support of his conclusion that in the case of a taxing statute a construction most beneficial to the subject should be adopted. This canon has obviously no application. In the case decided by the learned Judge (52 Mad 972[1]), the land-holder was interested in arguing, having regard to the amount of the fee payable on the ad valorem basis, that Art. 17-B applied; in the present cases, he is interested in putting forward the very opposite of that contention, as the court-fee which he would be liable to pay, were that Article applicable, would be greater than the amount payable ad valorem on the annual rent claimed.

In the result, we decide that the contention of the landholder's counsel must prevail. The learned Government Pleader, we may observe, has supported that contention, stating frankly that his desire is to obtain a considered ruling. We think that as between the Government and the Government Pleader, Rs. 75 for the whole batch would be the proper fee.

C.R.K./S.C. *Order accordingly.*

2. Bunwari Lal v. Daya Sunker-Misser, (1909) 1 I C 670=13 C W N 815.

A. I. R. 1937 Madras 787

VARADACHARIAR, J.

Secretary of State — Appellant.

v.

Lokanatha Behara and *another* — Respondents.

Second Appeal No. 672 of 1933, Decided on 26th April 1937, against decree of Sub-Judge, Berhampore, in A. S. No. 56 of 1932.

Limitation Act (1908), Art. 120 — Scope — Dispute between father and son in 1909 regarding possession of lands — Order under S. 146, Criminal P. C., leasing lands — Proceeds to be deposited in treasury — Father dying in 1915 — Notice to Collector in 1927 to pay money so deposited — Suit by son in 1929 for recovery of money deposited from 1910 to 1917 — Government though not regarded as trustee held stake-holder — Suit held governed by Art. 120 and not barred.

In 1909 there were disputes between a son and his father as to the possession of certain lands, the father claiming them to be his self acquisition and the son claiming them to be ancestral property in his possession. To avoid a breach of the peace, the Magistrate passed an order under S. 146, Criminal P. C., early in 1910, but instead of appointing a receiver to manage the property, he got the lands cultivated by somebody else and the sale proceeds were being deposited in the treasury. The father died somewhere about 1915. In 1927 the son sent a lawyer's notice to the Collector asking for payment of the money and threatened to sue in default of payment. The Collector as usual replied that the threatened suit

would be awaited. The son's right was not denied at any earlier stage. The son brought a suit in 1929 for the money deposited in the treasury from the income of the property :

Held : that as the only dispute was between the father and the son with regard to the possession of the lands and as on the father's death the son became undisputedly entitled to them, it was not necessary for the son to file a suit to obtain a declaration of his right to the money deposited in the treasury. [P 788 C 2]

Held further : that though the Government might not be regarded as a trustee within the meaning of S. 10, Limitation Act, they were at least in the position of stake-holders as they never claimed to hold the money for themselves. The suit was therefore governed by Art. 120 of the Act and as the son's right to the money was never clearly and unequivocally denied or threatened by Government more than six years before the suit, even if the Collector's reply to the son's notice could be regarded as a denial, the suit was not barred by limitation : *A I R 1930 P C 270, Rel. on.* [P 788 C 2; P 789 C 1]

Govt. Pleader — for Appellant.

Respondent in person.

Judgment.—This second appeal arises out of a somewhat unusual claim, but the Courts below have found in the plaintiff's favour on the facts. The main point for determination in the second appeal is the question of limitation.

In 1909 there were disputes between the plaintiff and his father as to the possession of certain lands, the father claiming them to be his self acquisition and the plaintiff claiming them to be ancestral property in his possession. To avoid a breach of the peace, the Magistrate passed an order under S. 146, Criminal P. C., early in 1910, but instead of appointing a receiver to manage the property, he asked the village karji, defendant 2, to look after the lands. The village karji deposes that he looked after the lands only for one or two years and that thereafter the Magistrate got the lands cultivated by somebody else and the sale proceeds were being deposited in the treasury. On account of acts of violence committed by the plaintiff on his father's tenants, the plaintiff was sentenced to imprisonment for about a year about this time and after he came out of the jail he says he went on a pilgrimage. When exactly he returned or how long he was absent from the village, it is not possible from the evidence to say. The father appears to have died somewhere about 1915. In some manner, which it is not now necessary to examine, the actual possession of the lands seems to have somehow been obtained by certain mortgagees from the Magisterial authorities. The present suit relates to the moneys alleged to represent the income deposited in the treasury, during the years 1910 to 1917. So far as the record discloses, it is only in 1927 that the plaintiff sent a lawyer's notice to the Collector asking for payment of the money and threatened to sue in default of payment. The Collector as usual replied that the threatened suit would be awaited. It does not appear anywhere that the plaintiff's right was denied at any earlier stage.

The Courts below decided against the defendants on the plea of limitation on the ground that the case was governed by S. 10, Limitation Act. I do not think it is necessary to canvass the correctness or otherwise of the position that in circumstances like those of the present case Government can be held to be a trustee in whom the property has become vested in trust for a specific purpose. It is not disputed that if S. 10 is out of the way, the only Article applicable to the suit will be Art. 120. The question is, when does the six years' period of limitation under that article begin to run in such a case.

It may be useful to refer here to another contention urged on behalf of the Government, namely, that the plaintiff has no cause of action at all for the present suit because there has in fact been no adjudication at all by a Civil Court in the sense contemplated by S. 146, Criminal P. C. The Courts below rightly overruled it on the ground that as the only dispute was between the father and the son and on the father's death the son became undisputedly entitled to the property, it was not necessary to file a suit to obtain a declaration. But this contention is relevant to show that in the circumstances of the case the plaintiff could not possibly have had a cause of action against the Government immediately the money was received in any particular year as representing the income of the land. We must therefore find some other starting point than the dates when the sums were received even for the application of Art. 120. Though the Government might not be regarded as a trustee within the meaning of S. 10, they were at least in the position of stakeholders and never claimed to hold the money for themselves.

In applying Art. 120 to a case of this kind, it is not proper to say that limita-

tion began to run at least from the plaintiff's father's death, on the assumption that the plaintiff could at that moment have claimed payment of the money in the Government's hands. As observed by the Judicial Committee in 59 M L J 621,[1] and some of the cases following it, the suit will be within time if instituted within six years of the date when the plaintiff's right was clearly and unequivocally denied or threatened by the Government. As I have already observed, no such denial took place more than six years before suit in this case, even if the Collector's reply to the plaintiff's notice of suit could be regarded as a denial. On this ground I hold that the Courts below were right in their conclusion that the suit was not barred by limitation.

A further contention was raised before me, on behalf of the Government, that it is for the plaintiff to prove how much has been deposited with the Government and that, as he has adduced very little evidence in support of his version, the decree of the Courts below is not sustainable. The case is certainly one in which under S. 106, Evidence Act, the onus lies upon the Government. Having regard to the nature and extent of the land and the general evidence as to its probable yield, the Courts below rightly held that the plaintiff's estimate was modest and reasonable. The Government can no doubt plead in extenuation, the destruction of some of the relevant records, in accordance with the well-known rules. But as pointed out by the Courts below, one set of books known as Shroff's books are expected to have been preserved under the rules for a period of 20 years, and indeed the books for some years were actually produced before the Appellate Court. I am asked to read the entries in some of those books and say that they are not specific enough to be held to relate to the plaintiff's claim. If these books had been produced in the trial Court, other evidence would presumably have been forthcoming to connect them with the sources from which the income referred to therein was received. If those who were conducting the case for the Government in the lower Court did not care to take steps to produce the books which in fact were made available on a more diligent search when the case was pending before the Appellate Court, that is no reason for making the plaintiff responsible for the consequence. I therefore see no reason to interfere with the finding of the Courts below as to the amount payable to the plaintiff. The second appeal fails and is dismissed, but as the respondent is not represented, there will be no order as to costs. (Leave to appeal asked for is refused).

C.R.K./A.L. *Appeal dismissed.*

1. Mt. Bolo v. Mt. Koklan, A I R 1930 P C 270 =127 I C 737=57 I A 325=11 Lah 657=59 M L J 621 (P C).

A. I. R. 1937 Madras 789

VENKATARAMANA RAO, J.

Kolicherla Seshacharlu and *others* — Appellants.

v.

Vidwan Ramanujacharulu and *another* — Respondents.

Second Appeal No. 356 of 1935, Decided on 26th February 1937, against decree of Dist. Court, Chittoor, D./ 1st March 1935.

(a) Trust — Creation of — Gift of certain sums by disciples to Guru to enable him to carry on charity which he was performing — Guru purchasing properties from out of those amounts — Gift held absolute followed by words merely expressing motive of gift and hence no trust was created.

Before a trust can be found, there must be an intention to create a trust. Where a gift is absolute followed by the words merely expressing the motive of the gift, no trust at all would be inferred. [P 791 C 1]

Where it was found that the disciples gifted two sums of money to their guru and the object of the gift was to enable him to carry on the charity which he was performing, viz. feeding of Vaishnava Brahmins at the time of a certain festival and the guru purchased properties from out of those specific amounts :

Held : that there was nothing more than an absolute gift of the moneys to the guru with an expression of a wish as to the mode of employing it, viz. to carry on the charity he was doing, that there was no intention to create a trust and constitute the guru a trustee and that therefore the properties were not trust properties : *Mackett v. Mackett, 14 Eq 49, Ref.* [P 791 C 1]

(b) Trust—Beneficiary should not be made trustee unless clearly so indicated.

A beneficiary should not be made a trustee unless there are clear words indicating that he was intended to be made a trustee. [P 790 C 2]

(c) Words and Phrases — 'Dattam' and 'samarpimpabadina'.

The words 'dattam' and 'samarpimpabadina' connote an absolute gift. [P 790 C 2]

B. Somayya for *K. E. Rajagopalachari* — for Appellants.

B. Sitarama Rao for *T. K. Srinivasathathachariar* and *V. Ganapathi Iyer* — for Respondents.

Judgment.—The question raised in this second appeal is whether the properties involved in the suit, a house and lands, are trust properties dedicated to a charitable trust. The suit was instituted by the plaintiffs as representatives of the Sri Vaishnava Brahmins who are claimed to be the beneficiaries under the said trust to have it declared that a decree obtained by defendant 2 against defendant 1 in O. S. No. 354 of 1930 on the file of the Tirupathi District Munsif's Court on the foot of a mortgage of the suit property executed by defendant 1 is not binding on the trust. The trust mentioned in the plaint is the feeding of Brahmins or Brahmin pilgrims that assemble in Tiruchanur near Tirupati during the Brahmotsavam festival of Sri Padmavati Thayarammal. The said trust is alleged to have been founded in the year 1914 by the disciples of defendant 1 who is an acharya or guru, and defendant 1 constituted a trustee. Both the lower Courts have negatived the plaintiffs' claim on the ground that the plaintiffs have not proved that there was any trust as alleged by them.

There is no deed evidencing any such trust, nor has any oral evidence been let in on which any trust can be found. The only evidence relied on are the two sale deeds under which the suit properties were purchased and the evidence of P. Ws. 2 and 3. Ex. B is a deed dated 9th January 1914 evidencing the purchase of a house by defendant 1 for a sum of Rs. 2,000. The relevant recitals therein are as follows:

> As you wanted the house for the use of Thadiaradhana to Vaishnavas conducted by you at the time of Brahmotsavam every year, I have sold this day to you for Rs. 2,000. Having sold the property to you, I have received from your Sishya Narayanaswami Chetti, the sale price which he made dattam to you for the performance of the said charitable object.

Ex. A is a sale deed dated 4th March 1914 of certain lands in Padi village. The relevant recitals therein are as follows:

> Having sold to you this day for Rs. 1,500 I have received in full the amount of sale consideration being the amount which was gifted to you by Narayanaswami Chetti as the agent of your disciples . . . for the purchase of feeding the Desantra Brahmins at the time of the Brahmotsavam of Sri Padmavati Thayaralu Varu at Tiruchanur.

Both the sale deeds contain the operative words which convey the property absolutely to defendant 1 with the full powers of alienation, gift, sale, etc. The evidence of P. W. 2 is that defendant 1 was the guru of her husband Narayanaswami Chetti, who is mentioned in the sale deeds, that he used to come to her places for collecting subscriptions, that he was himself feeding Brahmins in Tiruchanur, that he desired a house for that purpose and that moneys were raised by the disciples and given to him to enable him to have the said charity conducted. P. W. 3 does not know anything personally about it; he simply states that Narayanaswami Chetti told him that a house was wanted for the purpose of having the charity conducted and that ever since the purchase he knew that the feeding was done in the said house. There is no other evidence besides this.

The question is, are the suit properties dedicated to a charitable trust? I shall assume for the purpose of this case that a trust for the feeding of Brahmins is a valid charitable trust. The question still remains, was a trust created? From the said evidence it appears that two sums of money were gifted to defendant 1. The gift was prima facie absolute. The object of the gift was no doubt to satisfy the wishes of defendant 1, namely to put him in possession of funds to enable him to carry on the charity which he was performing. Defendant 1 is clearly the beneficiary. A beneficiary should not be made a trustee unless there are clear words indicating that he was intended to be made a trustee. All that the evidence indicates is that defendant 1 himself was doing some charity, namely feeding Brahmins; it was a charity which was entirely under his control both in the manner and method of performance.

It is common knowledge that an acharya like defendant 1 visits his disciples and collects moneys for the performance of the various objects which he has in view and that the disciples generally make gifts at such visits; whenever such gifts are made, they are always intended to be given absolutely to the guru because the object of such gift is to gain spiritual merit. The words appearing in the sale deeds are 'dattam' and 'samarpimpabadina' which connote an absolute gift. Having regard to the relationship between a guru and a disciple, it would hardly have been in the contemplation of the disciples to impose any restriction in the utilization of the moneys which were given to him absolutely or exact any pro-

mise or declaration to bind him'. The holiness and sanctity of the guru are always taken as a guarantee for the due carrying out of any wishes which a disciple might express in making a gift to him. Before a trust can be found there must be an intention to create a trust. It is a recognized rule of construction that where a gift is absolute, followed by words merely expressing the motive of the gift, no trust at all would be inferred. In 14 Eq 49[1] one John Brough on his death bequeathed all his personal property to one Sarah Mackett and to her heirs for her sole and separate use and in regard to the property so given, the proceeds to be applied for the upbringing and maintenance of J. M. and all her children. Sir James Bacon, Vice Chancellor, held that no trust was created. He observed thus at p. 53 :

As to his personal estate, he gives it absolutely and without qualification to Mrs. Mackett for her sole and separate use. He then adds these words : 'and the proceeds to be applied by her in the bringing up and maintenance of' her children. No doubt by these words he expresses the motive of his gift. But he lays no restriction upon the legatee.

The evidence in this case discloses nothing more than an absolute gift of the moneys to defendant 1 accompanied with an expression of a wish as to the mode of employing it, namely to carry on the charity which he was doing. The disappointment of a wish or expectation cannot be a reason for raising a trust. I am therefore of the opinion that there is no trust as alleged and the suit property is not trust property. The view taken by both the lower Courts is right. In the result, the second appeal fails and is dismissed with costs of respondent 2. Leave refused.

C.R.K./D.S. *Appeal dismissed.*

1. Mackett v. Mackett, (1872) 14 Eq 49=41 L J Ch 704=20 W R 860.

A. I. R. 1937 Madras 791

PANDRANG ROW, J.

S. P. P. L. Palaniappa Chettiar — Petitioner.

v.

Official Receiver, Madura — Respondent.

Civil Revn. Petn. No. 838 of 1935, Decided on 30th April 1937, from order of Dist. Court, Madura, D/- 25th March 1935.

Provincial Insolvency Act (1920), S. 54—Transfer of joint family property binding minor son's interest can be annulled under S. 54—Mortgage of joint family property by insolvent father in fraudulent preference—Minor sons represented by father—Mortgage can be set aside as whole and not only with regard to insolvent's share.

Section 54, Provincial Insolvency Act, does not say that it is only a transfer of the insolvent's own or separate property that can be annulled by the Court. So long as the transfer of property *ex facie* binds the whole property, such transfer can be annulled under S. 54, when the conditions are satisfied even though it may be joint family property in which the minor sons had an interest. [P 792 C 2]

Where therefore an insolvent father executes a mortgage of the entire joint family property in fraudulent preference of the creditors for paying off antecedent debt not tainted with illegality or immorality, the mere fact that the minor sons were also joined in the document with the father representing them does not show that it was intended to mortgage the son's shares separately from the father's share and the transfer can be annulled as a whole : *A I R 1935 Mad 246, Disting.*; *25 All 407, Ref.* [P 792 C 1, 2]

M. Patanjali Sastri—for Petitioner.

K. S. Desikan and *S. V. Venugopalachari*—for Respondent.

Order.—This petition arises out of an application by the Official Receiver of Madura under S. 54, Provincial Insolvency Act, to declare as void a certain hypothecation bond dated 21st July 1931 in favour of the respondent and annul the same. The bond was executed by the insolvent in I. P. No. 48 of 1931 and also on behalf of his minor sons. On the merits it was found by both the Courts below that the alienation was a fraudulent preference and it was accordingly annulled. In this petition no attempt has been made to question the correctness of the concurrent findings to this effect by the two Courts below, and the only point urged is that the transfer can be set aside or annulled only as regards the insolvent's own share in the family properties which were mortgaged and that it cannot be set aside or annulled in respect of the minor's shares in the properties, because it is only the transfer of the insolvent's property that can be set aside under S. 54 of the Act.

Reliance is placed in support of this contention on the decision of Sundaram Chettiar, J. reported in 1934 M W N 801.[1] No other decision on the point has been

1. Subramanian Chettiar v. Subbaraya Goundan, A I R 1935 Mad 246=155 I C 611=1934 M W N 801.

brought to notice, and Sundaram Chettiar, J. in his judgment mentions that the point is a new one. I have given my best consideration to this question and I find myself unable to agree with the view expressed by Sundaram Chettiar, J. The main point to remember is that what was mortgaged was the family property and not the separate shares of the executants, namely the father and the sons. The mere fact that the sons also were joined in the document with the father representing them, does not show that it was intended to mortgage the son's shares separately from the father's share. What was done was that the entire family property was mortgaged, the executants being not merely the father but also his minor sons represented by him. The minor sons cannot be said to have had any separate share in the family property which they could hypothecate under the bond.

In a somewhat similar case, the only difference being that instead of the father the eldest brother and managing member of the family took part along with his brothers, namely the case reported in 25 All 407[2] which went up to the Privy Council, it was held that though in that case one of the three executants of the deed was a minor represented by his mother and the alienation was open to objection on the ground that the mother could not validly act as guardian of the minor's property, the alienation was upheld by their Lordships of the Judicial Committee on the ground that the eldest brother's execution of the document was sufficient to convey the entire interest in the family property once it was proved that the alienation was for valid family necessity. In the present case there can be no doubt that the father had authority to mortgage the entire family property because the debt for which the mortgage was executed was an antecedent debt of his not tainted by illegality or immorality. In other words, this is a case in which the father, that is, the insolvent, was himself entitled in law to convey the entire interest in the family property and his execution of the bond purports to convey the entire interest also.

In these circumstances the mere joining of his minor sons represented by himself as their guardian does not in any way diminish the legal effect of the transaction which is that of a valid alienation of the entire joint family property by the father. S. 54, Provincial Insolvency Act, is to the effect that a transfer of property made by the insolvent may in certain circumstances be annulled by the Court. The present transfer is a transfer of property made by the insolvent, and the other conditions are satisfied. The section does not say that it is only a transfer of the insolvent's own or separate property that can be annulled by the Court. So long as the transfer of property *ex facie* binds the whole property, such transfer can be annulled under S. 54 when the conditions are satisfied, even though it may be joint family property in which the minor sons had an interest. I am therefore of opinion that the decree appealed from is right and that there is no need to interfere in revision. The petition is accordingly dismissed with costs.

O.R.K./K.B. *Petition dismissed.*

2. Gharibullah v. Khalak Singh, (1903) 25 All 407=30 I A 165=8 Sar 483 (P C).

A. I. R. 1937 Madras 792

MOCKETT AND HORWILL, JJ.

Emperor

v.

Koramutla Narasigadu and *others*

Accused.

Criminal Appeal No. 3 of 1937, Decided on 18th March 1937, against acquittal by Sess. Judge, Cuddapah Division, in Sessions Case No. 28 of 1936.

Penal Code (1860), Ss. 300, 302 and 326—No intention to cause grievous hurt but knowledge that such hurt is likely to be caused — Person wounded dying — Offence does not fall under S. 300—Person is considered to intend probable consequences of his act—Three persons attacking deceased with sticks — No common intention — One blow causing death of deceased by complicated fracture of skull—Person giving blow is guilty of murder—But who gave blow not known—None of three is guilty of murder.

A person can be guilty of voluntarily causing grievous hurt who does not intend to cause grievous hurt but only knows himself likely to cause grievous hurt. If he did not intend to cause grievous hurt but only knew himself likely to cause grievous hurt, then the offence committed, if the wounded man died, would not fall under any of the clauses of S. 300, I. P. C., and so would not be murder. [P 793 C 2]

A person is considered to intend the probable consequences of his act and therefore a person who hit another on the head with such force as to cause a complicated fracture of a kind sufficient

in the ordinary course of nature to cause death, must be considered to have intended to cause that injury and is therefore guilty of murder.

[P 793 C 2 ; P 794 C 1]

Three persons attacked the deceased. The blow of one of them caused the death of the deceased. The weapons used were such that if used with moderate force, they would not have caused the injury which resulted in the death of the deceased. There was no evidence of common intention of the accused in furtherance of which the deceased was killed, and it was also not known who of the three accused caused the fatal injury by using greater force:

Held: that the two persons who did not cause any fracture of the skull may not have had the same intention as the person who used greater force and fractured the skull and that although one person was guilty of murder and two of a lesser offence, it was not known who of the three was guilty of murder and that none of the accused could therefore be held guilty of murder.

[P 794 C 1]

A. Narasimha Ayyar for *Public Prosecutor* — for the Crown.

B. V. Ramanarasu — for Accused.

Horwill, J.—This is an appeal by the Crown against the acquittal by the Sessions Judge of Cuddapah of the three accused on a charge of murder, the Sessions Judge having found them guilty under S. 326 only.

The events which brought about the killing of the deceased are simple. The brinjals of P. W. 2 were rooted up and his plough stolen. He made a complaint about this, and the accused, rightly or wrongly, thought that P. W. 2 had thrown suspicion on them. On his way home on the day of offence, while he was passing the house of the accused, they abused him. He consulted some of his castemen about this abuse, and decided to refer the matter to the elders of the caste. The accused apparently heard what was going on and knew of the decision. As P. W. 2 passed their house again and on his way to the house of the elders, the three accused rushed out of the house and attacked him, beating him severely with sticks. The deceased sister, hearing her brother's cries, came to the scene and asked the accused why they were beating her brother. They then turned from him and attacked her, each delivering a blow on her head with considerable force with the sticks they held in their hands. One of these blows fractured her skull very extensively, causing a piece of bone to be pressed downwards on the brain. This led to death by compression of the brain.

The learned Sessions Judge had no doubts at all about the truth of the prosecution case, nor have we. In considering the question as to what offence was actually committed by the accused, the learned Sessions Judge says:

I do not consider that there was any definite intention by selecting the head for attack to cause her injuries of a particular kind. As against Nagi (the deceased) the accused had no motive whatsoever, whatever their feeling against Rosigadu (P. W. 2) might have been. It was therefore a case of merely voluntarily causing bodily injury which unfortunately proved to be fatal.

He then says that no doubt the accused used dangerous weapons, the sticks being 1½" to 2" in diameter. He says that the hurt was rendered grievous on account of the fracture of the skull bone and he found that the accused were guilty of voluntarily causing grievous hurt with a dangerous weapon. The first sentence of the learned Sessions Judge above quoted is quite unacceptable. It is most unlikely that when the accused struck the deceased on the head they intended to strike her elsewhere and none of them could have been ignorant of the probable consequences of their acts. Having found that the accused had voluntarily caused grievous hurt, the learned Sessions Judge really found for the prosecution most of the ingredients necessary for the offence of murder. Voluntarily causing grievous hurt is defined in S. 322 as follows:

Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."

Now, if the assailant causing any grievous hurt intended to cause that grievous hurt, then undoubtedly under S. 300 (3), he would be guilty of murder; for, under the words of that sub-section, he would have intended to cause bodily injury and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The doctor has spoken on this point and has said a fracture of this kind would be sufficient in the ordinary course of nature to cause death. A person can however be guilty of voluntarily causing grievous hurt who does not intend to cause grievous hurt but only knows himself likely to cause grievous hurt; and it would appear that if he did not intend to cause grievous hurt but only knew himself likely to cause grievous hurt, it would probably not fall under any of the clauses of S. 300, and so

would not be murder. However, a person is considered to intend the probable consequences of his act, and a person who hits another on the head with such force as to cause a complicated fracture of the kind actually caused here, must be considered to have intended to cause such bodily injury as would in the ordinary course of nature cause death. If therefore it were clear from the evidence who had delivered the fatal blow, that accused would, in our opinion, have been guilty of murder.

We do not however know, and no suggestion has been made, which of the three accused delivered the fatal blow. In order that all the three persons could be found guilty of an offence committed only by one of them, it is necessary under S. 34 that they should have acted in furtherance of a common intention. If there had been other evidence of the intention of the accused, or if the nature of the weapons used proved that all the three assailants must have intended to have caused an injury which would have in the ordinary course of nature led to the death of the deceased, then all the three persons would be guilty of murder. But the weapons used in this case do not seem to have been of such a size and weight that a blow given with moderate force would ordinarily cause a fracture of the skull. It is not at all improbable that something more than ordinary force was necessary, with the weapons actually used, to cause such a severe injury; and we therefore find it difficult to hold that the two persons who did not cause any fracture of the skull had the same intention as the person who used greater force and did fracture the skull. While therefore one person was guilty of murder and two of a lesser offence, we do not know which accused committed murder and which the lesser offence. We are therefore compelled, although for very different reasons from those given by the learned Sessions Judge, to hold that none of the accused could have been found guilty of murder. The appeal is consequently dismissed.

C.R.K./S.C. *Appeal dismissed.*

*** A. I. R. 1937 Madras 794**

KING, J.

P. Amaldoss — Petitioner.

v.

Mrs. Kamala Amaldoss —

Opposite Party.

Criminal Revn. Case No. 739 and Petn. No. 688 of 1936, Decided on 28th July 1937, from order of Special Honorary Presidency Magistrate (Single Bench), Madras, D/- 15th September 1936.

*** Criminal P. C. (1898), S. 488—S. 488 has nothing to do with conjugal rights—Application for maintenance by Christian wife—Husband willing to take her back and maintain her—Wife cannot claim sexual fidelity from husband before returning to him.**

Section 488, Criminal P. C., has nothing to do with conjugal rights. [P 794 C 2 ; P 795 C 1]

In a proceeding under S. 488, Criminal P. C., by a Christian wife against her husband claiming maintenance, the husband offered to take her back and maintain her, but refused to give up his mistress. The husband had never insulted her as to compel her to live in the same house as his mistress and it did not also seem likely that he would do so :

Held : that under the circumstances, the wife was not entitled to a separate maintenance and that she could not also exact from the husband a promise of sexual fidelity before she returned to live with him : *A I R 1933 Mad 688, Applied.* [P 794 C 2]

T. K. Rajagopalan for *N. Kasturiranga Iyengar* — for Petitioner.

Order. — This revision petition is not opposed. The wife's claim to maintenance is not a very strong one. She has waited three years to claim it. The petitioner now offers to take her back. She refuses to go unless he will give up his mistress. Petitioner's case is that Sundari is not his mistress, but the learned Magistrate believes that she is, and that he will not desert her. The main point however seems to be that petitioner has never so far insulted his wife as to compel her to live in the same house as his mistress nor does it seem likely that petitioner will now adopt this course of conduct. If he does, respondent may justifiably leave him and again claim maintenance. But I am not in agreement with the learned Magistrate that the respondent can exact a promise of sexual fidelity before she returns to live with the petitioner. In A I R 1933 Mad 688[1], my learned brother Burn, J. has held that S. 488, Criminal P. C., has

1. Arunachala Asari v. Anandyammal, A I R 1933 Mad 688=1933 Cr C 1178=145 I C 378 =56 Mad 913=34 Cr L J 950=65 M L J 386.

nothing to do with the conjugal rights; and although that case deals with Hindus, there is no reason why its principles should not be extended to the case of Indian Christians. I accordingly allow this petition and quash the order for maintenance.

C.R.K./K.B. *Petition allowed.*

A. I. R. 1937 Madras 795

VARADACHARIAR, J.

Thalayur Narayanan Moossad — Appellant.

v.

Mammadissa and *others* — Respondents.

Second Appeal No. 759 of 1933, Decided on 28th April 1937, against decree of Dist. Court, South Malabar at Calicut, in A. S. No. 562 of 1931.

(a) Malabar Tenancy Act (14 of 1930), S. 20, Cls. (5) and (6) — Court must be satisfied that landlord's assertion regarding his requirement of land is bona fide.

The words 'bona fide' in Cls. (5) and (6) of S. 20, Malabar Tenancy Act, if they have any significance at all, must mean that the Court must be satisfied that the assertion made by the landlord as regards his own requirement of the land is a bona fide assertion. [P 796 C 1]

(b) Malabar Tenancy Act (14 of 1930), S. 20, Cls. 5 and 6 — Cls. (5) and (6) are not happily worded or located.

The Cls. (5) and (6) of S. 20, Malabar Tenancy Act, are not perhaps very happily worded or located. It would perhaps have been more appropriate if the Act had provided that the landlord's bona fide requirements will be an answer to the tenant's application for renewal, instead of tacking on that requirement in the provisions dealing with the right to eject. [P 796 C 1]

(c) Malabar Tenancy Act (14 of 1930), S. 20, Cls. (5) and (6) and S. 23 — Grounds under Cl. (3) and Cls. (5) and (6) of S. 20 existing together — Ground under clauses other than Cl. 3 not substantiated — In dealing with tenant's right to apply under S. 23, Court will deal only on footing of claim based on expiry of term.

If in a case, where both the grounds, ground under Cl. (3) and that under Cls. (5) and (6) of S. 20, Malabar Tenancy Act, co-exist, the Court finds that grounds other than the expiry of time have not been substantiated, the result is that the Court will have to deal with the case only on the footing of a claim based on expiry of the time and immediately the tenant's right to apply under Ss. 22 and 23 will have to be dealt with as if no other ground existed. [P 796 C 2]

(d) Malabar Tenancy Act (14 of 1930), S. 22 — Second application by tenant under S. 22 is not barred merely on ground of dismissal of first.

There is nothing in the provisions of the Malabar Tenancy Act to bar a second application by the tenant under S. 22 merely on the ground of the dismissal of the first application, except in the case provided for in Cl. 1 of S. 25, viz. dismissal on the ground of the tenant's failure to make a deposit ordered under S. 24 (2) of the Act. [P 796 C 2]

K. Kuttikrishna Menon and *P. Narayanan Nair* — for Appellant.

K. P. Krishna Menon and *P. S. Sharma* — for Respondents.

Judgment. — This second appeal arises out of a suit in ejectment by a jenmi. The suit was instituted before the enactment of the Malabar Tenancy Act, as the term of the lease had expired by the date of the suit. As the case had not been disposed of before the Act came into force, the tenant thought fit to file I. A. 521 of 1931 praying for a renewal. S. 23, Tenancy Act provides that when such an application is filed, the landlord shall be asked to state whether he desires to evict the tenant on any of the grounds referred to in S. 20 except ground No. 3, i. e. the ground based on expiry of the term ; and if the landlord expresses his intention to do so, the section directs that the application of the tenant shall be dismissed. In this case, the plaintiff when he received notice under S. 22, amended his plaint by stating that he proposed to rely upon Cls. 2 and 5 of S. 20 relating to acts of waste by the tenant and bona fide requirement of the land by the landlord for his own cultivation. The District Munsif followed the strict letter of S. 23 and dismissed the tenant's application.

When the suit came on for trial, the Court found that the landlord did not succeed in making out either the ground under Cl. 2 or the ground under Cl. 5 of S. 20 and accordingly it dismissed the suit. On appeal, it appears from the judgment of the learned District Judge that the ground of waste was not pressed before him ; and on the other ground, viz. that under Cl. 5, the learned District Judge confirmed the finding of the trial Court. Hence this second appeal by the landlord. Before me, Mr. Kuttikrishna Menon tried to re-agitate the plaintiff's case under Cl. 2, but in view of the definite statement in the judgment of the lower Appellate Court, I am not prepared to permit that question to be re-opened.

As regards the case under Cl. 5, I see no reason to disturb the finding ; but Mr. Kuttikrishna Menon argues that the Court has really no power to investigate

the truth or otherwise of an allegation made by the landlord under Cl. 5. Reading Cls. 3, 5 and 6 of S. 20, his contention is that Cls. 5 and 6 can only mean that if once the landlord says that he wants the land for his own purpose, there is an end of the matter. Mr. Kuttikrishna Menon is of course right in pointing out that there is very little difference between the condition imposed by Cl. 3 and the condition imposed by Cls. 5 and 6 so far as the right to eject is concerned, viz. the expiry of the term. The only difference can therefore be according to him the additional allegation by the landlord in the terms referred to in Cls. 5 and 6. This construction, I think, will practically defeat the purpose of these provisions and give no effect whatever to the use of the words 'bona fide' in Cls. 5 and 6. These words, if they have any significance at all, must mean that the Court must be satisfied that the assertion made by the landlord as regards his own requirement of the land is a bona fide assertion.

I agree with Mr. Kuttikrishna Menon that the clauses are not perhaps very happily worded or located. I find it stated in one of the commentaries on the Act that Cls. 5 and 6 were added after the Bill had left the Select Committee. That perhaps explains why they were put in in the particular form and place, in which they are now found in the Act. It would perhaps have been more appropriate if the Act had provided that the landlord's bona fide requirements will be an answer to the tenant's application for renewal, instead of tacking on that requirement in the provisions dealing with the right to eject. On the language of S. 23, Mr. Kuttikrishna Menon is justified in saying that once a landlord alleges an intention to put forward a case under any clause other than Cl. 3 of S. 20, the Court has no option but to dismiss the tenant's application for renewal. In interpreting S. 23 also, it must be remembered that Cls. 5 and 6 to S. 20 were inserted at a later stage and the necessity for making corresponding modifications in S. 23 might have been lost sight of. The Act has proceeded on the footing that the other grounds of eviction will only be alleged at a date when the tenancy had not expired and therefore provided that if such allegation is made, the application for renewal shall be dismissed. It did not contemplate a case where both the grounds of eviction may co-exist. If in a case where both the grounds co-exist the Court finds that grounds other than the expiry of time have not been substantiated, the result is that the Court will have to deal with the case only on the footing of a claim based on expiry of time and immediately the tenant's right to apply under Ss. 22 and 23 will have to be dealt with as if no other ground existed. This seems to me the only way in which I can reconcile the various provisions of the Act and give reasonable effect to its scheme.

Dealing with the present case on the above footing, it seems to me that in the events that have happened, the proper course will be to hold that the Courts below were right in their view that the landlord had not made out the right to eject either under Cl. 2 or under Cl. 5 of S. 20. But having regard to the way in which I. A. No. 521 of 1931 had been disposed of, the case must still be dealt with by the lower Court on the footing that the plaintiff is claiming ejectment on the simple ground of the expiry of the term of the lease. There is nothing in the provisions of the Act to bar a second application by the tenant under S. 22 merely on the ground of the dismissal of a first application, except in the case provided for in Cl. 1 of S. 25, viz. a dismissal on the ground of the tenant's failure to make a deposit ordered under S. 24, Cl. 2. I do not therefore think that it is necessary to go through the formality of asking the tenant to make a fresh application. I would set aside the order of the trial Court dismissing I. A. No. 521 of 1931 and ask that Court to restore that application to the file. To this extent and for this limited purpose I set aside the decrees of the Courts below and send the case back to the Court of first instance to deal with I. A. No. 521 of 1931 in accordance with law and in the light of the above observations.

It would follow from the very terms of Cl. 3 of S. 20 that if the tenant does not avail himself of the opportunity thus given to him to take a renewal in accordance with the provisions of the Act, the landlord will be entitled to possession. The present impasse has largely arisen from the plaintiff's insistence on his untenable claim of a right to eject on the ground of waste or bona fide requirement for his own purpose. I would accordingly direct him to pay respondent 1's costs both here

and in the lower Appellate Court. As regards the costs in the first Court, I would direct the parties to bear their own costs, because the suit was instituted at a time when the Tenancy Act had not come into force. If however the tenant does not avail himself of the privilege of obtaining a renewal as contemplated by the Act and a decree in ejectment ultimately comes to be passed in plaintiff's favour, the plaintiff will be entitled to the costs of the action in the trial Court.

C.R.K./D.S. *Case remanded.*

A. I. R. 1937 Madras 797

BEASLEY, C. J.

Ambalanattath Pareri Balaram — Petitioner.

v.

Secretary of State — Opposite Party.

Civil Revn. Petn. No. 1727 of 1934, Decided on 22nd October 1936, from decree of Dist. Munsif, Tellicherry, in S. C. S. No. 37 of 1934.

Post Office Act (6 of 1898), S. 43 — Rules under, R. 100 — Petitioner sending money order from T to institution at D —Petitioner sending telegram to Post Office to stop payment — Amount paid at D to addressee in spite of telegram — Payment held fell within meaning of 'failure' in R. 100 and Secretary of State was not liable.

The petitioner having sent a money order from Tellicherry to an institution at Delhi, fearing that the institute was not a bona fide one and wishing to stop payment, sent an urgent telegram to the Delhi Post Office through the Post Master, Tellicherry, to that effect. In spite of this, the amount was paid to the addressee by the Delhi Post Office. The petitioner sued the Secretary of State for India holding him liable for all loss sustained by him and the Secretary of State denied liability relying upon R. 276, Post and Telegraph Guide, a reproduction of R. 100 made by the Governor-General in Council under the Indian Post Office Act and further contended that the payment was made through inadvertence :

***Held*: that the word "failure" in the rule in the Post and Telegraph Guide did not only mean "not succeed in the attainment of; not succeed in doing or to do", but also "an omission to do a thing" and it was unnecessary that there should have been either an attempt or an intention to do it and therefore it was a failure of the Delhi Post Office to stop payment within the meaning of R. 100 of the Rules made under the Indian Post Office Act and R. 276, Post and Telegraph Guide, and the Secretary of State was not liable.**

[P 798 C 1, 2]

A. K. Balakrishnan — for Petitioner.

Govt. Pleader — for Opposite Party.

Order.—The petitioner here filed a suit against the Secretary of State for India in Council to recover Rs. 155-11-3. The facts which were undisputed were that on 24th July 1933 the petitioner sent through the Post Office, Tellicherry, a money order for Rs. 150 to the address of the Director, Royal Institute of Technology, Delhi. This money order was No. 3609. Having sent off the money order, the petitioner, fearing that the Institute was not a bona fide one, wished to stop payment of the money order and on 27th July 1933 requested the Post Master Tellicherry to send an express telegram to the Delhi Post Office to stop payment of the money order to the addressee and towards the expenses remitted Rs. 3-6-0. The Post Master, Tellicherry, accordingly sent an urgent telegram to the Delhi Post Office and there is no question at all as regards its receipt at Delhi. In spite of this however the Delhi Post Office paid the money over to the payee on 29th July 1933.

The petitioner then complained to the Postmaster-General, Madras, and received a reply stating that the money could not be recovered and refunded to the petitioner because the Post Office by reason of R. 276, Post and Telegraph Guide, was not responsible for "inability" or "failure" to stop payment of the money order in compliance with the remitter's request. The petitioner replied to this letter contending that the rule referred to applied only to cases of "inability" or "failure" and not to a case of wilful refusal done fraudulently and collusively. He accordingly held the Secretary of State for India in Council responsible for all damages and costs which he might be put to and gave notice that legal proceedings would be instituted. In the District Munsif's Court the respondent denied liability relying upon R. 276, Post and Telegraph Guide, which is a reproduction of R. 100 made by the Governor-General in Council under the Indian Post Office Act (6 of 1898) and further contended that the payment was made through inadvertence. R. 100 made under the Indian Post Office Act (6 of 1898) reads as follows :

> The remitter of a money order which has not been paid may stop payment and require that the money be repaid to himself. This shall be done without additional charge on the remitter's applying in writing to the Post Office at which the money order was issued, and producing the receipt and giving full particulars of the payee's address as entered in the money order. In no case however shall the Post Office be responsible for inability or failure to stop payment of a

money order in compliance with the remitter's request.

This rule is reproduced as R. 276 in the Post and Telegraph Guide; and it was in accordance with that Rule that the petitioner applied to stop payment and that Rule alone in the Guide lays down the procedure for doing so. The learned District Munsif held that the respondent was not absolved from liability by reason of these Rules. He did this because he was of the opinion that this was not a case of "inability" to stop payment of the money order nor had there been a "failure" to stop payment. In his view the term "failure" connotes an attempt to do a thing which is attended with no success and omission to do a thing will not ordinarily mean "failure". He refers to one of the meanings of the word "fail" given in the Concise Oxford Dictionary, namely, "not succeed in the attainment of; not succeed in doing or to do". He then cites what he describes as the homely illustration of failure in an examination and says:

> If a student omits to appear for an examination it is not a case of failure. If he sits for the examination and fails to pass, it is a case of failure. We are not to judge by the result.

With all due respect to the learned District Munsif, although omission to appear for an examination cannot fairly be described as failure to pass it, it is failure to sit for the examination and the homely illustration does not seem to me to be at all helpful. In my view, the learned District Munsif has given a meaning to the term which is altogether too narrow; and I am clearly of the opinion that an omission to do a thing is a "failure" to do it and it is unnecessary that there should have been either an attempt or an intention to do it. For example, a creditor may write to his debtor demanding payment of the money owing by a certain date and threatening that on the failure of the debtor to do so within that time a suit will be filed. The debtor may have no intention at all of complying with his creditor's demand and does not attempt to do so. He has clearly "failed" to comply with his creditor's demand; he has "omitted" to do so; he has "defaulted".

The Concise Oxford Dictionary to which the learned District Munsif himself refers, gives the following meanings to the word "fail": "neglect; not remember or not choose". The term "failure" is given amongst other meanings: "non-occurrence non-performance"; and some of the meanings given to the verb "fail" in the Oxford Dictionary are "to make default; to be a defaulter; to leave undone, omit to perform; to be at fault," and amongst other meanings there given to "failure" are: "a failing to occur, be performed or be produced; an omitting to perform something due or required; default". In my view, this was a "failure" by the Delhi Post Office to stop payment of the money order within the meaning of R. 100 made under the Indian Post Office Act (6 of 1898) and R. 276, Post and Telegraph Guide. That being so, it is unnecessary to consider the other points which the learned District Munsif held in favour of the respondent which resulted in the dismissal of the suit, but nevertheles I refer to another point which the learned District Munsif found in favour of the petitioner, namely that there was a "wilful refusal" by the Post Office to stop payment. He holds that the payment was not due to an inadvertent mistake, that it was not due as alleged in the plaint to fraud and collusion, no attempt having been made to prove the two latter, but he accepts the petitioner's case that this was a case of "wilful refusal". There was no evidence whatsoever to prove fraud and collusion nor was there any evidence at all to prove that the refusal was wilful and no reason appears to have been suggested for any wilful refusal. "Wilful" means "deliberate" and "intentional" and even before me Mr. Balakrishnan in the course of his very strenuous and able argument was not able to suggest why the Post Master of the Delhi Post Office or any of his subordinates should intentionally refuse to stop payment. In my view, the failure to stop the payment was due to negligence at the most. The result is that although I disagree with the learned District Munsif's view upon the points already dealt with, which make it unnecessary for me to consider the points which he found in favour of the respondent, the lower Court's decree must be upheld and the civil revision petition dismissed with costs.

C.R.K./V.B.B. *Petition dismissed.*

A. I. R. 1937 Madras 799

MADHAVAN NAIR AND STODART, JJ.

T. S. Mohideen Pichai Sahib —

Appellant.

v.

Nagoore Meera Rowther and *others* —

Respondents.

Appeals Nos. 42 and 334 of 1931, Decided on 22nd January 1937, against decrees of Sub.Judge, Dindigul, in O. S. Nos. 6 and 7 of 1927.

Mortgage — Suit on — Sub-mortgage by mortgagee of mortgage rights—Suit by sub-mortgagee for amount less than original amount of mortgage and sale of hypothecated properties—Decree in such suit not making provision for realization of amount due on original mortgage—Suit subsequently on original mortgage — Such suit held maintainable — Decree in suit of sub-mortgagee held did not preclude original mortgagee from asserting his rights under mortgage in subsequent suit.

A mortgagee for Rs. 9,000 sub-mortgaged his mortgage rights in favour of a firm for an amount not exceeding Rs. 9,000 that might be borrowed from the firm. The firm instituted a suit for sale of the hypothecated properties impleading the mortgagee and the mortgagor and obtained an ex parte decree. The claim of the firm in the suit under the sub-mortgage was only for Rs. 3,400 odd. The firm did not execute the decree. The original mortgagee brought a suit on the original mortgage for the recovery of Rs. 9,000. The mortgagor contended that the suit was not maintainable because the cause of action under the mortgage was exhausted in the prior suit of the firm under the sub-mortgage and that the suit was barred by reason of the decree in the suit filed by the sub-mortgagee. That decree however was found to have not made any provision for the realization of the amount due to the original mortgagee :

Held : that there was no complete assignment of the cause of action of the mortgagee in favour of the sub-mortgagee and also that the sub-mortgagee's claim being only for Rs. 3,400 odd he could never have sued on the cause of action open to his mortgagor (the original mortgagee) to recover a sum of Rs. 9,000. The causes of action in the two suits were thus quite different. The suit as brought by the original mortgagee was therefore maintainable : *A I R 1934 P C 205, Ref.* [P 800 C 1]

Held also : that the decree in the suit of the sub-mortgagee as it was passed did not preclude the original mortgagee from asserting his rights in a subsequent suit. There was no prohibition in law against the mortgagee afterwards instituting a suit in the assertion of his cause of action which was separate from that of the sub-mortgagee. [P 800 C 2]

K. V. Srinivasa Iyer — for Appellant.

Madhavan Nair, J.—These are two connected appeals. The plaintiff is the same in the two suits out of which these appeals arise. Defendants 1 in the two suits are brothers. They had another brother. Each of these three brothers executed a hypothecation bond for Rupees 3,000 in favour of one Usan Ali Rowther. The hypothecation bonds involved in these two suits are Exs. A and B—two of the three hypothecation bonds. The mortgagee, Usan Ali, sub-mortgaged his mortgage rights under the three mortgages in favour of defendant 5, a Chetti firm, under Ex. C. The sub-mortgage was for an amount not exceeding Rs. 9,000 that may be borrowed from the firm. The Chetti Firm instituted O. S. No. 34 of 1921, a suit for the sale of the hypothecated properties, in exercise of its rights. The present plaintiff's predecessor, Usan Ali, was defendant 1 in suit, and the mortgagors were defendants 3 and 4. It was found in that suit that the mortgages and sub-mortgages were subsisting, and a decree was passed in favour of the plaintiff therein for the amount sued for. In that suit, the mortgagee as well as the mortgagors were ex parte. That decree was not executed by the sub-mortgagee plaintiff and is at present subsisting. The original mortgagee having died, his interests in the two mortgages were assigned over to the present plaintiff, and these two suits have been instituted by him for the recovery of his mortgage amount. Various issues were raised in the case. One of the issues was " whether the suit is barred by reason of the decree in O. S. No. 34 of 1921 on the file of this Court." On this issue, the learned Judge held that the suit was barred and dismissed the suit.

In this appeal, the question argued relates to this finding. Counsel for the appellant contends that the suit is not barred by reason of that decree. The decision of the lower Court is based upon various considerations. One of the main grounds of justification is this, namely that the cause of action of the mortgagee, the present plaintiff, and of the sub-mortgagee who was the plaintiff in the original suit is one and the same and that the cause of action was exhausted by the previous suit and the decree, and it cannot therefore be agitated again in a subsequent suit. With this opinion we cannot agree. No doubt the sub-mortgage is an assignment of the mortgage, but in this case it must be observed that the mortgages amcunted to Rs. 9,000 and what was sub-mortgaged was only a sum up to

Rs. 9,000 and the exact amount involved in the previous suit, O. S. No. 34 of 1921, was only Rs. 3,958. So, on the facts, it is clear that there is no complete assignment of the cause of action of the mortgagee in favour of the sub-mortgagee. Apart from this, as we have said, it is clear that the causes of action of the two suits are different : *see* 23 M L J 430,[1] at p. 433. The learned Judge after referring to the decision in 20 Mad 35,[2] which says that the sub-mortgagee can bring a suit for the sale of the mortgaged property, says that :

> 20 Mad 35[2] did not decide that a sub-mortgagee could sue to recover the debt due to his mortgagor, but only that the sub-mortgagee could in suing to recover his own debt bring to sale the properties mortgaged to his mortgagor, instead of merely bringing to sale his mortgagor's interest. His interest in what was mortgaged to his mortgagor was held sufficient to entitle him to sell what was mortgaged to his mortgagor. It would be going a great deal further to hold that the sub-mortgagee could sue on the cause of action open to his mortgagor to recover the debt due to the latter.

In the present case, it is clear that the sub-mortgagee's claim being only for Rs. 3,400 odd, could never have sued on the cause of action open to his mortgagor which was to recover a sum of Rs. 9,000. So, the main ground relied on by the learned Judge does not apply. In this connexion it may also be pointed out that the learned Judge says: just as the second suit for redemption is held barred, a second suit for sale should also be held to be barred. But recently the Privy Council has held in 56 All 561[3] that a second suit for redemption does lie : *see also* 71 M L J 83*n*[4], so that parity of reasoning also cannot apply.

It was then pointed out by the learned Judge that the decree passed in the previous suit is a bar to the present suit. Ex. 3 provided only for the payment to the sub-mortgagee of the amount due to him and for the sale of the mortgaged property and for the sale proceeds being applied towards the discharge of the sub-mortgage and the balance to be paid to the mortgagee. The decree as it stands does not make any provision for the realization of the amount due to the original mortgagee. The decree therefore in the form in which it stands does not preclude the original mortgagee from asserting his rights ; Form No. 11 has been referred to by the learned Judge in this connexion to show that in a properly framed decree in a suit by the sub-mortgagee, the mortgagee's right to institute a subsequent suit is taken away. But Form No. 11 provides for a decree in a suit brought by the sub-mortgagee. That decree does not give a mortgagee a right to sell. It gives him a right to pay off the sub-mortgagee, but it does not give him a right to sell the property and to recover his dues. No doubt the amount which he is entitled to will be ascertained, but there is no means to bring the property to sale. So the provisions of the decree cannot stand in the way of assertion of his rights by the mortgagee in a subsequent suit. The result of the learned Judge's finding is that the mortgagee will have to lose all his rights because the sub-mortgagee does not execute the decree in his previous suit. That cannot be right, and we do not think that there is any prohibition in law against the mortgagee afterwards instituting a suit in the assertion of his cause of action which as we have held is separate from that of the sub-mortgagee. In our opinion, the suit is maintainable.

Another question raised was 'whether the suit document has been discharged in the manner alleged by defendant 1'. In view of the Judge's finding that the suit was not maintainable, a decision on this point was unnecessary. But still the learned Judge, on an application made by the defendant in I. A. No. 181 of 1930 has given a decision that it cannot be said that the defendants are in any way barred from raising the plea of discharge. We do not express any opinion on this decision as the learned Judge, having regard to his decision under issue 2, cannot obviously have considered it with all the fullness it deserves, and as pointed out by the learned counsel for the appellant, a correct decision on this point would depend also on certain facts which are raised in the pleas of the defendants which have not been dealt with in the learned Judge's discussion of the question. In these cir-

1. Muthukrishnan v. Veeraraghava Iyer, (1912) 23 M L J 430=16 I C 601=1912 M W N 919.
2. Muthu Vijaya v. Venkatachellam Chetti, (1897) 20 Mad 35=6 M L J 235.
3. Raghunath Singh v. Mt. Hansraj Kunwar, A I R 1934 P C 205 = 151 I C 37 = 56 All 561=61 I A 362 (P C).
4. Virupakshan Nambudripad v. Chembu Nayar, A I R 1937 Mad 214 = 168 I C 110 = I L R (1937) Mad 545 = 71 M L J 83*n* = (1937) 1 M L J 83.

cumstances, it will be open to the lower Court to consider this issue also in deciding the case along with the other issues. As we have held that the suit is maintainable, we remand the two suits to the lower Court for disposal according to law. Court-fee in these appeals will be refunded. The appellant is entitled to his costs, but he will get the same only in one appeal, viz. A. S. No. 42 of 1931.

C.R.K./A.L. *Suits remanded.*

A. I. R. 1937 Madras 801

MENON, J.

M. K. A. P. Saiyed Muhammad Bhukari — Petitioner.

v.

Inspector of Municipal Councils and *Local Boards, Madras* — Opposite Party.

Civil Misc. Petn. No. 2252 of 1936, for issue of a writ of certiorari, Decided on 30th September 1936.

Madras Local Boards Act (14 of 1920), Ss. 43 and 233 — Inspector of Municipal Councils and Local Boards issuing notice to President of Local Board in respect of irregularities to show cause why he should not be removed from office under S. 43 (1) — Source of information stated in notice — Explanation submitted by President found unsatisfactory — Inspector ordering his removal giving reasons for his order — Order held one in compliance with S. 43—President held not entitled to copy of report of District Panchayat Officer.

The Inspector of Municipal Councils and Local Boards issued under S. 43 (1) and S. 233, Madras Local Boards Act, a notice to the President of the Panchayat Board, intimating to him that his attention had been drawn by the District Panchayat Officer to several irregularities committed by him in discharge of his duties as President of the Panchayat and calling upon him to show cause why those irregularities should not be regarded as deliberate abuse of his powers falling under the purview of S. 43 (1) of the Act warranting his removal from the office as President. The President sent an explanation admitting certain of the irregularities and explaining certain others. The Inspector holding that the explanation offered was quite unsatisfactory and could not be accepted, removed the President from the office in exercise of the powers conferred on him, stating in his order the reasons for such action taken by him, namely seven of the ten irregularities already mentioned in the notice :

Held : that the Inspector had complied with the requirements of S. 43, Madras Local Boards Act, and therefore a writ could not be issued, that what was material was not the bona fides of the order but only whether the rules laid down by the statute had been observed, that the Inspector by asking for an explanation intimating in the notice the source of the information of the irregularities and subsequently having stated in the order the reason for the action taken by him, had complied with the requirements of S. 43. [P 803 C 1]

Held further : that the president was not entitled to a copy of the report of the District Panchayat Officer : *Board of Education* v. *Rice*, *(1911) A C 179* ; *Fisher* v. *Keane*, *(1876) 11 Ch D 353* and *Labonchere* v. *Earl of Wharncliffe*, *(1880) 13 Ch D 346*, *Ref.* ; *Local Government Board* v. *Arlidge*, *(1915) A C 120*, *Rel. on.* [P 803 C 2]

K. Bhashyam Iyengar and *R. Desikan* — for Petitioner.

Govt. Pleader and *S. Ramachandra Iyer* — for Opposite Party.

Order.—This is an application for the issue of a writ of certiorari to call for the records of the proceedings connected with the removal of the petitioner from the office of the President of the Panchayat Board, Kayalpatnam, and to quash the proceedings of the Inspector of Municipal Councils and Local Boards.

The petitioner was the President of the Panchayat Board of Kayalpatnam in Tiruchendur Taluq, in Tinnevelly District, having been elected to that office in October 1934. On 7th March 1936, the Inspector of Municipal Councils and Local Boards issued a notice to the petitioner under Ss. 43 and 233, Local Boards Act, drawing his attention to several irregularities in the discharge of his duties as the President of the said Panchayat Board and calling upon him to show cause within 15 days from the date of receipt of that notice why those irregularities should not be regarded as deliberate abuse of his powers falling under the purview of S. 43 (1), Madras Local Boards Act, and warranting his removal from the office of President. The petitioner sent an explanation on 21st March 1936. The Inspector of Municipal Councils and Local Boards, holding that the explanation offered by the petitioner was quite unsatisfactory and could not be accepted, removed the petitioner from the office of President of the said Panchayat in exercise of the powers delegated to him by the Local Government under S. 233, Madras Local Boards Act, and in virtue of the powers conferred under S. 43 (1) of the said Act. It is to quash those proceedings removing the petitioner from the office of President of the Panchayat Court that this application is filed.

It is not disputed that the Inspector of Municipal Councils and Local Boards has been authorized by the Local Government

to take action under S. 43, Madras Local Boards Act, whenever it was found necessary. The question therefore for consideration is whether the requirements of S. 43 of the Act have been complied with in the matter of these proceedings. S. 43 (1) authorizes the Local Government to remove, by notification, any President or Vice-President of a Local Board who, in their opinion, wilfully omitted or refused to carry out or disobeyed the provisions of the Act or any rules, bye-laws, regulations or lawful orders issued thereunder or abused the powers vested in him. And sub-s. 2 of S. 43 runs as follows :

> The Local Government shall, when they propose to take action under sub-s. (1), give the President or Vice-President concerned an opportunity for explanation and the notification issued under the said sub-section shall contain a statement of the reasons of the Local Government for the action taken.

As already observed, the Inspector of Municipal Councils and Local Boards is authorized to take action in these matters. On 7th March 1936, the Inspector of Municipal Councils and Local Boards gave a notice to the petitioner stating that the District Panchayat Officer had brought to his notice that the petitioner as the President of the Kayalpatnam Panchayat Board had committed certain irregularities and directing the petitioner to show cause within 15 days why those irregularities should not be regarded as deliberate abuse of his powers. Ten charges were levelled against the petitioner. The petitioner submitted an explanation in respect of these charges on 21st March 1936. He denied the truth of all the charges except two, viz. (1) those relating to the removal of the Office of the Panchayat Board to a new building without the consent of the Board, and (2) that the works sanctioned by the Panchayat Board were not executed. In respect of these two, he gave explanations ; with regard to the first, he stated that the office was removed to a new building because the old building was unsafe and that the sanction of the Board was not obtained because there was no provision in the Act requiring such sanction. With regard to the second, he stated that it was not possible to execute the works as it was the rainy season.

After receipt of the explanation, the Inspector of Municipal Councils and Local Boards made an order for the issue of a notification to the effect that on 7th March 1936 the President of the Panchayat Board was given a notice under S. 43 (1), Madras Local Boards Act, to show cause why he should not be removed from the office for the reasons mentioned in the notice, that the explanation offered by the President on 21st March 1936 was quite unsatisfactory and could not be accepted and that therefore in exercise of the powers delegated to him by the Government under Ss. 233 and 43 (1), Madras Local Boards Act, he (the Inspector of Municipal Councils and Local Boards) removed the petitioner from the office of the President of the said Panchayat. Out of the ten charges mentioned in the notice of 7th March 1936, only seven are mentioned in the final order removing the petitioner from the office of President. The other three relating to the non-verification of the cash balance in January 1936, to the disregard of public opinion in his administration of the Board and to the omission to collect the full amount of the demand were dropped. The explanation offered by the petitioner about the remaining 7 charges was found to be unsatisfactory and unacceptable. The order makes mention of the fact that besides the notice issued by the Inspector and the petitioner's explanation about it, the report of the District Panchayat Officer, Tinnevelly, dated 23rd April 1936 and also other connected papers had been perused before that order was made.

The question is whether, in making the order complained of, the Inspector had followed the procedure laid down by the statute. When the Inspector proposes to take action under S. 43 (1), he should give an opportunity to the President concerned to give an explanation. It is clear that by issuing a notice on 7th March 1936 to the petitioner to show cause why the acts mentioned therein should not be regarded as deliberate abuse of the powers warranting his removal from the office of President, an opportunity was given to the petitioner to explain. The petitioner did avail himself of that opportunity by submitting an explanation on 21st March 1936. The first requirement of sub.s. (2) of S. 43 has therefore been complied with.

The next requirement is that the notification issued under the said sub-section shall contain a statement of the reasons of the Local Government for the action taken. The order sets out 7 out of 10

charges mentioned in the notice of 7th March 1936. The Inspector then proceeds to say that in respect of those charges the explanation submitted by the petitioner was unsatisfactory and unacceptable. Probably he could have given more reasons having regard to the fact that a report from the District Panchayat Officer dated 23rd April 1936 had also been perused before the order was made. But by his omission to state more reasons, it cannot at all be said that he had not complied with the provisions of S. 43 (2). He had given reasons for his removing the petitioner from the office of the President. His statement that the explanation given by the petitioner with respect to the 7 charges mentioned by him was unsatisfactory and not acceptable is certainly a statement of the reason for the action taken. In these circumstances it cannot at all be said that the requirements laid down by the statute had not been complied with.

But the learned advocate for the petitioner argues that the charges were vague, that there was no due enquiry in respect of those charges, that the report of the District Panchayat Officer was not supplied to the petitioner and the petitioner asked for his explanation about it and that therefore the order is not one made after the enquiry. All the charges cannot be said to be vague. At least as regards two of the charges, the petitioner himself admitted the truth of them and gave an explanation. And when the statute lays down what has to be done in matters of this kind, all that the authority need do is to observe the rules laid down by the statute. In this case it has been done, namely an opportunity had been given to the petitioner for an explanation in respect of the charges levelled against him. Even in (1911) A C 179,[1] relied on by the petitioner, the observations of the Lord Chancellor (Lord Loreburn) are as follows :

> In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that they must act in good faith and fairly listen to both sides, for that is a duty levying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

In this case, even in the first notice sent to the petitioner it was stated that it was the District Panchayat Officer who had brought to the notice of the Inspector that the petitioner had committed the irregularities referred to therein. The source of the information had thus been disclosed and an opportunity given to meet it. But the petitioner was certainly not entitled to have a copy of the Panchayat Officer's report either then or subsequently. In deciding whether the report of the District Panchayat Officer should have been disclosed to the petitioner or not, the observations of the Lord Chancellor in (1915) A C 120[2] at p. 134 with respect to the reports of a health inspector are instructive:

> It is said that the report of the inspector should have been disclosed. It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so any more than it would be bound to disclose all the minutes made on the papers in the office before a decision was come to.

In this Lord Shaw of Dumfermline agreed and said:

> And I feel certain that if it were laid down in Courts of law that such disclosure should be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks.

The same view was taken by Lords Farmoor and Moulton. The cases relied on by the petitioner, viz. (1876) 11 Ch D 353[3] and (1880) 13 Ch D 346,[4] turn merely on the construction of the rules of the particular clubs concerned in these cases. As in this case the procedure laid down in the statute had been followed and as the notification contains a statement of the reasons for the action taken by the Inspector of Municipal Councils and Local Boards, I do not think that this is a case in which a writ of certiorari should be issued. The petition is therefore dismissed with costs. Advocate's fees Rs. 50.

C.R.K./K.B. *Petition dismissed.*

1. Board of Education v. Rice, (1911) A C 179=80 L J K B 796=104 L T 689=75 J P 393=27 T L R 378=55 S J 440=9 L G R 652.

2. Local Government Board v. Arlidge, (1915) A C 120=84 L J K B 72=111 L T 905=79 J P 97=12 L G R 1109=30 T L R 672.

3. Fisher v. Keane, (1876) 11 Ch D 353=49 L J Ch 11=41 L T 335.

4. Labouchere v. Earl of Wharncliffe, (1880) 13 Ch D 346=41 L T 638=28 W R 367.

A. I. R. 1937 Madras 804

VARADACHARIAR, J.

Cheerath Nanikutti Amma — Appellant.

v.

Anantha Lakshmiammal, wife of Narayana Vadhiar — Respondent.

Second Appeal No. 818 of 1933, Decided on 29th April 1937, against decree of Sub-Judge, South Malabar at Palghat, in A. S. No. 3 of 1932.

Res Judicata—Cause of action distinct—Suit for ejectment by *A*, assignee of kanomdar against tenant *R*—*N*, another assignee of kanom interest, attempting to get possession in collusion with *R*—*N* made party to ejectment suit and relief claimed against him—Suit dismissed as no collusion was found and as *N* was found in possession—Subsequent suit by *A* based on title—Subsequent suit held not barred—Question of title held could not have been raised in previous suit as *N* was added only in position of tenant.

The plaint properties belonged in jenm to the *K* tarwad. They were held on kanom by the *P* tarwad. One *V*, a member of *P* tarwad, assigned the kanom interest to the plaintiff's uncle *S* and later *S* assigned the interest to the plaintiff *A*. After the assignment to *S* by *V*, the *K* tarwad instituted a suit against the karnavan and certain members of the *P* tarwad for arrears of michavaram and got a decree. In execution of that decree, *K* tarwad brought the kanom interest to sale and a member of that tarwad bought it and afterwards assigned that interest to *N*, the present defendant 1. Prior to the assignment by *S* to plaintiff *A*, one *R* was on the land as a tenant, and as *A* suspected that after the Court sale in execution *R* was colluding with *N* and her assignor, she took the precaution of impleading *N* and her assignor in a suit by her for ejectment against *R*. The plaint in that suit was framed as one on tenancy and not on title. She also took care to claim relief against *N* and her assignor who were defendants 3 and 2 in that suit only on the ground of their having got into possession or attemptfng to get possession in collusion with the tenant *R*. In the course of the trial of the suit, *A* distinctly stated that she did not want the question of title raised in the suit. The Court found that there was no collusion between the tenant and *N*, but it also found that *N* and her assignor had got into possession of the items now in question after the purchase in execution of the decree in the first suit and dismissed the suit. The plaintiff then instituted the present suit based on title to eject *N*:

Held: that the present suit based on title was not barred by the previous suit as the present suit was not based on the same cause of action as the former suit nor the claim put forward in the present suit was one that might and ought to have been put forward in the former suit. [P 805 C 1]

Held also: that a person who gets into possession in collusion with the tenant in possession is so far as the landlord is concerned placed under the same disability as the tenant from calling his landlord's title in question. Therefore in the former suit *N* having been added only in the position of the tenant, any question of title being raised in that suit is precluded: *13 Mad 335, Ref.* [P 805 C 1]

P. Govinda Menon — for Appellant.

P. S. Narayanaswami Iyer — for Respondent.

Judgment. — The plaint properties belong in jenm to the *K* tarwad and were held on kanom by the *P* tarwad. In 1919 one Velu Nair, a member of the *P* tarwad, assigned the kanom interest to the plaintiff's uncle Subbarama Iyer and later that uncle assigned the interest to the plaintiff. After the assignment to Subbarama Aiyer by Velu Nair, the *K* tarwad instituted O. S. No. 335 of 1920 against the karnavan and certain members of the *P* tarwad for arrears of michavaram and they obtained a decree. In execution of that decree, the *K* tarwad brought the kanom interest to sale and a member of that tarwad purchased it and afterwards assigned that interest to the present defendant 1. Prior to the assignment by Subbarama Iyer to the plaintiff, one Raman was on the land as a tenant and as the plaintiff suspected that after the Court sale in execution of the decree in O. S. No. 335 of 1920 that Raman was colluding with the present defendant 1 and her assignor, she took the precaution of impleading the present defendant 1 and her assignor in a suit in ejectment which this plaintiff instituted against Raman. The plaint in that suit (O. S. No. 689 of 1928) was clearly framed as one based on the tenancy and not on title. She also took care to claim relief against the present defendant 1 and her assignor who were defendants 3 and 2 in that suit only on the ground of their having got into possession or attempting to get possession in collusion with the tenant Raman. In the course of the trial of O. S. No. 689 of 1928, the plaintiff distinctly stated that she did not desire to have the question of title raised in that suit. Indeed it is doubtful whether having regard to the way in which the plaint was framed, the question of title could properly have been gone into in that suit at all, even if the plaintiff so desired. The Court found that there was no collusion between the tenant and the present defendant 1; but it also found that the present defendant 1 and her assignor had got into possession of the items now in question after the purchase

in execution of the decree in O. S. No. 335 of 1920. The plaintiff's suit against her tenant was accordingly dismissed so far as the present items are concerned. Hence the present suit, based on title, to eject defendant 1.

The Courts below have passed a decree in favour of the plaintiff. Hence this second appeal by defendant 1. Mr. Govinda Menon first contends that the present suit is barred by O. S. No. 689 of 1928. I agree with the Courts below that there is no such bar. The mere fact that the present defendant 1 had been impleaded in the former suit will not by itself suffice to raise the bar. Whether the bar is sought to be raised under S. 11, Civil P. C., or under O. 2, R. 2, the Court will have to consider whether the present suit is based on the same cause of action as the former suit or the claim now put forward is one that might and ought to have been put forward in the former suit. I am of the opinion that the present suit is not based on the same cause of action as the former suit; nor can it be said that the present claim ought to have been included in the former suit. Indeed I even doubt whether it might have been included at all.

It is well established that a person who gets into possession in collusion with a tenant in possession is, so far as the landlord is concerned, placed under the same disability as the tenant from calling his landlord's title in question: *see* 13 Mad 335.[1] In the former suit therefore, the present defendant 1 must be held to have been impleaded only as standing in the same position as the plaintiff's then tenant and the principle of estoppel above referred to, precludes any question of title having been raised in the former suit. There is accordingly no force in the plea based upon O. S. No. 689 of 1928.

Mr. Govinda Menon next contended that as the other members of the *P* tarwad (including the karnavan) had been impleaded in O. S. No. 335 of 1920 and as the michavaram was according to the kanom document a charge on the kanom properties, the plaintiff and her assignors must be held bound by the sale in execution of the decree obtained by the *K* tarwad in O. S. No. 338 of 1920. Here again I am of the opinion that the Courts below rightly overruled the contention. Neither the fact of the other members of the tarwad being parties to the former litigation nor even the fact of the rent being a charge on the property will make the adjudication in that suit and a sale proceeding in execution of that decree binding upon a person to whom the property had been assigned before the institution of that suit. It may be that Velu Nair's interest (then subsisting) in the tarwad property could be bound by reason of the karnavan having been a party, but the interests of an assignee in property which before the institution of the suit had been alienated cannot be bound by the sale. To take a familiar case by way of illustration, a mortgage debt may be binding on all the mortgaged items, but if before the institution of a suit for sale some of the items are sold by the mortgagor to third persons, a decree obtained by the mortgagee without impleading the purchaser of the equity of redemption in those items cannot as such bind that purchaser though there can be no doubt as to the liability of those items to bear their share of the mortgage debt. I must therefore hold that as against the plaintiff and her assignor, defendant 1 has not derived a valid title to the kanom interest by reason of the purchase in execution of the decree in O. S. No. 335 of 1920.

It was next contended that this line of argument was not available to the plaintiff because the assignment by Velu Nair to Subbarama Iyer must be deemed to be void. Whether the assignment was valid or not will depend upon a number of facts. If for instance the alleged partition in the *P* tarwad is true, there is no reason why the assignment of Velu Nair should not be operative. Even otherwise, circumstances are conceivable in which the assignment may at least be voidable if not void. It cannot therefore be said that this question raises a pure point of law. The lower Appellate Court was therefore justified in refusing to allow it to be raised for the first time at a late stage during the hearing of the appeal before it. The appeal accordingly fails and is dismissed with costs.

C.R.K./K.B. *Appeal dismissed.*

1. Pasupathi v. Narayana, (1890) 13 Mad 335.

A. I. R. 1937 Madras 806

VARADACHARIAR, J.

V. Kameswara Ayyar and *another* —
Appellants.

v.

Secretary of State and *others* —
Respondents.

Second Appeals Nos. 761 and 762 of 1933, Decided on 28th April 1937, against decree of Dist. Court, Madura, in A. S. Nos. 92 and 102 of 1931.

Madras Irrigation Cess Act (7 of 1865), S. 1 —Ryotwari owner of wet land getting water through sluice—Obstruction to sluice caused by third person resulting in more flow of water — Owner not connected in any way with such obstruction — Owner held could not be said to have used improperly extra water coming to his lands and water-cess levied upon him was illegal.

Water flowed on to the land registered as wet of a ryotwari owner only through the sluice through which he was authorized to take water. It was found that because some obstruction was caused by some unknown person to a sluice much lower down, the water banked up in the channel with the result that through the customary sluice a greater volume of water than might have flowed in did happen to flow and it was not in evidence that the owner of the land had anything to do with the blocking up of the sluice :

Held : that the owner of the land could not be said to have improperly "used" the extra water that came to his lands through his customary sluice without any act of his own and that the cess levied under the Irrigation Cess Act was illegal and ought to be refunded : *A I R 1936 Mad 42* and *A I R 1937 Mad 548*, *Rel. on*; *A I R 1914 Mad 155*, *Not foll.* [P 806 C 2]

K. S. Sankara Iyer and *T. V. Rajagopal* — for Appellants.

K. S. Krishnaswami Iyengar — for Respondents.

Judgment. — In view of the decisions in 59 Mad 107 [1] and L. P. A. No. 10 of 1936,[2] these second appeals must be allowed. The appellant is undoubtedly the owner of ryotwari land registered as wet and on the occasion in question, water flowed on to his land only through the sluice through which he is authorized to take water. All that is found is that because there was some obstruction caused by some unknown person to a sluice much lower down, the water banked up in the channel with the result that through the customary sluice of the appellant a greater volume of water than might otherwise have flowed did happen to flow. No serious attempt has been made to connect the appellant with the blocking of the channel at the lower point. On these facts the principle of the decisions above referred to is clearly applicable, because the appellant could not be said to have "used" the water in the sense there explained. After these decisions, it is no longer possible to follow the observations of Ayling, J. in 26 M L J 210[3] in all their generality.

It does not appear to me to involve any distinction in principle merely to say that in the prior cases water flowed through a breach in the channel, whereas here the excess flow through the customary sluice was the result of somebody's act in blocking up some lower sluice. If the appellant had in some way been connected with the blocking up of the sluice, the position might be different. In the absence of anything of that kind, it cannot be maintained that the appellant who had already cultivated these lands in an authorized manner must be held to have improperly used extra water that came to his lands through his customary sluice without any act of his own.

The second appeals are allowed and the plaintiffs given a decree for refund of the amounts claimed to have been illegally levied, with interest thereon at six per cent. per annum from the date of the institution of the suit till date of payment. In dealing with the question of costs, I cannot overlook the circumstance that the state of the decisions as they stood at the time when the assessment was levied was such as to warrant the course adopted by the revenue authorities. In the circumstances I think the proper order will be that in the Courts below each party should bear his own costs but that in this Court the appellant in each case will be entitled to his costs. Time for payment is three months. Leave to appeal is refused.

C.R.K./K.B. *Appeals allowed.*

1. Kanniappa Mudaliar v. Secretary of State, A I R 1936 Mad 42=159 I C 13=59 Mad 107=69 M L J 728.
2. Secretary of State v. Veeranna, *Reported in* A I R 1937 Mad 548=168 I C 864=(1937) 1 M L J 732.
3. Krishna Rao v. Collector of Kistna, A I R 1914 Mad 155=22 I C 692=26 M L J 210.

* A. I. R. 1937 Madras 807

VENKATARAMANA RAO, J.

T. Sivasankaram Pillai — Appellant.

v.

Agali Narayana Rao — Respondent.

Second Appeal No. 556 of 1933, Decided on 19th April 1937, against decree of Dist. Court, Anantapur, in A. S. No. 102 of 1932.

***Evidence Act (1872), S. 62, Expl. 2 and S. 124—To bring document within meaning of Expl. 2 to S. 62, whole document with signature must be made by one uniform process—Suit for damages for libel of *A* in letter addressed by *B* to Secretary to Government — Government claiming privilege under S. 124 — *A* producing carbon copy of typed letter to Government — Original signed and copy initialled — Carbon copy held could not be treated as prepared by one uniform process — Letter sent to Government must be treated as original and being privileged, its copy was not admissible in evidence.**

In a suit for damages for an alleged libel of *A* in a letter addressed by *B*, the President of a Taluk Board, to the Secretary to Government, summons was issued to the Government to produce the said letter. The Government claimed privilege under S. 124, Evidence Act. *A* sought to let in evidence of the contents of a letter, Ex. A, which purported to be a copy of the letter addressed to the Government and which contained the initials of *B*. The said Ex. A was produced from the Office of the Taluk Board and *A* sought to use it for his purpose, relying on Expl. 2 to S. 62 of Evidence Act, on the ground that the said Ex. A and the letter sent to the Government were prepared by the same process, viz. by typing, and as Ex. A contained the initials of *B*, it was itself the original:

Held: that to bring the document within the meaning of Expl. 2 to S. 62, Evidence Act, the whole document with the signature must have been made by one uniform process. As only after the contents of the letter had been typed, *B* signed the document which was addressed to the Government and then initialled Ex. A, which was kept in the Taluk Board Office, the signature on the document addressed to the Government and the initials in Ex. A could not be said to have been made by one uniform process within the meaning of that section. The document sent to the Government must be treated as the original as it constituted the communication between the Government and *B* and that therefore Ex. A, produced by the Taluk Board Office, was not admissible in evidence, being a copy of the original which was not admissible as being privileged document under S. 124, Evidence Act.

[P 807 C 2; P 808 C 1]

S. Ranganadha Iyer — for Appellant.

U. S. Narasimhachar — for Respondent.

Judgment.—This second appeal arises out of a suit instituted by the plaintiff for damages for an alleged libel in a letter dated 4th February 1929, addressed by the defendant as President of the Taluk Board, Penukonda, to the Secretary to Government, Local Self-Government Department, Madras. On a summons to produce the said letter, the Government sent it in a sealed cover and pleaded privilege under S. 124, Evidence Act. Both the Courts upheld the privilege. The plaintiff then sought to let in evidence of the contents of the letter by filing Ex. A, which purports to be a copy of the said letter containing the initials of the defendant. This document was produced from the Office of the Taluk Board on a summons for production in a criminal case and it was sought to be made use of for the purpose of this case by the plaintiff. Both the lower Courts took the view that as the original could not be admitted in evidence on the ground of privilege, no secondary evidence of its contents could be given and therefore declined to rely on Ex. A and dismissed the suit as there was no evidence before the Court of the alleged libel.

Mr. Ranganadha Iyer on behalf of the plaintiff does not dispute the proposition that where the original of a document could not be admitted in evidence on the ground of privilege, no secondary evidence of its contents can be given; but he argues that Ex. A itself is the original as it contains the initials of the defendant. For this purpose he relies on S. 62, Evidence Act. S. 62, Expl. 2 of that Act runs thus:

> Where a number of documents are all made by one uniform process as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are copies of a common original, they are not primary evidence of the contents of the original.

The contention is that Ex. A and the letter sent to the Government were all made by one uniform process, namely by typing on a type machine, and as it contains the initials of the President, Ex. A itself is also the original. It seems to me that this contention proceeds on a misapprehension of the said Explanation. It is no doubt true that the contents of both the letter addressed to the Government and Ex. A were made by one uniform process, namely typing, but without the signature of the President they cannot constitute a letter and therefore a document within the meaning of the said Explanation. It is after the contents of

the letter had been typed that the defendant signed the document which was addressed to the Government and then initialled Ex. A which was kept in the Taluk Board Office. Therefore the signature on the document addressed to the Government and the initials on Ex. A could not be said to have been made by one uniform process. The whole document with the signature must have been made by one uniform process within the meaning of the Explanation which is not the case here. The document that was sent to the Government must be treated as the original as it constitutes the communication between the parties, that is, the defendant and the Government and it is clear from the plaint that what is complained of is the communication contained in that letter. I must therefore overrule the contention of Mr. Ranganadha Iyer.

I fail to see why the plaintiff has involved himself in this litigation, as on a reading of the entire letter it seems to me there is nothing libellous against him. It is unnecessary to give a decision on this matter in the view I have taken of the admissibility of Ex. A. In the result, the second appeal fails and is dismissed with costs. Leave refused.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1937 Madras 808

KING, J.

In re Kotha Achayya Setti — Petitioner.

Criminal Revn. Case No. 87 and Petn. No. 82 of 1937, Decided on 23rd July 1937, from judgment of Sub-Divisional Magistrate, Gooty, D/- 16th October 1936.

Madras District Police Act (24 of 1859), S. 47 — Conviction under — Distinction between S. 47 and S. 211, Penal Code, stated — Accused making false charge against Police Officer — It is not necessary for conviction under S. 47 that intention of accused in making such false complaint must be that criminal proceedings should be started against police officer.

Section 47, Madras District Police Act, is different from S. 211, I. P. C., and there is no similarity between the two except the word 'charge' which appears in both sections. S. 211, Penal Code, provides for two offences — one is actual institution of criminal proceedings with a certain intent and the other is false charge against a person of having committed an offence knowing that there is no just or lawful ground for such a charge. The charge referred to in S. 211, Penal Code, must be a charge of the same nature as the complaint and the actual institution of the criminal proceedings referred to in the first clause in that section. The charge should further be made with the intention of bringing the person charged to trial in criminal proceedings. In S. 47 there is no reference to any criminal proceedings or any Court. [P 809 C 1]

Where the accused makes a certain charge against the police officer and such charge is found to be false for his conviction under S. 47 of the Act, it is not necessary that the intention of the accused in making a false complaint against the Police Officer should be that criminal proceedings against him should have been instituted : *26 Mad 640* and *A I R 1932 Cal 511, Disting.* [P 808 C 2 ; P 809 C 1]

K. Krishnaswami Iyengar and *K. S. Jayarama Iyer* — for Petitioner.

Public Prosecutor — for the Crown.

Order.—The petitioner in this case sent a petition to the District Superintendent of Police, Anantapur, in January 1936, alleging that the Sub-Inspector of Police, Gooty, had obtained certain jewels from him in the preceding June and had refused to return them when requested to do so. He accordingly asked that the District Superintendent of Police should give orders that the jewels should be soon returned to him. It is the case for the prosecution that this petition contained allegations which were false and that the jewels had been returned before the petition was sent, and the petitioner was convicted under S 47, Madras District Police Act. He of course denied at the trial that the statements in his petition were false, but it was found both by the trial Court and by the Appellate Court that those statements were false and this finding of fact cannot now be further challenged.

It is however argued before me that S. 47 does not apply to the petitioner's action. All that the petitioner wanted to do, it is urged, was to bring some kind of departmental punishment upon the Sub-Inspector and he had no intention of compelling him to stand his trial for any criminal offence. Rulings have been cited before me both of this Court and of the Calcutta High Court. 26 Mad 640[1] and 59 Cal 334,[2] which deal with the interpretation of S. 211, I. P. C., and which hold that before a man can be found guilty of having made a false charge against another person under S. 211, it must be established that his intention in bringing the false information

1. Rayan Hutti v. Emperor, (1903), 26 Mad 640.
2. Abdul Hakim Khan v. Emperor, A I R 1932 Cal 511=1932 Cr C 440=138 I C 551=59 Cal 334=33 Cr L J 631.

was that criminal proceedings should be instituted.

It is argued before me that the same principle ought to be applied to S. 47, District Police Act. I am unable to accept this argument. It is no doubt asserted that the language of S. 47 and the language of S. 211 are similar. But except that the word 'charge' appears both in S. 47 and in S. 211 there is no similarity at all. S. 211 provides for two offences both of which are equally punishable. One is the actual institution of criminal proceedings with a certain intent and the other is the false charge against a person of having committed an offence knowing that there is no just or lawful ground for such a charge. It is clear therefore that the charge referred to in S. 211 must be a charge of the same nature as the complaint and the actual institution of criminal proceedings dealt with by the first clause in that section. And further, the reference to the specific allegation that the person charged had committed an offence is an indication that the charge must be with the intention of bringing him to trial in a criminal proceeding. In S. 47 there is no reference to any criminal proceeding or any Court. The language simply is: "shall maliciously and without probable cause prefer any false or frivolous charge against any police officer."

There are minor differences also which may be incidentally referred to, viz. the very much greater severity with which an offence under S. 211 is punished, the maximum being two years in that case and only three months in S. 47 and the fact that in S. 47 the institution of a false or frivolous charge is coupled not with any offence connected with legal proceedings but with the assaulting or resisting a police officer in the execution of his duty.

I am quite unable therefore to hold that there is any such identity of meaning between these two sections with regard to the word 'charge' as would justify me in applying the rulings cited before me to a case under S. 47, Madras District Police Act. I therefore hold that the conviction in this case is vitiated by no error of law and must be upheld. The revision petition is accordingly dismissed.

C.R.K./A.L. *Petition dismissed.*

A. I. R. 1937 Madras 809

KING, J.

Mohideen Bi — Petitioner.

v.

Bashu Sahib — Respondent.

Criminal Revn. Case No. 916 and Petn. No. 828 of 1936, Decided on 25th March 1937, from order of Special Honorary Presidency Magistrate, George Town, Madras, D/- 17th September 1936.

Maintenance — Children — Mother, legal guardian, forsaking husband without reasonable excuse — Children should be granted maintenance though not mother.

Where a woman, who is the legal guardian of her children, forsakes her husband without any reasonable excuse, although the husband is willing to maintain her, she is not entitled to any maintenance, but the children, being in her custody, should be granted maintenance : *21 I C 469* and *A I R 1933 Lah 969*, *Rel. on.*

[P 809 C 2]

T. R. Ramchandran — for Petitioner.

Crown Prosecutor — for the Crown.

V. Rajagopalachari —

for Counter-Petitioner.

Order.—In this case, maintenance was claimed by a Mahomedan wife for herself and her children. It was found by the learned Magistrate that the respondent made a bona fide offer to maintain them in his own house, which the petitioner, his wife, unreasonably refused to accept. Her application was accordingly dismissed. In revision it is argued that the Magistrate should have awarded maintenance to the children, whose legal guardian their mother is, and who cannot therefore be taken separately to live with their father. In support of this argument, I have been referred to 21 I C 469[1] and A I R 1933 Lah 969,[2] and no authority has been cited to the contrary. The petition will accordingly be sent back to the Magistrate with a direction to enquire what is the proper rate of maintenance for the children and to award them maintenance at that rate.

C.R.K./B.D. *Case remanded.*

1. *In re* Parthy Valappil Moideen, (1913) 21 I C 469=14 Cr L J 597=25 M L J 355=1913 M W N 997.

2. Allah Rakhi v. Karam Ilahi, A I R 1933 Lah 969=1933 Cr C 1457=147 I C 123=14 Lah 770=35 P L R 34.

A. I. R. 1937 Madras 810

VARADACHARIAR AND
PANDRANG ROW, JJ.

Gadde Venkatarayudu — Appellant.

v.

Anumolu China Ramakrishnayya and *others* — Respondents.

Appeal No. 258 of 1931, Decided on 14th April 1937, against decree of Sub-Judge, Bezwada, D/- 8th September 1930.

Principal and Agent—Creditor paying debtor's other creditors lesser amounts and obtaining full satisfaction—Debtor executing sale deed in favour of creditor for same—Such creditor cannot claim remission so obtained because he acts as his agent.

A creditor agreed to pay off the debts due to the other creditors of his debtor upon which the debtor was to execute a sale deed of certain immoveable property in his favour. It was also agreed that if the creditor was required to pay more than the consideration in the sale deed, the debtor would make good the excess. In fact the creditor paid less to the other creditors and obtained satisfaction of their debts and claimed to himself the remission so obtained :

Held : that the creditor was not entitled to claim the remission, as he acted on behalf of his debtor as his agent. [P 810 C 2]

Ch. Raghava Rao — for Appellant.

C. Sambasiva Rao — for Respondents.

Varadachariar, J.—This appeal arises out of a suit for specific performance of a contract to sell land to the plaintiff. The Court below has decreed specific performance; this appeal by the plaintiff relates to two subsidiary matters, namely (1) his claim to an amount of Rs. 2,861.5.1 referred to in the sixth issue, and (2) the order of the lower Court directing each party to bear his own costs.

The first claim arises under the following circumstances: The suit properties were agreed to be sold to the plaintiff for the purposes of discharging certain debts due by the family of the defendants, but as there was some delay in completing the sale transaction, the plaintiff was requested to pay off the creditors even before the execution of the sale deed and he was assured that the amount so paid might be adjusted towards the sale price and that, if the plaintiff had to pay to the creditors anything in excess of the sale price, the same would be made good to him with interest. It is not the plaintiff's case that he paid anything more than the sale price to the defendant's creditors. He managed to get a transfer of the documents held by the creditors on payment of smaller amount than was actually due under those documents and he now claims that he is entitled to get the benefit of the remission given by those creditors. The lower Court has disallowed this part of the claim and we think its conclusion is right. In making disbursements out of the agreed sale price, the plaintiff was only acting as the agent of the defendants and he was not entitled to retain for his own benefit any remission that he obtained from the creditors. If a contract to the contrary were clearly established, the plaintiff might have some justification for this claim; but even the contract pleaded in the plaint is not sufficient for this purpose, because that contract is only to the effect that any excess paid by the plaintiff would be made good to him.

As regards the lower Court's order as to costs, we do not think we will be justified in interfering with it, unless the appellant is able to show that there has been any error of principle into which the lower Court has fallen in the exercise of its discretion. It is true that the plaintiff has been obliged to spend a pretty large sum in instituting this suit, but we do not find that defendants 2 and 3 ever disputed their liability to execute a sale deed. It is only the plaintiff's claim for the remission amount that has been disputed by those defendants. We therefore find no reason for saddling them with the costs of the suit. Defendant 1 no doubt did raise other defences which have been found against; but as regards defendant 1's attitude, the plaintiff himself seems to be largely responsible for it. At one time the plaintiff sided with defendant 1 in his disputes with defendants 2 and 3 and gave a notice (Ex. 2) only to defendants 2 and 3, ignoring the sale contract and asking for payment of moneys paid by him in discharge of the debts due by the defendants. The plaintiff and defendant 1 fell out later and defendant 1 was prosecuted and punished for fraudulent removal of documents. In this suit he has been ex parte both in the lower Court and here, after filing the written statement. While it cannot be said that defendant 1 stands in the same position as defendants 2 and 3, we do not see sufficient reason for differing from the manner in which the lower Court has exercised its discretion in the matter of costs.

The appeal therefore fails and is dismissed with costs of respondents 2 and 3.

C.R.K./B.D. *Appeal dismissed.*

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* A. I. R. 1937 Madras 811

VARADACHARIAR AND PANDRANG ROW, JJ.

Katta Venkatayyagari Srinivasayya — Appellant.

v.

Gowra Lakshmayya and *others* — Respondents.

Appeal No. 269 of 1931, Decided on 9th April 1937, against decree of Dist. Court, Anantapur, in O. S. No. 17 of 1930.

(a) Tort— Malicious proceeding — Attachment of property of person not party — Liability of person attaching — Finding of malice or want of reasonable care is not essential—Action is based on trespass.

The fact that the attachment was ordered by the Court or was effected by an officer of the Court is not sufficient to exclude the liability of the person asking for attachment and no finding of malice or want of reasonable care is necessary in a case where the property of a person who is not a party to the suit is wrongly attached. In such cases, the action is really one founded on trespass and not on special damages : *17 Cal 436, Rel. on* ; *A I R 1931 P C 28* and *12 W R 329, Ref.* [P 812 C 1]

*** (b) Civil P. C. (1908), O. 16, Rr. 10, 13— Purpose is to vindicate authority of Court— If witness does not appear, his property is attached and sold to recover fine only — Action is taken by Court on motion by one party—Such party cannot be placed on same footing as attaching decree-holder— Person moving Court to proceed under O. 16, R. 10 —Property of wrong person attached—Such applicant cannot be penalized.**

The main purpose of proceedings under O. 16, R. 10, Civil P. C., is to vindicate the authority of the Court, though incidentally the particular party who is anxious to secure the presence of a witness may also benefit, if as a result of the proclamation or attachment the witness should ultimately appear. If the witness does not appear, the property attached is sold only for the purpose of realising the fine and not for the purpose of paying any money to the party who required his attendance. A Court will not be justified in placing a person who asks the Court to take proceeding under O. 16, R. 10, Civil P. C., on the same footing as a decree-holder who moves the Court to attach certain properties as the properties of his judgment-debtor. Primarily, the proceeding to enforce the attendance of a witness is the act of the Court and it is only by way of indicating the method of procedure that R. 13 in that Order enacts that as far as they are applicable the provisions relating to the attachment of property of the judgment-debtor shall apply to attachment and sale under this Order. This does not warrant the view that for all purposes the legal consequence must be the same. Hence, where a person moves the Court to proceed under O. 16, R. 10 for the failure of his witness to attend and property of a wrong person is attached, such person cannot be penalized. [P 813 C 1]

(c) Tort—Malicious proceeding— Whether decree-holder attaching wrong person's immoveable property is liable (*Quære*).

Quære.—A decree holder attaching wrong person's moveables is liable to pay damages in an action by such person founded on trespass and damages, but whether decree-holder attaching wrong person's immoveable property is similarly liable, as there is no damage and as trespass is by an officer of the Court ? [P 812 C 2; P 813 C 1]

B. Somayya — for Appellant.

K. Krishnaswamy Iyengar — for Respondents.

Varadachariar, J.—This appeal arises out of a suit for damages for wrongful attachment of the plaintiffs' properties. Plaintiff 1 is the father and plaintiffs 2 and 3 are his sons. Plaintiff 3 has a son, Sriramayya, who was summoned as a witness in a suit instituted by the defendant against certain third parties. He did not appear and the present defendant accordingly applied to the Court to take proceedings under O. 16, R. 10, Civil P. C. In the attachment thus issued, four items of property were attached, as though they were the property of Sriramayya. Admittedly, Sriramayya would not in any event be entitled to the full interest in those properties, because, even on the footing of the plaintiffs and Sriramayya being undivided, Sriramayya would be entitled only to a sixth share. There can be little doubt that, whoever may be responsible for it, the warrant of attachment was wrongly drafted in not limiting the attachment to the sixth share of Sriramayya in the properties.

The plaintiffs however contend that before the date of that attachment there had been a division between the three plaintiffs under an unregistered partition deed Ex. C and that as between plaintiff 3 and Sriramayya, Sriramayya had relinquished his interest in the family property by a registered deed of relinquishment (Ex. A) in 1927. It also appears that in the Municipal Registry these properties no longer remained joint in the names of the plaintiffs but that specific items had been registered in the names of the three plaintiffs, in pursuance of the partition Ex. C. According to the plaintiffs therefore, Sriramayya had no interest at all in these properties. The plaintiffs further complain that the defendant acted mali-

ciously and without reasonable care in getting the properties attached when Sriramayya had no interest whatever therein.

The learned District Judge came to the conclusion that the defendant could not be said to have acted maliciously but that he must have been reckless or at any rate did not know or realize that the plaintiffs' family had become divided. He refused to accede to the defendant's contention that the partition arrangement in the plaintiffs' family was not true or operative. Though Ex. C was unregistered, he was of opinion that it could be received in evidence to prove a division of status; and in view of Ex. A, which was a registered document, and of the entries in the Municipal books, he held that the plaintiffs' story of partition and release by Sriramayya of his interest in the family properties must be true. He also rejected the defendant's contention that he could not be held liable in damages because the attachment was made under the orders of the Court. Relying on the principle recognized in 17 Cal 436,[1] he awarded Rs. 100 each to the three plaintiffs by way of damages. Against this decree the defendant has appealed. Plaintiff 3 has filed a memorandum of objections, claiming that a larger sum should have been awarded.

We do not see any sufficient reason for differing from the view of the lower Court that the defendant has not been shown to have acted maliciously. We do not think it necessary, for the purpose of this case, to canvass the correctness of the finding of the lower Court as to the truth of the partition in the plaintiffs' family or as to the reality or operativeness of Ex. A. We propose to deal with the case on the assumption that Sriramayya had no interest in the properties attached. We agree with the learned District Judge that the fact that the attachment was ordered by the Court or was effected by an officer of the Court is not sufficient to exclude the liability of the defendant and according to the principle laid down in 17 Cal 436[1], no finding of malice or want of reasonable care is necessary in a case where the property of a person who is not a party to the suit is wrongly attached. In such cases the action is really one founded on trespass and not on special damage.

1. Kissori Mohan Roy v. Harsukh Das, (1890) 17 Cal 436=17 I A 17=5 Sar 472 (P C).

The observations in 61 M L J 330[2] must be read in the light of the decision in 17 Cal 436[1] and the reference to 'judicial sanction' limited to cases where the Court has addressed itself to the question whether particular properties were liable to attachment or not : *see* 12 W R 329[3]. Mr. Somayya however contended that in all the reported cases where damages for wrongful attachment have been awarded on the footing of trespass, the complaint had been made with reference to the attachment of moveable property which was taken away from the custody of the real owner in consequence of the attachment. He argued that such deprivation of goods must necessarily have caused damage in that class of cases, but that in the case of attachment of immoveable property there can be nothing similar to it. Under the law, the attachment of immoveable property merely operates as a prohibition of alienation by the person against whom the order is made and who is supposed to be its owner; there is nothing in the attachment to fetter the rights of the real owner, if he is not the defendant or party sought to be proceeded against. At best, there might be a cloud cast upon his title, which must be remedied by proceedings under O. 21, R. 58, Civil P. C., but it cannot be said that an attachment of immoveable property involves anything in the nature of trespass or necessarily causes damage to the real owner.

It cannot be denied that there is some force in this distinction insisted on by Mr. Somayya. Mr. Krishnaswami Ayyangar, the learned counsel for the respondents, sought to answer this distinction by pointing out that even in the case of attachment of immoveable property, the amin has necessarily to go upon the property to affix the notice of attachment thereon as required by law and that this would amount to a trespass. He invited our attention to the very wide definition of the term 'trespass' in the authorities, and contended that if trespass in law is established, the presence or absence of damage is immaterial. We do not propose to express any final opinion upon the maintainability or otherwise of this dis-

2. Ramanathan Chetty v. Meera Saibo Marikar, A I R 1931 P C 28=130 I C 310=61 M L J 330 (P C).
3. Soobjan Beebee v. Shaik Shureentoollah, (1869) 12 W R 329=3 Beng L R A C 413.

tinction, where an attachment takes place at the instance of a decree-holder or upon the question whether if all that the real owner can complain of consisted in the entry of the amin on the property to affix the notice, the principle of *de minimis non curat lex* will avail the defendant to save him from liability for damages. In the present case, the proceedings were not taken at the instance of a decree-holder who may ordinarily be regarded as the person setting the Court in motion to attach the properties of his judgment-debtor and therefore rightly to be held responsible for pointing out to the Court officer the properties of his judgment-debtor.

As already stated, the proceedings in this case were taken under O. 16, R. 10, Civil P. C. The main purpose of these proceedings is to vindicate the authority of the Court, though incidentally the particular party who is anxious to secure the presence of a witness may also benefit, if as a result of the proclamation or attachment, the witness should ultimately appear. If the witness does not appear, the property attached is sold only for the purpose of realising the fine and not for the purpose of paying any money to the party who required his attendance. In view of this being the object of the proceeding in the present case, we do not feel we will be justified in placing a person who asks the Court to take proceedings under O. 16, R. 10, Civil P. C., on the same footing as a decree-holder who moves the Court to attach certain properties as the properties of his judgment-debtor. Primarily, the proceeding to enforce the attendance of a witness is the act of the Court and it is only by way of indicating the method of procedure that R. 13 in that Order enacts that as far as they are applicable the provisions relating to the attachment of property of a judgment-debtor shall apply to attachment and sale under this Order. This does not warrant the view that for all purposes the legal consequence must be the same. It is on this narrow ground that we hold that there is no justification for holding the defendant liable in damages in the present case.

A further question may arise whether, if damages are to be awarded on the footing of trespass at all, anybody except plaintiff 2 would be entitled to damages because, even according to the plaintiffs' case, the particular item on which, according to the report of the amin, the notice of attachment was affixed, namely item 2, had fallen to the share of plaintiff 2 in the family partition. Mr. Krishnaswami Ayyangar asked us to hold that the defendant must have acted maliciously in securing the attachment of the properties as the properties of Sriramayya; and in support of that argument he relied upon the evidence to the effect that the servant who beat the tom-tom went about the village saying the properties of the Goura people—a description which will include the plaintiffs and not merely Sriramayya—had been attached and that the attachment warrant was not restricted to Sriramayya's share. The latter circumstances seem more probably due to carelessness than to malice. The story as to the tom-tomming, even taking it to be true, will not warrant the inference that the defendant instructed the village servant to use those words. On the other hand, there is no suggestion either in the evidence of the plaintiffs or in the cross-examination of the defendant that there was any motive for the defendant to think of injuring the reputation of the plaintiffs.

The result is that the decree of the Court below is set aside and the suit dismissed. But there can be little doubt that the defendant had acted very carelessly and that the plaintiffs had a certain amount of sentimental grievance. We accordingly direct the parties to bear their own costs both in the lower Court and in the appeal here. So far as the memorandum of objections is concerned, there is so little to be said in favour of it that we think we must dismiss it with costs of the defendant-respondent.

C.R.K./B.D. *Decree set aside.*

A. I. R. 1937 Madras 813

HORWILL, J.

G. Mohideen Sahib — Appellant.

v.

Kotta Lakshmayya — Respondent.

Appeal No. 8 of 1935, Decided on 5th March 1937, against appellate order of Dist. Court, Anantapur, D/- 10th August 1934.

Hindu Law — Debts — Father — Decree — Suit against father on agreement—Divided son

made party to suit as his father's legal representative after father's death—Decree passed against assets of father in his hands — Property allotted to son in partition before suit cannot be proceeded in execution of decree.

If the son is divided from his father, the father has no power of disposal over the son's property and the creditor who cannot have greater powers than the father is unable to bring the property of the son to sale in execution of the decree against the father. In a case where partition takes place even before the suit is filed, the case of the son is much stronger than if the partition had been after suit, for the father's property is distinct from that of the son and the property of the son can be no more made liable for the debt of his father without a finding from a Court in a regular suit that it is so liable than can the property of a complete stranger be made liable for another person's debt, unless a Court after due enquiry in a regular suit has declared it to be so. [P 814 C 2]

Where, during the pendency of a suit against a Hindu father on an agreement, the father dies and the divided son is made party to the suit not in his individual capacity but as a legal representative of the father, and a decree is passed against the assets of the father in the hands of the son, the property which has fallen to the hands of the son in the partition between the father and the son before the suit cannot be proceeded with in execution of decree : *22 Mad 519; A I R 1928 Mad 657; A I R 1934 Mad 662; A I R 1937 Mad 424; A I R 1936 P C 277* and *A I R 1928 Mad 735, Rel. on; A I R 1937 Mad 610 (F B), Disting.* [P 815 C 2; P 816 C 1]

K. Srinivasa Rao and *K. S. Jayarama Iyer* — for Appellant.

A. Gopalacharlu — for Respondent.

Judgment. — The appellant brought a suit on an agreement against the father of the respondent. During the course of the trial, the father died and the respondent was brought on record as his legal representative. Thereupon an additional issue was framed "whether defendant 2 or his share of the family properties is not liable for the suit debt". It is difficult to see why this issue was framed at all, because defendant 2 was brought on record merely as the representative of the father and so the question whether his own property was liable for the debt or not was not in issue. However, this issue was framed; but the appellant made an endorsement on the written statement to the effect that he did not press this issue against the defendant and so the suit proceeded on the same footing as before defendant 2's father's death, i.e. the question became whether this agreement was true. The result of the suit was that a decree was given against the assets of the deceased defendant in the son's hands. The appellant in execution of this decree obtained against defendant 2 as the legal representative of his father, sought to attach property which was not the property of the father but which admittedly had fallen to the son's share in the partition between the father and the son prior to the suit. The question in this appeal is whether in execution the liability of defendant 2 to pay this debt can be gone into. The executing Court held that it could and the first Appellate Court that it could not.

If a suit is brought against the father as the manager of his family, then the decree, although it purports to be against the father only, is in reality one against the family and in execution the share of the son can be proceeded against, because the decree is virtually one against the son as well as against the father. Even where it is not clear that the father is on record in the suit as the manager of the family, yet nevertheless the sons can be made liable in execution, because their father has the power of selling his son's property for debts which are not illegal and immoral and the creditor has the right of selling not merely the father's property, but that property which the father has power to dispose of. If however the son is divided from his father, the father has no power of disposal over the son's property and the creditor who cannot have greater powers than the father is unable to bring the property of the son to sale in execution of the decree against the father. In a case like the present, where the partition took place even before the suit was filed, the case of the son is much stronger than if the partition had been after suit; for, the father's property is distinct from that of the son, and the property of the son can be no more made liable for the debt of his father without a finding from a Court in a regular suit that it is so liable than can the property of a complete stranger be made liable for another person's debt, unless a Court after due enquiry in a regular suit has declared it to be so.

In a long course of decisions from 22 Mad 519[1] onwards, it has been held that where the father is divided from the sons and therefore has no power of disposal over their property, the creditor cannot proceed against the property of the sons in execution. In 51 Mad 361[2] the liability

1. Krishnaswami Konan v. Ramaswami Iyer, (1899) 22 Mad 519=9 M L J 127.
2. Subramania Iyer v. Sabapathy Iyer, A I R 1928 Mad 657=110 I C 141=51 Mad 361=54 M L J 726 (F B).

of the sons for a pre-partition debt was decided, and although the question of liability in execution did not arise, some of the observations made are relevant to this question. Jackson, J. at p. 380 for example says :

> I fully see the force of the assumption if the creditor is trying to execute a decree obtained against the father alone against assets held by the son after partition, which the father has no present power to bring to sale, then the creditor can be in no better position than the father. But I should hesitate to assume that the creditor's rights are equally circumscribed when he has made the son a party to the suit, and by virtue of the son's pious obligation has obtained a decree against assets in the son's hands. His claim then is based upon the son's pious obligation, and in my opinion is not affected by the circumstance that the father has no longer the power to sell.

This statement of law has been repeated in many other cases, i. e. A I R 1934 Mad 662[3] and by Varadachariar and Burn, JJ. in 1937 M W N 113.[4] Varadachariar, J. has expressed the law on this point very clearly in the following passage :

> In order that properties may be liable to attachment in execution, it must be shown that they belonged to the debtor or that the judgment-debtor has disposing power over the properties or their profits which power he may exercise for his own benefit.

The proposition has now been settled beyond doubt by the observations of their Lordships of the Judicial Committee in 1936 M W N 1204,[5] that the father's power of sale for his debts exists only so long as the joint family remains undivided. A reference to the decision of this Court in 51 Mad 417[6] shows that a division in status will suffice to put an end to this power. It would therefore follow that after division in status, the father's creditor cannot, any more than the Official Assignee, claim that the property is saleable by the father and therefore attachable by himself. Burn, J. in his judgment in the same case points out that even if the partition is entered into to defeat creditors, nevertheless if by a genuine partition division of status takes place, the power of the father to sell the shares of the sons is brought to an end.

In the present case the son was not a party to the suit originally but was added as legal representative of his father after his father's death. This, on the face of it, would appear not to make the son in his individual capacity any more a party to the suit than if his father had continued alive. The son continued in the suit merely as a representative of his father's estate. He was not made a party as a holder of land that was also liable for the suit debt. The learned advocate for the appellant relies on A I R 1929 Mad 898,[7] which was a case somewhat like this, except that in that case the sons were made parties to the suit and afterwards exonerated. However, it could at least be argued in that case that the sons continued parties to the suit even though exonerated, and that an enquiry could therefore be held in execution under S. 47, Civil P. C. Coutts-Trotter, J. however did not base his opinion that the sons could be made liable in execution on this narrow ground. He seems to have been of opinion, although he does not expressly dissent from the opinion of Ananthakrishna Ayyar, J. in 51 Mad 361[2] to the contrary, that the son is always liable for his father's debts even though divided from him, unless he can establish that the debts are illegal or immoral.

Reliance is placed by the appellant on the words of S. 53, Civil P. C. :

> For the purposes of S. 50 and S. 52, property in the hands of a son or other descendant which is liable under the Hindu law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

This section must have been introduced to prevent undivided sons after their father's death from contending that the property in their hands was not their father's because it had passed to them by survivorship.

Since dictating the above, I have had the advantage of perusing the judgments of the learned Judges in A. A. O. No. 433 of 1936.[8] The question there was the liability of a son in execution for a decree passed against

3. Bapiraju v. Sreeramulu, A I R 1934 Mad 662 =152 I C 459.
4. Kuppan Chettiar v. Masa Goundan, A I R 1937 Mad 424=169 I C 400=(1937) 1 M L J 249=1937 M W N 113.
5. Sat Narain v. Sri Kishen Das, A I R 1936 P C 277=164 I C 6=63 I A 384=17 Lah 644= 1936 M W N 1204 (P C).
6. *In re* Baluswami Iyer, A I R 1928 Mad 735 =112 I C 541=51 Mad 417=55 M L J 175 (F B).
7. Doraiswami Nadan v. Nagaswami Naicken, A I R 1929 Mad 898=121 I C 863.
8. Venkatanarayana Rao v. Venkata Somaraju, *Reported in* A I R 1937 Mad 610=(1937) 2 M L J 251 (F B).

his father while they were still undivided. It was found that the suit was brought against the father as the representative of his branch of the family. It followed that the son must be considered as having been a party to the decree and liable in execution of the decree. Venkatasubba Rao and Venkataramana Rao, JJ. doubted the correctness of the decisions of Varadachariar, J. in the cases quoted earlier, but distinguished them as being based on the pious obligation theory, which it was unnecessary to apply in the case before them. Cornish, J. went further and held that even as a son (as opposed to a junior coparcener) the son would be liable. Obviously, this Full Bench case will not help the appellant; for it is clear here that the suit could not have been brought in a representative character.

The lower Court therefore rightly held that execution could not proceed against the property of the son which fell to his share in partition. The appeal is therefore dismissed with costs. Leave granted.

C.R.K./K.B. *Appeal dismissed.*

A. I. R. 1937 Madras 816

VENKATASUBBA RAO AND CORNISH, JJ.

M. A. R. R. M. Visvanathan Chettiar— Appellant.

v.

Ramanathan Chettiar and *others* — Respondents.

Appeal No. 190 of 1931, Decided on 20th April 1937, against decree of Sub-Judge, Devakotta, in O. S. No. 29 of 1927.

(a) Hindu Law—Debts—Necessity—Burden of proof — Manager of trading family incurring debts for paying off trade debts—Lender must prove only existence of such trade debts — Lender is not required to prove whether manager acted prudently or debts were incurred for benefit or necessities of family.

Where the manager of a trading family incurs debts for purpose of paying off trade debts, the lender is not called on to prove more than that such debts did in fact exist. What is a necessary or beneficial purpose is a question which, in the case of a trading family, is governed by considerations different from those that apply to an ordinary Hindu co-parcenary. The lender discharges his duty by showing that there were in fact trade debts in existence, that is to say that the debts had been incurred in the course of, or for purposes of the trade. There his duty ends and he is not called on to prove further that in the incurring of the debts the manager had acted prudently ; nor is he required to prove that the debts could have been discharged otherwise than by borrowing the amount from him : *A I R 1927 P C 121, Rel. on.* [P 817 C 1]

(b) Evidence Act (1872), S. 114 — Manager of joint family executing mortgage in favour of creditor for paying off trade debts — Assignee of creditor bringing mortgage suit against members—Failure of manager to produce account books even when summoned to do so for proving existence of debts—Neither manager nor members going into witness box —Adverse inference held could be drawn.

The manager of a joint family carrying on a family trade executed a mortgage in favour of a creditor for purpose of paying off trade debts. In a mortgage suit brought by assignee of the creditor against the manager and other members, the assignee applied for discovery of account books of the family in order to prove existence of trade debts, but the manager failed to produce them even when summoned to produce them. The defendants did not even go into the witness-box. The manager had impliedly admitted in his written statement the existence of trade debts :

Held : that as the defendants deliberately withheld from the Court the evidence bearing on the question of existence of debts which was peculiarly within their own knowledge, the inference was irresistible that had it been produced it would have been fatal to their case : *A I R 1919 Mad 444, Rel. on.* [P 818 C 1, 2]

V. Rajagopala Iyer and *T. V. Ramiah* — for Appellant.

M. Patanjali Sastri, R. Kesava Iyengar and *R. Swaminatha Iyer* — for Respondents.

Venkatasubba Rao, J. — The question which this appeal raises is whether the mortgage debt is binding upon defendants 2, 3 and 4. The actual executant of the suit bond was defendant 1, but he purports to have executed it not only on his own behalf but also as the "family manager and guardian of his undivided younger brother," defendant 2, who was then a minor. All the defendants resisted the claim, even the receipt of the consideration having been denied by defendant 1. There was a further allegation that so far as defendants 2 to 4 were concerned, the debt was not incurred for a purpose binding upon the joint family. The learned trial Judge has come to the conclusion that consideration was paid, with which we unhesitatingly concur.

The facts may be shortly stated. A person by name Chokkalinga had three daughters by his first wife but no male issue ; thereupon he adopted defendant 1 as his son. Subsequently he married a second wife and defendant 2 was his son by her. Egappa Chetty, the mortgagee, is the husband of one of Chokkalinga's daughters by his first wife. The mortgage was

granted in December 1916 and it was assigned to the plaintiff, a relation of the parties, in January 1924. Egappa died about the year 1926. The suit was filed in 1927 and was heard in 1930. Chokkalinga was carrying on a family trade, which upon his death devolved upon his sons, and it is not disputed that on the date of the mortgage bond, defendant 1 was conducting a family trade at two centres, namely Devakotah and Colombo. There is a recital in the deed to the effect that the amount mentioned as the consideration, namely Rs. 5,000, was borrowed for the purpose of discharging the debts due by the family firm at Colombo. At the trial the account books of Egappa were produced, which show that the amount was paid to defendant 1 by means of a hundi. Both defendants 1 and 2 were debited with Rs. 5,000, the drawee of the hundi having been credited with a like sum. The entries were made on 15th January 1917, the date on which the deed was registered, and the credit entry recites that the drawee is entitled to interest from 22nd December 1916, the date of the mortgage bond. There is absolutely no ground shown for discrediting the accounts, and we must, as already stated, hold that the lower Court's conclusion on this point is perfectly correct.

The learned trial Judge however has held that it has not been shown that the debt is binding upon the other defendants, and it is this finding that the plaintiff as the appellant here attacks. According to the recital in the deed, the amount was borrowed for the purpose of paying off the trade debts of the family. The question that arises is, whether that recital is true; for, in the case of a trading family, the lender is not called on to prove more than that such debts did in fact exist. What is a necessary or beneficial purpose is a question which, in the case of a trading family, is governed by considerations different from those that apply to an ordinary Hindu co-parcenary. The lender discharges his duty by showing that there were in fact trade debts in existence, that is to say that the debts had been incurred in the course of or for purposes of the trade. There his duty ends and he is not called on to prove further that in the incurring of the debts the manager had acted prudently ; nor is he required to prove that the debts could have been discharged otherwise than by borrowing the amount from him. To hold differently would be to throw upon the lender a duty so onerous that no ordinary man can be expected to perform adequately. Moreover, it would neither be reasonable nor in the interests of the borrowing family itself, to require the lender to make an investigation and ascertain whether the manager could have carried on the trade more advantageously by pursuing a different course.

As Mayne observes in his Hindu Law, it is the same fundamental principle that is applied both in the case of a trading family and a non-trading family ; only in the application of the principle the considerations that are to be borne in mind are different. The incurring of debts is a necessity to a trading family, while it would not be to a non-trading family. Therefore it follows :

> Even where the debts in fact are incurred merely for the personal purposes of the manager, they will bind the family if they are within the ostensible authority of the manager as conducting the family business. So it is that those that deal with him and to whom he incurs debts are not put upon inquiry as to whether the debts were incurred for the benefit or necessities of the family, so long as they are incidental to the family business : Mayne's Hindu Law, Edn. 9, pp. 398 and 399.

With this statement of the law we entirely agree. Indeed, whatever doubts might have been once entertained on this question, the point now seems concluded by authority. Their Lordships of the Judicial Committee point out that where there is a joint family business, the manager has authority to raise money not only for the payment of debts but also for the purpose of carrying on the business. It might be argued that it would be better to close down the business than to raise more money to carry it on. Their Lordships refute such an argument and declare that it would be unreasonable to require a lender or purchaser to go into questions of this kind as to which he would rarely be in a position to form a sound opinion : 8 Lah 597.[1]

This being the correct view, the question that arises is, as already stated, whether the recital in the mortgage deed is true, in other words, whether in point of fact there were trade debts to be discharged. Let us now turn to the written statement of defendant 1, who, making common cause with the second, resisted

1. Niamat Rai v. Dindayal, A I R 1927 P C 121 =101 I C 373=54 I A 211=8 Lah 597 (P C).

the plaintiff's suit. He admits categorically that in the ancestral trade which he was conducting, there were debts amounting to Rs. 5,000 or 6,000 which remained to be discharged on the date of the bond. He admits again that for the purpose of discharging those debts, the suit bond was executed, but goes on to say that for certain reasons the consideration was not actually received and that he was therefore obliged to utilize other moneys for satisfying the debts. As regards the non-receipt of the consideration, his case has been, as already stated, rightly disbelieved. So much for defendant 1's written statement. Now turning to the statement filed by defendant 2, there is no suggestion made anywhere that there were no debts in existence; on the contrary he asserts: "No portion of the consideration of the suit bond was utilized for discharging the debts due by the said firm," thereby implying that there were debts which had to be paid off. (See also another allegation to the same effect in Para. 13.)

Egappa, as already stated, had died before the date of the suit. The plaintiff, with a view to prove that there were debts in existence, applied to the Court that defendants 1 and 2 should be directed to make discovery of their account books. His application was granted by the lower Court. And what is the result? Defendant 1 filed an affidavit stating that at some time (when, it is not stated) the account books had been deposited with some persons and that he was not aware as to what had since happened to them. This is a most incredible statement to make, and so far as defendant 2 is concerned, he was content with saying that he never had in his control any account books whatsoever. This happened more than two years previous to the trial, but the matter does not stop there. The plaintiff took out a subpœna against defendant 1 for the production of the account books at the hearing and to this again he paid no heed; and the lower Court properly remarks that every presumption should be drawn against him from this suppression of material evidence.

Then again, there is the further fact that neither defendant 1 nor the second has chosen to go into the witness box. From these circumstances which show that the defendants deliberately withheld from the Court the evidence bearing on this question which was peculiarly within their own knowledge, the inference is irresistible that had it been produced, it would have been fatal to their case. 42 Mad 629,[2] decided by Sir John Wallis, C. J. and Ayling, J. on which Mr. Radhakrishnayya for the plaintiff relies, bears a very close resemblance to the facts of the present case. There, as here, the lender was dead; the defendants failed to produce their books and abstained from going into the box. Wallis, C. J. observed, relying upon the decision of the Judicial Committee reported in 40 Mad 402,[3] that the defendants were not entitled to lie by, trusting to the abstract doctrine of onus of proof, and if they did so, the Court would rightly draw an adverse inference against them.

Then the learned Chief Justice goes on to say (and this is a very important observation) that the Court would find against the defendants even though no evidence was adduced on behalf of the plaintiffs (Ibid, p. 629). Turning to the present case, we have already referred to defendant 1's written statement where the existence of the debts was expressly admitted and to defendant 2's statement where, to say the least, there was no denial of that fact. The only witness examined for the defence was obliged to depose that defendant 1 was saying that there were debts. On the whole, it seems to us that the proper inference to make is that the existence of the debts has been made out. We may observe that the question does not depend upon the credibility of the witness, in which case the lower Court's opinion would have been entitled to great weight, but upon the correct principles to be applied. We have therefore no hesitation in coming to the conclusion that the lower Court's decision is wrong.

Mr. Radhakrishnayya contends in the alternative that granting that the existence of the trade debts has not been proved, the plaintiff would still be entitled to a decree against defendants 2 to 4. He argues that we must hold on the

2. Guruswami Nadan v. Gopalaswami Odayar A I R 1919 Mad 444=50 I C 775=42 Mad 629=36 M L J 568.
3. Murugesam Pillai v. Gnanasambandha Pandara Sannadhi, A I R 1917 P C 6=39 I C 659=44 I A 98=40 Mad 402 (P C).

evidence, first, that there was a representation by defendant 1 that there were trade debts to discharge, and secondly, that Egappa satisfied himself after due enquiry that the representation was true and acted upon it. That the representation was made to Egappa there can be no doubt, as apart from what P. W. 3 says, the recital in the deed is the best evidence of it.

Then Mr. Radhakrishnayya puts his argument thus : the mortgagee, who could have satisfied the Court as to the enquiries made, is dead ; moreover he was the only person who could have told the Court whether any independent evidence was available. Therefore he contends that the rule applicable to ancient transactions (44 Cal 186,[4] 43 Mad 541,[5] 48 M L J 224,[6] 36 M L W 186 [7] and 51 M L J 73 [8]) should be applied here although the suit mortgage cannot be strictly described as old, for according to him the principle underlying the rule is equally applicable to such transactions as the present one. Mr. Radhakrishnayya's argument is that the circumstances of the case are such as to warrant the inference that an enquiry was in all probability made, and that the lender was reasonably satisfied that the representation made to him was true. We do not think it is necessary, in view of the conclusion at which we have already arrived, to deal with this alternative contention.

In the result, the appeal is allowed and a mortgage decree is granted against the interests of all the defendants in the mortgaged property. Time for payment is extended by three months from today. The lower Court's order directing the plaintiff to pay the costs of defendants 2 to 4 is set aside. The plaintiff will get his costs both here and in the Court below from all the defendants.

C.R.K./K.B. *Appeal allowed.*

4. Banga Chandra Dhur v. Jagat Kishore Achrya, A I R 1916 P C 110=36 I C 420=43 I A 249=44 Cal 186 (P C).
5. Chintamani Bhatla Venkata Reddi v. Rani Sahiba of Wadhwan, A I R 1920 P C 64=55 I C 538=47 I A 6=43 Mad 541 (P C).
6. Somayya v. Venkayya, A I R 1925 Mad 673=86 I C 483=48 M L J 224.
7. Kumaraswami Mudaliar v. Narayanaswami, A I R 1932 Mad 762=139 I C 766=36 M L W 186.
8. Aukula Sanyasi v. Ramchandra Rao, A I R 1926 Mad 692=95 I C 691=51 M L J 73.

A. I. R. 1937 Madras 819

VENKATARAMANA RAO, J.

Ettiyat Ahmed Kutty and *others* — Appellants.

v.

Vayalikath Ayithraman Kutty and *others* — Respondents.

Second Appeal No. 46 of 1936, Decided on 16th April 1937, against decree of Sub-Judge, South Malabar at Calicut, in A. S. No. 138 of 1932.

Religious Endowment — Alienation by trustee—Representative suit by worshipper or beneficiary for injunction, declaration or for possession is competent—Relief to be granted depends on circumstances of each case—Trustee should be made party—Fact that possession cannot be granted in presence of trustee is no ground for dismissing suit.

Where a trustee has alienated the trust property and therefore would not proceed to recover possession of the same or has disabled himself otherwise from maintaining a suit in respect thereof or declines to institute a suit, it cannot be said that the institution is without a remedy. The worshippers who are the beneficiaries entitled to participate in the benefits of the institution, are entitled to maintain a suit for preserving the trust property or restoring the property to the trust either by instituting a suit for declaration or for an injunction or even for possession; but whether the worshippers are entitled to claim all or any of the reliefs which a trustee is entitled to do in a properly framed suit would depend on the circumstances of each case. It is desirable and necessary to make the trustee a party to the suit and where he is made a party, it is open to the Court to mould the relief as the circumstances may require. If the suit is one brought for possession by the worshippers, the Court can, after declaring the property to be trust property and setting aside the alienation, direct delivery of possession to the trustee. In cases where there is no trustee, it is open to the Court to direct delivery of possession to the worshippers on behalf of the trust. Again, in certain circumstances it is competent to the worshippers to maintain an action for a declaration that a certain property is trust property and for an injunction restraining the defendant from interfering with their right of worship, which is a personal right without making the trustee party to the suit. This would not offend the principle that a trustee alone is competent to maintain a suit to eject a trespasser. But the mere fact that by reason of the institution having a trustee a Court might refuse to grant delivery of actual possession to a worshipper, would not take away his right to maintain a suit for ejectment of a trespasser of trust property, where the circumstances would entitle a worshipper to claim that relief : *Case law referred.* [P 820 C 2; P 821 C 1, 2]

B. Sitarama Rao and *B. Pocker* — for Appellants.

K. Kuttikrishna Menon and *P. Narayanan Nair* — for Respondents.

Judgment.— This second appeal is against the decree of the learned Subordi-

nate Judge of South Malabar dismissing the plaintiffs' suit which is a representative action filed on behalf of the Mussalmans of Feroke for an injunction directing defendant 1 to demolish and remove the structure put up in the plot which is claimed to be an adjunct of the Jemath Mosque at Feroke, for possession of the same by the plaintiffs on behalf of the mosque and the Mussalman public of Feroke and for granting all other reliefs to the plaintiffs for and on behalf of the mosque which the Court may deem fit to grant. The ground of the claim is that the Jemath Mosque belongs in common to the Feroke Mussalman public, that the dead bodies are buried in the paramba of the mosque and that the plaintiffs congregate at the said mosque for worship. The necessity for the institution of this suit is alleged to be a trespass by the defendant in that he has put up a shed and has been attempting to build a stone structure besides opening a teashop therein.

It is stated in the plaint that the karnavans or elders have been managing the affairs of the mosque; but it is not stated who the karnavans are. Defendant 1 alleges that the suit property does not belong to the mosque and it is not trust property. He further set up title to the suit property in defendant 26 as mutawalli and denied the title of the plaintiffs to sue as it was the mutawalli alone that could maintain such a suit. Defendant 26 was impleaded as a party defendant to the suit. While supporting defendant 1 in the contention that he is mutawalli of the mosque and that the affairs of the mosque are under his control, defendant 26 in his written statement alleges that the suit property does not belong to the mosque, that the mosque had no right over it at any time and that it is not useful in any way for the mosque. He has also contended that the Mussalmans who assemble in the Jemath Mosque are not entitled to recover the suit property.

The points in controversy that arose on the pleadings were whether the suit property is trust property belonging to the mosque or private property as asserted by the defendants and whether the plaintiffs are competent to sue for all or any of the reliefs claimed in the plaint. The learned District Munsif who tried the suit came to the conclusion that the property is trust property attached to the mosque, that defendant 1 was a trespasser, and that plaintiffs 2, 4, 5, 6 and 8 were the elders who were in management of the affairs of the mosque without their being appointed as such by anybody. He however thought that a mandatory injunction was not necessary and he therefore gave a decree for possession on behalf of the general public of Feroke by directing defendant 1 to remove the basement on the plot which he erected in contemplation of the stone structure intended to be put up by him. The learned Subordinate Judge dismissed the plaintiff's suit on the ground that the plaintiffs as worshippers of the mosque cannot maintain the suit for possession of the mosque property.

It is contended in this second appeal by Mr. Sitarama Rao on behalf of the plaintiffs that the view of the learned Subordinate Judge was wrong and that even assuming they are not competent to maintain the suit for possession on the allegations in the plaint, the learned Subordinate Judge was not warranted in dismissing the suit. I may at once state that the learned Judge did not go into the question whether the property was trust property or not, whether there was any mutawalli for the mosque or whether there were any accredited managers for the institution who were in management de facto of the mosque property, because in the view he took, he considered it unnecessary to go into those questions. The principles which regulate the right of suit by a worshipper in relation to trust property are now well settled. Where there is a lawful trustee for an institution, he is the person competent to institute a suit in relation to the property of the institution, to take the necessary steps for safeguarding and preserving it and to eject a trespasser and recover possession thereof for the trust; but the recovery of the property is only for and on behalf of the institution which he represents. But where a trustee has alienated the trust property and therefore would not proceed to recover possession of the same or has disabled himself otherwise from maintaining a suit in respect thereof or declines to institute a suit, it cannot be said that the institution is without a remedy. The worshippers, who are the beneficiaries entitled to participate in the benefits of the institution, are entitled to maintain a suit for preserving the trust property or restoring the property to the trust either by instituting a suit for declaration or for an

injunction or even for possession; but whether the worshippers are entitled to claim all or any of the reliefs which a trustee is entitled to do in a properly framed suit would depend on the circumstances of each case.

It is desirable and necessary to make the trustee a party to the suit and where he is made a party, it is open to the Court to mould the relief as the circumstances may require. If the suit is one brought for possession by the worshippers, the Court can, after declaring the property to be trust property and setting aside the alienation, direct delivery of possession to the trustee. In cases where there is no trustee, it is open to the Court to direct delivery of possession to the worshippers on behalf of the trust: *vide* 44 M L J 116.[1] Again, in certain circumstances it is competent to the worshippers to maintain an action for a declaration that a certain property is trust property and for an injunction restraining the defendant from interfering with their right of worship, which is a personal right, without making the trustee a party to the suit. This would not offend the principle that a trustee alone is competent to maintain a suit to eject a trespasser: *vide* 7 Bom 170,[2] where a relief of injunction was given to worshippers in a caste temple.

Applying these principles, the question in this case is, is the present suit by the plaintiffs for all or any of the reliefs claimed by them maintainable? The title to the suit property is in dispute. A declaration therefore, whether the property is trust property is absolutely necessary before the plaintiffs can get any other relief by way of an injunction or for possession, and the plaintiffs are entitled to claim that relief and the suit involves the granting of that relief. If the property is declared to be the trust property, the next question that arises is, whether the defendant is a trespasser and if he is, he has to be ejected from the trust property in order to safeguard the interests of the trust. Therefore that relief also the plaintiffs can claim. The fact that by reason of the institution having a trustee a Court might refuse to grant delivery of actual possession to a worshipper, would not take away his right to maintain a suit for ejectment of a trespasser of trust property, where the circumstances would entitle a worshipper to claim that relief. The right of a worshipper to maintain a suit in ejectment ought not to be confused with the relief of actual possession which the Court may or may not give him: *vide* 23 M L J 348.[3] That it is competent to a worshipper to maintain a suit in ejectment is too well established, though I have stated that the form in which the appropriate relief should be moulded would depend upon the circumstances of the case. In 5 All 497[4], a relief by way of an injunction for removal of a building was granted in respect of a mosque property. In 32 All 631,[5] the learned Judges cite with approval 5 All 497[4] and also a passage of Ameer Ali in his work on Mahomedan Law, where the learned author observes:

> Every Mahomedan who derives any benefit from a wakf or trust is entitled to maintain an action against the mutawalli to establish his rights thereto or against the trespasser to recover any portion of the wakf property which has been misappropriated.

In 2 Pat 391[6] Mullick, J. observes thus:

> It is now settled that a beneficiary of a trust in respect of a Mahomedan wakf interested in the maintenance of a mosque or other charitable institution may, without having recourse to the provisions of R. 8, O. 1, Civil P. C., and without other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the properties are the subject of the trust and that they cannot be alienated.

The same view was taken in 23 C W N 115.[7] So far as the cases in our High Court are concerned, the view has always been taken that it is competent to a worshipper to maintain a suit in ejectment against the alienee in possession of the trust property and direct delivery of possession of the trust property to the trustee after declaring the alienation invalid: 20 M L J 151.[8] The principle underlying such a suit has been that the suit is really on behalf of the trust and the worshippers must be deemed to be suing in right of the

1. Rengasami Naidu v. Krishnaswami Aiyar, A I R 1923 Mad 276=71 I C 463=44 M L J 116.
2. Kuvarbai v. Mir Alam Khan, (1883) 7 Bom 170.
3. Srinivasacharlu v. Subuddhi, (1912) 17 I C 589=23 M L J 348.
4. Zafaryab Ali v. Bakthwar Singh, (1883) 5 All 497=1883 A W N 91.
5. Muhammad Alum v. Akbar Hussain, (1910) 32 All 631=6 I C 835=7 A L J 797.
6. Fahimul Huq v. Jagat Ballav, A I R 1923 Pat 475=74 I C 403=2 Pat 391.
7. Ashraf Ali v. Muhammad Nurajjama, A I R 1919 Cal 179=49 I C 355=23 C W N 115.
8. Subramania Iyer v. Nagaratna Naicker, (1910) 20 M L J 151=5 I C 901.

trustee as pointed out in 41 Mad 124[9] at p. 135; but in cases where possession cannot be awarded to the plaintiffs on the ground that there is a lawful trustee and that such a trustee has not been made a party to the suit, the suit cannot be dismissed, for other reliefs can be granted, for example, a declaration that the property is trust property : *vide* 24 Bom 170.[10]

The cases relied on by Mr. Kuttikrishna Menon do no more than lay down that actual possession cannot be given to a worshipper if there is duly constituted representative for the institution: 23 Mad 99[11] and 27 M L J 270.[12] In this case it is alleged in the written statement that the defendant 26 is the mutawalli. If he is really found to be the mutawalli, there is nothing to prevent possession being delivered to him. It is also stated that plaintiffs 2, 4, 5, 6 and 8 are persons in de facto management of the mosque and its property and if so, there is nothing to prevent the Court delivering possession to them. But if it is found that there is no mutawalli or plaintiffs 2, 4, 5, 6 and 8 are not the de facto managers, the Court may award possession to the plaintiffs on behalf of the trust, so that when appropriate proceedings are instituted for the management of the trust property and a trustee is appointed, they may hand over possession to him.

It seems to me therefore that the plaintiffs are competent to maintain this suit. The decree of the lower Appellate Court is therefore set aside and the learned Subordinate Judge is directed to dispose of the other issues in the case, namely, whether the property is trust property or not; whether the 26th defendant is the mutawalli and is in possession and management of the mosque and its property and whether plaintiffs 2, 4, 5, 6 and 8 are de facto managers of the mosque and its property. It is competent to him to remand the case to the lower Court for findings on the questions as to who is the mutawalli and who are the de facto managers and dispose of the appeal after the receipt of the said finding. The plaint has not been happily worded and it is partly responsible for the view which the learned Subordinate Judge took in the lower Court. In the circumstances therefore, I direct each party to bear his own costs in this appeal. The order of costs made by the lower Court will stand. Leave to appeal refused.

C.R.K./V.B.B. *Appeal allowed.*

9. Chidambaranatha Thambiran v. Nallasiva Mudaliar, A I R 1918 Mad 464=42 I C 366=41 Mad 124=33 M L J 357.
10. Kaji Hassan v. Sagun Balakrishna, (1900) 24 Bom 170=1 Bom L R 649.
11. Kamaraju v. Asan Ali Sherif, (1900) 23 Mad 99.
12. Noor Muhammad Saib v. Karima Bibi Ammal, A I R 1915 Mad 687=25 I C 559=27 M L J 270.

A. I. R. 1937 Madras 822

KING, J.

In re Dastagir and *others* — Petitioners.

Criminal Revn. Case No. 385 and Petn. No. 353 of 1937, Decided on 16th July 1937, from order of Third Presidency Magistrate, Egmore, Madras, D/- 5th July 1937.

Criminal P. C. (1898), S. 162—Granting copies—Court is bound to grant copy subject to Proviso 2—It is not for Court to see if contradiction exists.

Section 162, Criminal P. C. does not require the Court to satisfy itself before granting a copy to the accused that a certain contradiction exists; and subject to the provisions of Proviso 2 of S. 162 regarding any part of the statement the Court must grant the copy and it is for the accused's counsel to examine it after it is granted to discover whatever contradictions may exist : *A I R 1935 Rang 370 (FB)* and *A I R 1929 Pat 268, Foll.* [P 823 C 1]

V. Rajagopalachari — for Petitioners.

E. A. Lobo for *Crown Prosecutor* — for the Crown.

Order.— The petitioners in this case are charged with murder and the preliminary enquiry into the alleged offence is in progress before the learned Third Presidency Magistrate. P. W. 1 has been examined in chief, and one question has been put to him in cross-examination. At that stage petitioners' pleader applied under S. 162, Criminal P. C., for a copy of P. W. 1's statement to the police. The learned Magistrate refused to grant it. Hence this application in revision. It is little difficult to understand the precise reason for the refusal. The Magistrate begins by pointing out that the one answer given by the witness in cross-examination does not establish any contradiction, but if he means by that the accused's pleader must either establish an actual instance of contradiction or lay a foundation for the belief that such a contradiction will be found if the police record is referred to, he is asking the accused's pleader to per-

form an impossible task : A I R 1931 All 34 ;[1] 1929 M W N 885[2] and A I R 1929 Cal 182.[3]

From what the Magistrate goes on to say however it seems to me that he must also have refused to grant the copy because he did not himself on examining the statement perceive in it anything which contradicted the witness's evidence in Court, though he does not specifically say this. This raises the question whether under S. 162, Criminal P. C. it is the duty of the Court to satisfy itself that a contradiction exists before granting a copy. There are two cases in which this question has been considered which have been brought to my attention. One is that reported in A I R 1929 Pat 268.[4] There it is clearly laid down that S. 162, Criminal P. C., does not require the Court so to satisfy itself and that subject to the provisions of the second Proviso regarding any part of the statement the Court must grant the copy and it is for the accused's counsel to examine it after it is granted to discover whatever contradictions may exist. The other is a Full Bench ruling of the Rangoon High Court, A I R 1935 Rang 370,[5] which in a brief paragraph confirms the view that whether the Court itself finds any contradiction or not in the statement, it must nevertheless grant a copy of it. The Magistrate relies upon an unreported judgment of my learned brother Burn, J. in Cr. R. C. No. 44 of 1936. It was not necessary in that case to decide this point and though Burn, J. may perhaps have given an indication of this view, he has not definitely said that a Court can refuse to grant a copy if it sees no contradiction itself.

Following with respect the Patna and Rangoon decisions referred to above, I hold that the learned Magistrate was wrong in refusing to grant the copy, and subject to anything which he may find under the second Proviso, direct him to grant it and proceed with the enquiry.

C.R.K./A.L. *Revision allowed.*

1. Tahal Saithwar v. Emperor, A I R 1931 All 34=1931 Cr C 207=130 I C 696=32 Cr L J 578=53 All 94=1931 A L J 10.
2. Public Prosecutor, Madras v. Vedi, A I R 1930 Mad 185=1930 Cr C 185=122 I C 463=31 Cr L J 414=1929 M W N 885.
3. Babar Ali Sardar v. Emperor, A I R 1929 Cal 182=116 I C 167=30 Cr L J 690=56 Cal 840=49 C L J 197.
4. Jhari Gope v. Emperor, A I R 1929 Pat 268=1929 Cr C 21=118 I C 130=30 Cr L J 859=8 Pat 279=10 P L T 460.
5. Emperor v. Nga Lun Thaung, A I R 1935 Rang 370=1935 Cr C 1088=158 I C 784=36 Cr L J 1487=13 Rang 570 (F B).

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* A. I. R. 1937 Madras 823

VENKATASUBBA RAO, J.

C. Ramasubbier — Appellant.

v.

G. Mahomed Khan Saheb and *another*— Respondents.

Second Appeal No. 313 of 1933, Decided on 22nd March 1937, against decree of Sub-Judge, Salem, in A. S. No. 84 of 1931.

*** (a) Nuisance—Throwing filthy water on neighbour's land—Easement can be acquired by grant or by prescription—Right of easement not acquired—Polluting amounts to actionable nuisance—Abatement, damages and injunction are remedies—Remedy of injunction is generally better.**

The right of throwing filthy water on a neighbour's land is an easement like that of polluting of the air which can be acquired either by grant or under S. 15, Easements Act, by prescription; the words "any other easement" in the section are comprehensive enough to include such a right. Where such a right has not been acquired, the act of polluting amounts to a nuisance which is actionable. In an action for nuisance the party may justify his act by relying upon prescription. The remedies for nuisance are threefold: abatement, damages and injunction; but where the remedy by injunction is available, that is the preferable course as abatement may prove a hazardous proceeding : *Bonner* v. *G. W. Ry. Co.*, *(1883) 24 Ch D 1, Expl.* [P 824 C 1, 2]

*** (b) Injunction — Judicial discretion — Guiding principles—Defence of delay how far available—Amount of delay and nature of acts during interval affecting parties should be considered—Chances of injured party taking action in latter part of prescriptive period—Submitting to nuisance for a while is not acquiescing in it for all times.**

Whether an injunction shall be granted or not in any case is in the judicial discretion of the Court guided by principles which have become pretty well settled. If an argument against relief which otherwise would be just is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

In a case of nuisance where defence is of laches, the chances are far greater that the injured party will assert his rights in the second rather than in the first half of the prescriptive period. A person may be willing to submit to an injury for some time; that does not mean that from his attitude

it should be inferred that he wishes to put up with it for ever. Again, when he is conscious that he may terminate it at his pleasure, he may not complain; that is different from saying that he acquiesces in the opposite party acquiring a legal right to inflict the injury : *Greenhalgh* v. *Brindley*, (*1901*) *2 Ch 324*, *Rel. on.* [P 825 C 1, 2]

K. Subba Rao — for Appellant.

T. Krishnarajan — for Respondents.

Judgment.— The judgment of the lower Appellate Court is in my opinion utterly wrong and cannot be supported. The plaintiff and the defendant own adjacent houses with backyards abutting on each other. A drain has been constructed on the defendant's land, through which the sewage is poured through an opening into the plaintiff's backyard. Somewhere near the drain on the defendant's property stands a latrine. The plaintiff complains that the defendant has no right to pour the filthy matter on his land and prays for an injunction both to restrain him from doing so and to direct the removal of the drain. The finding of both the Courts is that the drain on date of the suit was in existence for about thirteen years, and the simple point that arises for decision is, whether the plaintiff is entitled to the remedy of injunction. The right of throwing filthy water on a neighbour's land is an easement which can be acquired either by grant or under S. 15, Easements Act, by prescription; the words "any other easement" in that section are comprehensive enough to include such a right. Where such a right has not been acquired, the act of polluting amounts to a nuisance which is actionable.

In an action for nuisance (and in my opinion this is essentially a suit of that sort) the defendant may justify his act by relying upon prescription; but in this case, his enjoyment, as already stated, being for less than the statutory period, that defence is not available to him. Transmitting filthy water may be likened to the polluting of the air and in both cases there is a right of action. The following passage in Goddard on Easements, dealing with the subject of polluting the air, shows what the true legal principle is underlying such an action :

> A right to pollute the air has been shown to be an easement which can be acquired only by grant or by prescription—that is, when an interrupted practice of polluting has been continued for twenty years in a manner capable of being resisted on account of it being a nuisance and it has not been resisted.

Then he goes on to say that a person, until an adverse easement is gained against him, may rely upon his natural right and sue for the pollution (Goddard on Easements Edn. 8, p. 438). That is to say, in respect of the throwing of filthy water, as in the case of polluting the air, an action lies for nuisance, which the defendant can resist by proving an acquisition by him of the easement, or, in the words of Pollock, "the defendant may in some cases justify by prescription" (Pollock on Torts, Edn. 13, p. 426). Thus, if the defendant could establish an adverse right acquired by prescription, what would otherwise amount to a nuisance would cease to be so; or, what amounts to the same thing, the act complained of would cease to be an actionable nuisance. In this case, upon the facts that the plaintiff is entitled to some remedy, there can be no doubt. The remedies for nuisance are threefold: abatement, damages and injunction. The plaintiff here could have abated the nuisance by merely filling up the hole opening on his land; but where the remedy by injunction is available, that is the preferable course as abatement may prove a hazardous proceeding (Pollock on Torts, Edn. 13, p. 436).

However, had the plaintiff chosen by his own act to abate the nuisance, would the Court have granted at the defendant's instance an injunction? In (1883) 24 Ch D 1,[1] the plaintiff was the owner of a house some of the windows of which overlooked a piece of land belonging to the Railway Company. After the house had been in existence for sixteen years, the Company put up a screen opposite the plaintiff's windows to prevent his acquiring an easement of light and air. The plaintiff brought an action for injunction and the Court of Appeal held that he had no equity to restrain the company from taking measures to prevent prescriptive rights from being acquired for windows looking upon their land. Baggallay, L. J. observes that it is contrary to every principle that a person who has no right should obtain an injunction to restrain anybody from doing that which will interfere with his acquiring a right, by reason of his being unmolested for a certain length of time (page 8). This case is not exactly parallel, there being no question there of anything amounting to a

1. Bonner v. G. W. Ry. Co., (1883) 24 Ch. D. 1=48 L T 619=32 W R 190=47 J P 580.

nuisance ; but it furnishes an illustration of the right which a person has, to take measures to prevent prescriptive rights from being acquired.

But then it is said (and that is the view of the lower Court) that the plaintiff has been guilty of laches which disentitle him to an injunction. Turning again to Goddard, the following passage shows what the principle is, underlying this contention.

> Although the circumstances of a case may be such that the Court would, in its discretion, think it a case fit for the grant of an injunction to restrain pollution of air, it is always essential for the obtaining of that remedy that the party injured shall not have acquiesced in the pollution, nor have slept upon his rights, for if he has done so the Court would refuse an injunction, though it would probably award him damages for the injury (p. 447).

I cannot understand what possible equity can be urged on the defendant's side in the present case. Granting that there has been laches (I assume this for the sake of argument), how has the defendant's position been prejudiced thereby ? The case is not one of demolition or destruction of costly structures and the loss, if any, which the defendant will suffer by his removing or diverting the course of the drain, is in my opinion negligible. Whether an injunction shall be granted or not in any case is in the judicial discretion of the Court, now guided by principles which have become pretty well settled: Pollock on Torts, 13th Edn., p. 442. As Sir Barnes Peacock observes :

> If an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable.

Then again :

> Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

In that case his Lordship after adverting to the facts, concluded by observing that there was no reason to attach any importance to the defence founded upon time, as the situation of the parties had in no substantial way been altered either by delay or by anything done during the interval : (1874) 5 P C 221[2] at p. 240. In a case of this sort, the defence based upon delay is not, in my opinion, entitled to much weight. As Farwell, J. points out (and that accords with one's experience of human nature), the chances are far greater that the injured party will assert his rights in the second rather than in the first half of the prescriptive period: (1901) 2 Ch 324[3] at p. 328. A person may be willing to submit to an injury for some time; that does not mean that from his attitude it should be inferred that he wishes to put up with it for ever. Again, when he is conscious that he may terminate it at his pleasure, he may not complain ; that is different from saying that he acquiesces in the opposite party acquiring a legal right to inflict the injury.

In the result an injunction will issue prohibiting the defendant from pouring the sewage upon the plaintiff's backyard and secondly directing him to remove or divert the drain to such an extent or in such a manner as to prevent the transmission of the sewage to the aforesaid backyard. This order applies to the upper as well as the lower drain. The relief granted by the lower Appellate Court in respect of the eaves will stand.

In regard to costs this is the order I make : The trial Court's order pertaining to them will be maintained ; in the lower Appellate Court the appellant before me will get his costs in A. S. No. 84 of 1931 and here the second appeal is allowed with costs. Leave to appeal is refused.

C.R.K./B.D. *Appeal allowed.*

2. Lindsay Petroleum Co. v. Hurd, (1874) 5 P C 221.

3. Greenhalgh v. Brindley, (1901) 2 Ch 324=70 L J Ch 740=84 L T 763=49 W R 597=17 T L R 574.

✻ A. I. R. 1937 Madras 825

KING, J.

In re M. S. Ponnuswamy Ayyar — Petitioner.

Criminal Revn. Case No. 205 and Petn. No. 193 of 1937, Decided on 28th July 1937, from order of Court of Session, East Tanjore at Negapatam, D/- 2-2-1937.

✻ **Criminal P. C. (1898), S. 345 (2)—Applicability — Prosecution must be pending and permission of Court obtained—Any act of parties before prosecution is not composition — Magistrate cannot hold inquiry into factum of such composition alleged by one and denied by other party.**

Under S. 345 (2), Criminal P. C. there must be a prosecution pending and the permission of the Court must be given. Any act of the parties done

before the prosecution has begun and without reference to any Court cannot be a composition under this sub-section, and whatever may be the civil rights to which it may give rise, can have no effect on the trial. [P 826 C 2]

An accused was prosecuted by the complainant for an offence under S. 337, I. P. C. Accused produced a receipt during trial, given by the father of the complainant and alleged that the complainant had agreed not to prosecute him. The complainant denied that any payment was made. The Court refused to take evidence on this question on the ground that the offence could not be so compounded under S. 345 (2), Criminal P. C.:

Held: that the Court could not inquire into the factum of compromise alleged by one and denied by the other party under S. 345 (2): *A I R 1928 Lah 232, Foll.*; *A I R 1919 Mad 879, Disting.* [P 826 C 1]

R. Swaminatha Aiyar — for Petitioner.

Public Prosecutor — for the Crown.

Order. — The petitioner here is the accused in C. C. No. 406 of 1936 on the file of the Stationary Second Class Magistrate, Shiyali, and the offence which in the complaint he is said to have committed is one under S. 337, I. P. C., which falls under S. 345 (2), Criminal P. C., as one compoundable with the permission of the Court. During the trial he produced a receipt said to have been given by the father of the complainant for the sum of Rs. 50 and alleged that the latter had agreed not to prosecute him. It was denied for the prosecution that any such payment was made. The Stationary Second Class Magistrate refused to take evidence on this question of fact on the ground that whether it were proved or not, the offence could not be compounded under S. 345 (2). In so deciding he followed 9 Lah 400.[1]

On revision the learned Sessions Judge of East Tanjore held that this view was wrong, and that in normal circumstances the Stationary Second Class Magistrate should have followed not 9 Lah 400[1], but 41 Mad 685.[2] However as it was not the complainant himself in this case but complainant's father who is said to have agreed not to prosecute, his action cannot be recognized as a valid composition in view of the provisions of S. 345 (4).

It seems to me that both Courts have come to the correct final decision but that the reasoning of the Stationary Second Class Magistrate should be preferred. The learned Sessions Judge observes that a Court in Madras must follow this High Court instead of some other High Court, but that is only if this High Court has dealt with a case exactly in point. 41 Mad 685[2] is not exactly in point as it deals with offences under Ss. 355 and 323, I. P. C. both of which are compoundable under S. 345 (1), Criminal P. C., i. e. without the requirement of any permission by the Court. The learned Sessions Judge relies only upon a single sentence of the judgment which is somewhat ambiguously expressed, and is actually quoted by the Judges of the Lahore High Court in support of their own view. The Stationary Second Class Magistrate was quite right therefore in following 9 Lah 400.[1]

Apart from rulings, the matter seems very clear on the language of the section. Composition under S. 345 (1) is an act of the parties which requires no permission. Nor is there any language to restrict its completion to any particular time. Under S. 345 (2), there must be a prosecution pending and the permission of the Court must be given. Any act of the parties done before the prosecution has begun and without reference to any Court cannot be a composition under this sub-section, and whatever may be the civil rights to which it may give rise can have no effect on the trial. For these reasons this criminal revision case is dismissed.

C.R.K./S.C. *Revision dismissed.*

1. Naurang Rai v. Kidar Nath, A I R 1928 Lah 232=109 I C 601=29 Cr L J 585=9 Lah 400=29 P L R 510.
2. Kumaraswami Chetty v. Kuppuswami Chetty, A I R 1919 Mad 879=44 I C 583=19 Cr L J 359=41 Mad 685=34 M L J 217.

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* A. I. R. 1937 Madras 826

HORWILL, J.

Halsnad Madappaya — Appellant.

v.

P. Mahabala Rao and *another* — Respondents.

Second Appeal No. 927 of 1932, Decided on 10th September 1936, against decree of Dist. Court, South Kanara, in A. S. No. 279 of 1931.

(a) Pleadings—Plaint—Plea of limitation—Plaintiff must show in his plaint how his suit is in time.

As a general principle, a plaintiff must show in his plaint how his suit is in time; for, the question whether the suit is in time must, if denied, be one of the issues in the case, and if the plaintiff does not explain how his suit is in time, it is impossible for the defendant to meet his case. [P 828 C 1]

(b) Limitation Act (1908), S. 19—Essentials of acknowledgment — Acknowledgment to

save limitation must be direct acknowledgment of debt or one inevitably implied — Acknowledgment of decree debt differs from acknowledgment of debt — Purchaser of equity of redemption in his application to set aside sale of mortgaged property stating that amount due under mortgage decree is included in some other alienation—Such statement in petition does not amount to acknowledgment of liability under S. 19.

An acknowledgment, to save limitation, under S. 19, Lim. Act, must either be a direct acknowledgment of the debt or an acknowledgment of such a kind that an acknowledgment of the debt is inevitably implied. An acknowledgment of a decree debt is obviously not necessarily the same as an admission that if the debt which had ripened into a decree had still been alive at the time of the acknowledgment, he would have been liable. [P 828 C 2]

The mortgagor executed a mortgage in favour of the plaintiff wherein he had recited that there was no prior mortgage. In fact there was a prior mortgage on certain items of the property mortgaged to the plaintiff. The prior mortgagee brought a suit on his mortgage to which the plaintiff was a party. During the pendency of this suit the defendant purchased the equity of redemption. The property was sold under the decree of the prior mortgagee and the defendant purchaser applied for setting aside the sale on payment of the decree amount stating in the application that the amount due under the mortgage decree was included in some other alienation made afterwards by the mortgagor and that owing to the alienee's failure to pay it, the property covered by the sale in his favour was sold under the mortgage decree:

Held : that such statement in the application did not amount to an acknowledgment of liability of the mortgage debt within the meaning of S. 19 of the Act and could not therefore save limitation. [P 828 C 2]

(c) Mortgage — Mortgagee's liability — Recital in mortgage that there were no prior mortgages—Recital does not safeguard mortgagee against existence of prior mortgages.

Where there is a recital in the mortgage deed that there were no prior mortgages, the recital merely shows that the mortgagee accepted the statement. It does not however safeguard the mortgagee against the existence of the prior mortgages. [P 828 C 2]

(d) Limitation Act (1908), S. 19 — Mortgagor acknowledging his liability under mortgage in alienation made after his parting with equity of redemption—Acknowledgment is against his interest and is acknowledgment of liability within meaning of S. 19 and binds his successors-in-title.

Where a mortgagor acknowledges his liability under the mortgage in an alienation made after he parted with the equity of redemption, he does so against his interest and such acknowledgment amounts to an acknowledgment of liability within the meaning of S. 19, Lim. Act, and binds his successors-in-title : *A I R 1935 Mad 899, Foll.* ; *Case law referred.* [P 829 C 2]

(e) Mortgage — Acknowledgment —Mortgagor after parting with equity of redemption making admission not against his interest — Such admission is no acknowledgment at all (*Obiter*).

Obiter. — If a mortgagor after he had parted with the equity of redemption made an admission which was not against his interest, it would presumably be held that such an admission was no acknowledgment at all. [P 829 C 2]

*** (f) Transfer of Property Act (1882), S. 92 — Limitation — Time runs against subrogated mortgagee from original date of mortgage—He can avail to save limitation only of those pleas and acknowledgments which original mortgagee can avail.**

The rights of the subrogated mortgagee are the rights of the original mortgagee before he brought the suit and time begins to run from the original date of the mortgage. The subrogated mortgagee-plaintiff can therefore put forward to save limitation only such pleas as were available to the original mortgagee and such acknowledgments as might have occurred since he acquired his right to subrogation : *Case law discussed.* [P 830 C 2]

B. Sitarama Rao and *K. Y. Adiga* — for Appellant.

B. Somayya, *K. Sundara Rao* and *K. Vittal Rao* — for Respondents.

Judgment. — On 23rd February 1916 defendant 1 executed the mortgage deed, Ex. A, in favour of the plaintiff for Rupees 20,000. In this document were recitals by which the plaintiff held himself responsible for any loss that might accrue to defendant 1 on the ground of his not paying off certain debts out of the consideration. On the other hand, defendant 1 held himself liable on the security of the same property for any excess amount that might be spent by the plaintiff in preserving his mortgage rights. In Ex. A there was a definite recital that there were no prior mortgages. In fact however there was a mortgage evidenced by Ex. M dated 15th January 1900 for Rs. 400 on items 1 to 5 of the same property. In 1916 the mortgagee of that prior mortgage brought O. S. No. 180 of 1916, to which both the present plaintiff and defendant 1 were parties. During the course of the suit, on 8th June 1917, defendant 2, by Ex. J., purchased the equity of redemption. The property was brought to sale and both the plaintiff and defendant 2 filed petitions, Exs. C and I, to set aside the sale on payment of the decree amount. The plaintiff had filed the earlier petition and it was the plaintiff who was allowed to pay off the decree amount.

The plaintiff, relying on the recital in Ex. A that on the same security defendant 1 would be liable for any excess amount spent by the plaintiff in preserving the

mortgaged property, has brought this suit for sale of the whole of the property subject to his own mortgage. The suit is opposed by defendant 2, who purchased the property in 1917. The District Munsif of Kundapur held that the recital in Ex. A relied on by the plaintiff was not intended to have any reference to prior mortgages and so dismissed the suit. In appeal the District Judge of South Kanara, while upholding the District Munsif's finding with respect to the interpretation of the relevant clause in Ex. A, held that the plaintiff is entitled by the principle of subrogation enunciated in S. 74 of the old T. P. Act to maintain the suit against such items of the property as were mortgaged by Ex. M and that the right of subrogation thus acquired was one that placed him in the position of a mortgagee under Ex. M. As this document was executed in 1900, this suit is prima facie out of time. The District Judge however held that there was an acknowledgment of the mortgage debt by Ex. N on 29th May 1914 and again by Ex. I on 6th October 1918. He therefore gave a decree to the plaintiff for the mortgage amount due under Ex. M from the date of the mortgage.

In appeal it is contended, firstly, that as the plaintiff did not show in his plaint how the suit was not barred by limitation, he ought not to have been given a decree, and secondly, that Ex. I was not an acknowledgment of the mortgage debt and that the suit was not therefore in time. It is no doubt true, as a general principle, that a plaintiff must show in his plaint how his suit is in time; for the question whether the suit is in time must, if denied, be one of the issues in the case, and if the plaintiff does not explain how his suit is in time, it is impossible for the defendant to meet his case. The District Judge held, and I think he is correct, that the plaintiff had set out in his plaint all the facts from which one could imply subrogation; and it also appears that the documents relied on to save time had necessarily to be filed in the suit and that in this particular case the defendant was in no way prejudiced. When the question was argued in the first Appellate Court, defendant 2 does not seem to have raised any objection to this omission; and I find no objection raised in the memorandum of cross-objections. I am not therefore prepared to interfere with the decree of the lower Appellate Court on this account.

An acknowledgment, to save limitation, must either be a direct acknowledgment of the debt or an acknowledgment of such a kind that an acknowledgment of the debt is inevitably implied. Ex. I is the petition filed by defendant 2 to set aside the sale in pursuance of the mortgage decree and in it he states that the property that had been sold had been sold to him by defendant 1 for Rs. 40,000, that the amount due under the decree is included in some other alienation, and that he had learnt that as the alienee did not pay the decree amount, the property covered by the sale in his favour had been sold. It is seen therefore that he files this petition because the property has been sold, i. e. he acknowledges the liability of the land under this decree and admits that he must satisfy the decree if the sale is to be set aside. An acknowledgment of a decree debt is obviously not necessarily the same as an admission that if the debt which had ripened into a decree had still been alive at the time of the acknowledgment he would have been liable. A similar case arose in an unreported case of this Court, C. M. S. A. No. 87 of 1919, where the same principle was enunciated. I therefore, disagreeing with the lower Court, find that Ex. I does not save limitation.

The plaintiff has three answers to defendant 2's case. The first, which is the subject of his memorandum of cross-objections, is that Ex. A makes express provision for the safe-guarding of the plaintiff against prior mortgages. The second is that Ex. O dated 28th March 1919, which was a deed of transfer by defendant 1 to another, is an admission. The third is that time runs against the plaintiff not from the date of the mortgage but from the date of his demand to set aside the sale. With regard to the first point, I have been taken through Ex. A again, and I agree with the two lower Courts that it is not clear from Ex. A that any provision was made to safeguard the plaintiff against the existence of prior mortgages. There is a recital in Ex. A that there were no prior mortgages and from the wording of the document it would seem that the plaintiff accepted that statement.

By Ex. O, defendant 1, after he had parted with the equity of redemption and had therefore no interest in the property at all, fraudulently conveyed the property

to another. In it he naturally makes no reference to his sale to defendant 2 but he does refer to the mortgage in question. Mr. Somayya for the plaintiff relies on a case reported in A I R 1935 Mad 899,[1] which follows 32 Cal 1077.[2] Ramesam, J., in the Madras case, has reviewed all the previous decisions on the point and he holds that in all cases a mortgagor, even after he has parted with his equity of redemption, can bind his successors-in-title by his admissions.

In the earlier cases, such as 40 M L J 126[3] and 86 I C 434,[4] it had been held that acknowledgments by a mortgagor who has parted with his equity of redemption would be binding on his successors-in-title only if he still had some interest in the property. This is what Pandalai, J. says in 55 Mad 758,[5] and this would seem to be in accordance with the wording of S. 19, Lim. Act, which refers to an acknowledgment of liability by a party against whom a right is claimed or by a person through whom he derives title. If the mortgagor has no interest whatever in the property and is not personally liable for the mortgage debt, it would seem that he has no liability to acknowledge. To allow limitation to be saved by admissions where there is no liability would open the door to fraud. Jackson, J. in 55 Mad 758,[5] in laying down the law that an admission after sale of the equity of redemption will save limitation, does not make any qualification; but Pandalai, J. does. In that case, as in all the earlier cases, the mortgagor did have some liability to acknowledge.

In 58 Mad 418,[6] a passing reference with approval is made to 55 Mad 758;[5] but there too there was a liability to acknowledge. There was also a liability in A I R 1935 Mad 899,[1] in which Ramesam, J. relied on the judgments of Jackson, J. in 55 Mad 758[5] and the learned Judges in 58 Mad 418[6] and 32 Cal 1077,[2] who discussed the question generally, and came to the conclusion that an acknowledgment by a mortgagor after sale of the equity of redemption would bind those who succeeded to his title. Presumably, the reason why no case where there had been an acknowledgment by a person who had no right at all has been quoted is that it is very difficult to conceive of a case in which there can be an acknowledgment by a person who had no interest. If a person had no interest, no occasion could arise on which he would be called upon to give an acknowledgment. Even in the present case, defendant 1 in making the acknowledgment, was making a statement against his own interest ; for the making of such an acknowledgment naturally lessened the amount of consideration. The acknowledgment was therefore one to which some value can be attached. I feel bound to follow the Division Bench ruling in A I R 1935 Mad 899[1], and I do not think that it can work any hardship ; because if such a rare case did arise in which a mortgagor made an admission which was not against his interest, it would presumably be held that such an admission was no acknowledgment at all. I therefore find that Ex. O does amount to an acknowledgment and that the suit is therefore in time.

The third contention raised on behalf of the plaintiff is that time runs from the date of payment, and as an example of the injustice that might result from any other interpretation of S. 74 of the old T. P. Act, it is pointed out that if a suit on mortgage is filed just within 12 years, then the sale might not take place until more than 12 years had elapsed and that by the time a person made the payment, more than 12 years would have elapsed from the date of the mortgage ; and that his remedy would be barred before he even made the payment. I should imagine however that this could not happen if a mortgagee was really diligent ; because he could always ascertain from the Registrar's office if there were any prior mortgages ; and it would be in his own interest to see that he was not left in a position in which he would have no remedy for any payment that he might make to save the property. The principle enunciated in S. 74, T. P. Act, is the old English principle of subrogation. It was a purely equitable relief

1. Modhugari Narayana v. Venkataramanna, A I R 1935 Mad 899=161 I C 924.
2. Krishnachandra Saha v. Bhairab Chandra Saha, (1905) 32 Cal 1077=9 C W N 868.
3. Lakshmanan Chetty v. Muthaya Chetty, A I R 1920 Mad 1026=62 I C 833=40 M L J 126.
4. Yegnanarayana v. Venkata Krishna Rao, A I R 1925 Mad 1108=86 I C 434.
5. Muthu Chettiar v. Muthusami Ayyangar, A I R 1932 Mad 516=138 I C 632=55 Mad 758=63 M L J 111.
6. Lakshmi Naidu v. Gunnamma, A I R 1935 Mad 101=154 I C 1053=58 Mad 418=68 M L J 470.

and enabled a person who pays off the amount due under a mortgage to be placed in the same position as the mortgagee was under his mortgage. I can understand an argument that from the date of payment the person who made the payment would have some sort of personal remedy; but I do not see under what principle of law he would be entitled to a charge on the property from the date of payment.

There seems to be no provision in the Transfer of Property Act or elsewhere that would justify a presumption that from the date of payment some sort of charge was established. Such a charge would not be by subrogation but something entirely different. I have been referred by Mr. Somayya to 44 All 67[7] and 47 M L J 316,[8] in both of which cases there were remarks and findings which justify Mr. Somayya's contention. The question came up for consideration in 52 M L J 532[9] by Wallace and Madhavan Nair, JJ. Wallace, J. was the Judge who decided 47 M L J 316[8] and his judgment in 52 M L J 532[9] was devoted to explaining why he had come to his decision in 47 M L J 316,[8] which he then considered to be wrong. Madhavan Nair, J. in his judgment referred to 44 All 67[7] and 47 M L J 316[8] and dissented from them. He says :

> The fact that a decree has been passed and the mortgage has become merged in a decree does not therefore make any difference. The obtaining of a decree does not put an end to the charge on the property ; after the passing of the decree the charge attaches itself to the decree and the puisne mortgagee, by making the payment, becomes entitled by virtue of S. 74, T. P. Act, to enforce that charge.

In 52 M L J 532,[9] the person who had paid off the mortgage debt and claimed subrogation was the defendant, as he was in A I R 1929 Mad 465.[10] In the latter case, it was held that whatever may be the law of limitation with regard to the bringing of a mortgage suit by a mortgagee-plaintiff, it was always open to the defendant to hold up the mortgage as a shield against a suit for possession if that mortgage had not been discharged. 52 M L J 532[9] was referred to and it was pointed out that if that decision went as far as to say that the defendant was barred by limitation from setting forth such a plea it was wrong. The correctness of 52 M L J 532[9] in describing the effect of subrogation and its effect on the question of limitation against a plaintiff was not however doubted. From a review of the above cases it would seem that the rights of the plaintiff were the rights of the mortgagee before he brought the suit and that time begins to run from the original date of the mortgage. The subrogated mortgagee-plaintiff can therefore put forward to save limitation only such pleas as were available to the original mortgagee and such acknowledgments as might have occurred since he acquired his right to subrogation.

In view of my finding that Ex. O saves limitation, it follows that the appeal has to be dismissed with costs. A memorandum of cross-objections has been filed in respect of the interpretation of Ex. A, objecting to the limitation imposed by the lower Appellate Court with regard to the property that could be proceeded against by the plaintiff in satisfaction of his subrogated right. I have already held that Ex. A has been correctly interpreted. The memorandum of cross-objections also refers to certain miscellaneous claims all disallowed by the lower Appellate Court ; but in view of my findings above, they do not arise and are not pressed. Another objection raised in the memo of cross objections is that the costs of the plaintiff were disallowed in the trial Court, the reason given by the lower Appellate Court being that the plaintiff had not set forth his true case in the plaint and had also to some extent not succeeded. I do not feel justified in interfering with this order. Both sides agree that as the plaintiff is found only to have the rights of the prior mortgagee against items 1 to 5, he is entitled to sell them free of the usufructuary mortgage and not, as the lower Appellate Court has ordered, subject to the mortgage. With the exception of this modification, the memorandum of cross-objections is dismissed with costs. Leave to appeal refused.

C.R.K./A.L. *Appeal dismissed.*

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7. Bora Shib Lal v. Munni Lal, A I R 1922 All 153=63 I C 604=44 All 67=19 A L J 840.
8. Parvati Ammal v. Venkatarama Aiyar, A I R 1925 Mad 80=81 I C 771=47 M L J 316.
9. Kotappa v. Raghavayya, A I R 1927 Mad 631 =102 I C 316=50 Mad 626=52 M L J 532.
10. Karuppan Chettiar v. Venkataperumal, A I R 1929 Mad 465=116 I C 841.

A. I. R. 1937 Madras 831

VENKATARAMANA RAO, J.

Gudia Dullabho Sahu — Petitioner.

v.

Cinni Adinarayana and *others* — Opposite Party.

Civil Revn. Petn. No. 487 of 1935, Decided on 2nd December 1936, from decree of Dist. Court, Ganjam, in M. C. A. No. 31 of 1934.

Court-fees Act (1870), S. 7 (v) and (x) — Arrangement that in consideration of certain sum defendant 2 to convey two-thirds of certain properties and defendant 1 one-third of some other property to plaintiff — Subsequently much of property intended to be conveyed by defendant 2 to plaintiff, sold off by mutual consent — Suit by plaintiff to enforce original arrangement with possession — Prayer that defendant 1 should relinquish interest in share to be conveyed and defendant 2 should execute conveyance — Claim against defendant 2 held was for specific performance — Court-fee held payable under S. 7, Cl. (x) on agreed sum in original arrangement, though only some properties remained to be conveyed — Claim against defendant 1 held was for possession, court-fee being payable under S. 7 (v).

In a suit for specific performance, there is no question of primary and secondary relief and both the execution of the conveyance and delivery of possession are essential reliefs. Further, without getting a conveyance it is not possible to get possession. [P 833 C 1]

Where the plaintiff prays that the Court should give effect to an arrangement he has entered into, by which certain properties are to be conveyed to him, but in the plaint he desires that only certain properties described should be conveyed and possession in respect thereof need be given, the suit will have to be valued on the consideration mentioned in the original arrangement, as the Court will in any event have to declare the original arrangement and on that basis only will be able to give any relief to the plaintiff. [P 833 C 1]

To compromise a dispute about the title to certain properties, an arrangement was arrived at by which in consideration of certain sum payable by the plaintiff to defendant 2, defendant 2 was to convey two-third of certain properties and defendant 1 was to convey one-third of his interest in some other property. Subsequently by mutual arrangement between the plaintiff and defendant 2 much of the property intended to be conveyed by defendant 2 to the plaintiff was sold and the realizations therefrom credited towards agreed sum to be paid to defendant. The plaintiff brought a suit praying that defendant 1 should be directed to execute a relinquishment in favour of plaintiff for the one-third share and defendant 2 be directed to execute a conveyance in plaintiff's favour of two-third with an additional prayer that plaintiff be put in possession :

Held : that so far as a conveyance respecting defendant 2's interest was sought, the suit was essentially one for specific performance of a contract and the court-fee payable was on the sum agreed to be paid to defendant 2, under S. 7, Cl. (x), Court-fees Act, though many of the properties agreed to be conveyed had been disposed of. The claim against defendant 1 was really one for possession and so plaintiff was entitled to value the same under S. 7, Cl. (v) of the Act. [P 832 C 1, 2; P 833 C 2]

G. Lakshmanna and *G. Chandrasekhara Sastri* — for Petitioner.

Y. Suryanarayana — for Opposite Party.

Order.—This revision petition raises a question of court-fee. A few facts may be necessary for the disposal of the same. Defendant 1's grandfather was entitled as reversioner of one Cinni Errayya to certain properties and he filed a suit for recovery of the same as reversioner.

All the properties which appertain to the estate of Cinni Errayya are described in Sch. A to the plaint in this action. While the litigation was pending, defendant 2 in this suit who was financing the plaintiff in the said litigation in consideration of the advances made by him obtained a transfer of two-third share in all the properties which defendant 1's family would obtain as a result of the said litigation. Defendant 1's grandfather succeeded in the suit and an appeal was preferred against the said decision to this High Court. While the appeal was pending, a certain arrangement took place on 26th January 1927 between the plaintiff and the father of defendant 1 who had succeeded to the estate by virtue of his father's death. The arrangement was this: Both the plaintiff and the father of defendant 1 should buy out defendant 2 by paying Rs. 7,500 and get a transfer of the two-third share which defendant 2 was entitled to under the sale in his favour; after getting the said transfer the property should be sold except 3 acres 73 cents being items 10, 11, 13 and 36 in Sch. A and the plaintiff and the father of defendant 1 should enjoy the profit resulting from the said sale in equal shares. The reason why 3 acres 73 cents of land was omitted is that the plaintiff purchased from some of the defendants in the reversionary suit the said property and obtained possession and was in possession of the same on the date of the said arrangement. But somehow the arrangement of 26th January 1927 was not carried into effect and defendant 1's father died. The appeal in the High Court was settled by a compromise in and by which among other things the title of defendant 1's family was declared and established. At

any rate from the plaint it appears that defendant 1's family was ultimately declared the owner of all the properties left by Cinni Errayya. As I stated above, the arrangement of 26th January 1927 was not given effect to and both defendants 1 and 2 also sold some of the properties which formed the basis of the said arrangement.

In consequence whereof, the plaintiff, defendant 1's guardian on behalf of defendant 1 and defendant 2 entered into an arrangement in regard to the properties which were left undisposed of, viz. both defendants 1 and 2 should retain certain items: defendant 1 should retain one-third share in certain items which are specifically described in Sch. C to the plaint; defendant 2 should transfer all his interests in the remaining properties to the plaintiff for a sum of Rs. 6,088 which properties are now specifically described in Sch. D hereto. It was also a part of the said arrangement that in the 3 acres 73 cents which also formed part of Sch. D property excluding the two-third which had to be conveyed to the plaintiff under this arrangement, defendant 1 also should relinquish his one-third share so that the plaintiff may get a complete title in respect of the entire 3 acres 73 cents possession whereof had been disturbed by the decree of the High Court.

It will thus be seen that so far as the plaintiff is concerned, the arrangement is that in consideration of the sum of Rs. 6,088 payable by him to defendant 2, defendant 2 should convey two-third of the properties in Sch. D and defendant 1 should convey one-third of his interest in the 3 acres 73 cents which are items 10, 11, 13 and 36 in Sch. A and which also formed part of Sch. D and which now form part of Sch. E. The prayer in the present plaint is that defendant 1 should be directed to execute a relinquishment in favour of the plaintiff for the one-third share in 3 acres 73 cents which are items 1 to 4 of Sch. E and defendant 2 directed to execute a conveyance in plaintiff's favour of two-third of all the properties in Sch. E. There is a further prayer that the property should be partitioned and the plaintiff be put in possession of the entire items 1 to 4 being 3 acres 73 cents and two-third of the remaining items in Sch. E.

The question is what is the court-fee payable on the basis of the allegations and the reliefs claimed in the plaint. There can be no question that so far as a conveyance is sought in favour of the plaintiff in respect of defendant 2's interest, the suit is essentially one for specific performance of a contract and court-fee will have to be levied under S. 7, Cl. (x), Court-fees Act. That will be on the amount of Rs. 6,088. But what Mr. Lakshmanna contends is that the present Sch. E properties do not comprise all the properties which were intended to be conveyed under the arrangement entered into between the parties. According to the said arrangement the properties that were intended to be conveyed were defendant 2's interest in the entire Sch. D properties; by a subsequent arrangement between the plaintiff and defendant 2 the properties which were intended to be conveyed were sold to third parties and the moneys realised therefrom were credited towards the said sum of Rs. 6,088, the price fixed to be paid to defendant 2. Thus a greater portion of the properties comprised in Sch. D had been sold away and only the properties in Sch. E remained to be conveyed.

It is only in respect of these properties Mr. Lakshmanna says that a conveyance is sought and he is therefore not bound to pay the court-fee leviable on a claim for specific performance. His argument is that as the entire contract could not be performed, the suit cannot be deemed to be one for specific performance but only for possession of the plots in Sch. E. It seems to me that this argument is unsound. The basis of the plaintiff's claim is the arrangement that was come to between the plaintiff and defendants 1 and 2. It was for a conveyance of the entire properties in Sch. D. It can only be by enforcing that contract the plaintiff can get any relief. Unless that contract is affirmed and declared, the plaintiff cannot get any relief either in respect of the whole or any portion of the properties sought to be conveyed under the said arrangement. The fact that certain properties have been sold by mutual arrangement will not alter the nature of the claim which is essentially one for specific performance of contract of sale which is implied in the said arrangement. How I understand the relief claimed is this:

The plaintiff requests the Court to give effect to the arrangement which he entered into, but desires that in effecting

the conveyance only the properties described in the Schedules should be conveyed and possession in respect thereof should be given. As the Court will in any event have to declare the original arrangement entered into and only on that basis should give the relief to the plaintiff, the suit will have to be valued on the consideration mentioned therein. In a suit for specific performance, the view has always been taken by this Court that there is no question of primary and secondary relief and both the execution of the conveyance and delivery of possession are essential reliefs. Further, without getting a conveyance it is not possible to get possession. In 47 Mad 150[1] at p. 157, Venkatasubba Rao, J. explains the scope and the nature of a suit for specific performance thus:

> In a suit for specific performance the purchaser seeks to enforce the terms of his contract. The seller as much agrees to put the purchaser in possession as he agrees to execute a conveyance in his favour. Then it is argued that as the plaintiff also claims possession in the suit, the suit must be regarded as one for possession. But the specific provision relating to suits for specific performance excludes the applicability of the general provision relating to suits for possession. If the claim to possession is involved in the claim to specific performance, the suit will still remain one for specific performance and it must be dealt with only on that footing.

Therefore I have no hesitation in holding that so far as the plaintiff claims relief against defendant 2, court-fee must be paid on the sum of Rs. 6,088. The question then is how is the relief against defendant 1 to be valued. As I have already indicated, the consideration for the relinquishment is also the said sum of Rs. 6,088. Again what is essentially sought so far as that relief is concerned, is this: The plaintiff by virtue of sale deed from some of the defendants in the reversionary suit obtained possession of 3 acres 73 cents aforesaid but the title thereto was challenged and by a compromise between the plaintiff and defendant 1 it was negatived. To the said compromise the plaintiff was not a party. The plaintiff seeks possession of the said property from both defendants 1 and 2 and an assurance that he will not be disturbed in the said possession by getting a release from defendant 1, because as far as defendant 2 is concerned he gets a conveyance. It seems to me that the essential claim against this defendant 1 is really one for possession and he is entitled to value the same under S. 7, Cl. (v), Court-fees Act. On the basis of this valuation the suit will certainly not lie on the District Munsif's Court. In the result the revision petition fails and is dismissed with costs.

C.R.K./V.B.B. *Petition dismissed.*

1. Sundara Ramanujam v. Sivalingam Pillai, A I R 1924 Mad 360=77 I C 542 = 47 Mad 150=45 M L J 431.

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* A. I. R. 1937 Madras 833

GENTLE, J.

Kodak Ltd. — Petitioner.

v.

South Indian Film Corporation Ltd. —Respondent.

O. P. No. 306 of 1935 and Appln. No. 337 of 1936, Decided on 8th January 1937.

*** Companies Act (1913), S. 229—Compulsory liquidation—*S* company agreeing to hire out film to *R* on *R* depositing Rs. 1,000 with *S*—*R* immediately sending Rs. 250 as part payment but *S* informing *R* its inability to conclude contract — *S* not returning Rs. 250 to *R* inspite of demands—*S* subsequently becoming insolvent—*S* having more than Rs. 250 to its credit in bank at time of winding up — *S* held trustee for *R* in respect Rs. 250—*R* held entitled to whole amount of of Rs. 250, such amount not being divisible amongst creditors generally.**

Where a fiduciary relationship is established, it is not necessary that the actual moneys paid over to a recipient and paid into his banking account must be traceable. It is sufficient if there is an equivalent sum. If the balance is however less than the moneys paid, the payer is entitled to look to the recipient up to the amount remaining in his hands. [P 835 C 1]

S, a Company letting out films on hire to renters, agreed to let out film to *R*, on depositing by *R* with *S* a sum of Rs. 1,000. *R* immediately sent to *S* Rs. 250 as part payment of deposit but *S* informed *R* of its inability to conclude the contract. *S* did not return the amount of Rs. 250 to *R* in spite of demands. *S* subsequently became insolvent and in the winding up proceedings the liquidator admitted *R* as one of the creditors of *S*. *S* had to its credit a sum of Rs. 1,100 in the bank between the date of payment of Rs. 250 by *R* and the winding up order. It was contended by *R* that it was not like other creditors and so was entitled to whole amount:

Held: that the sum of Rs. 250 was paid by *R* as an anticipated earnest payment in respect of the contract which would come into existence between the parties. There was never any contract owing to the withdrawal of the offer by *S* and so the amount of Rs. 250 remained the moneys of the creditor *R* and the Company *S* was holding this sum to the benefit of *R*. A fiduciary relationship was therefore established between the parties and so *S* was therefore trustee for *R*

in respect of Rs. 250. In view of the provisions of S. 229, Companies Act, read with S. 52 (1) (a), Presidency Towns Insolvency Act, *R* was entitled to the whole amount of Rs. 250 and it was not divisible among the general body of creditors : *English cases referred.* [P 834 C 2; P 835 C 1]

K. R. Shenoi for *K. P. Sarvothama Rao* — for the Official Liquidator.

C. A. Md. Ibrahim and *A. Dorairaj* — for Respondent.

Order.—In this matter the Royal Talkies, Trichinopoly, have been admitted by the liquidator as creditors of the Company in the sum of Rs. 250. It is contended on behalf of the creditor that they are a different category to the ordinary unsecured creditor. The indebtedness arose in this way. The Company was in the habit of letting out films upon hire to renters and on the 10th September 1935 the Company wrote to these creditors setting out the terms upon which they were prepared to hire out a film and the letter concludes : "If you agree to the above condition, send us a deposit of Rs. 1,000 immediately." Instead of Rs. 1,000, only a sum of Rs. 250 was sent and on the 19th September 1935, the Company by letter intimated to the creditors that it was unable to conclude the agreement for hiring the film. This Rs. 250, it appears from the correspondence and from the books of the Company, was entered into a suspense account to the credit of the Royal Talkies. Applications for payment were made on many occasions but the Company failed to repay this sum.

At the date of the winding up order of the Company, there was in the credit of the Company's account at the bank a sum of approximately Rs. 1,100 and there is no evidence before me that it was even less sum than that amount between the time of the payment by the creditor to the Company of the Rs. 250 I have mentioned and the date of the winding up order. The creditors' contention is that this sum of Rs. 250 is not divisible amongst the general body of creditors. I have been referred first of all to S. 229, Companies Act, 1913, which provides that in the winding up of an insolvent Company, the same rules apply that will be observed and will prevail in regard to the respective rights of secured and unsecured creditors as are in force for the time being under the law of insolvency. By S. 52 (1), Presidency Towns Insolvency Act 1919, it is provided that the properties of the insolvent divisible amongst his creditors shall not comprise amongst others the property held by the insolvent on trust for any other person. S. 94, Trusts Act, provides that in any case not coming within the scope of any preceding sections of the Act, where there is no trust, but the person having possession of property has not the whole beneficial interest in such property, he holds it for the benefit of the persons having such interest.

The learned counsel on behalf of the liquidator has quite properly informed me that under those circumstances the position of the trust arises. When the sum of Rs. 250 was paid, this money was sent by way of an anticipated earnest payment in respect of the contract which was contemplated would come into existence between the parties. There was never any contract and therefore the moneys paid remained the moneys of the creditor. I have been referred to 58 Bom 67,[1] a case in which a sum of Rs. 1,000 was paid to a firm subsequently becoming insolvent by way of deposit in contemplation of the payer entering into a service agreement with the payee, the sum paid being the contemplated sum by way of fidelity guarantee. No agreement was ever concluded and in that case it was held by Wadia, J. that the payees were the trustees of the payers in respect of that money. His decision went to appeal and whilst approving of his view it was reversed upon another point which was not argued before the learned Judge in the first instance.

When the Company intimated to the creditor that there would be no concluded contract between them, in other words, when the Company withdrew its offer to make a contract upon the terms contained in an earlier letter (which they were entitled to do), the position of mere negotiation which had then existed terminated and upon the letters which I have seen it is quite clear that the Company were holding this sum of Rs. 250 for the benefit of the creditor. I have been referred to several decisions, both Indian and English: (1880) 13 Ch D 696,[2] (1894) 2 Q B 237,[3]

1. Official Assignee of Bombay v. Abdul Hajee, A I R 1933 Bom 437=147 I C 587=58 Bom 67=35 Bom L R 941.
2. *In re* Hallett's Estate, (1880) 13 Ch D 696=49 L J Ch 415=42 L T 421=28 W R 732.
3. *In re* Hallett & Co; *Ex Parte* Blano, (1894) 2 Q B 237=63 L J Q B 573=9 R 278=70 L T 361=1 Manson 25=42 W R 305.

(1915) 1 Ch 62.[4] The tenor of all those decisions is that a fiduciary position having been established, it must be shown that the moneys received can be identified as still in the hands of the recipient. That does not mean that the actual moneys paid over to a recipient and paid into his own banking account are traceable, but an equivalent sum. Subsequent withdrawals from the banking account, it is presumed, are first of all in respect of his own moneys and not as against the moneys which he was holding for the benefit of another person. As long as there is in his possession at material times moneys of the total value of the sum held by him to the benefit of another, that other is entitled to take up the position that he has traced those moneys paid over by him. If the balance is less than the moneys paid, then the principles set out by Mr. Justice Sergant in (1915) 1 Ch 62[4] cited above apply, i. e. the payer is entitled to look to the recipient up to the amount of money remaining in his hands. The claim of these creditors is the only one of its nature as far as I have been informed and the sum which they paid into the hands of the Company, namely Rs. 250, apparently being still in the hands of the Company, at the date of the winding up order, in my view they are entitled to be brought within the benefits which S. 229, Companies Act, coupled with the provisions of S. 52 (1) (a), Presidency Towns Insolvency Act, affords him.

I therefore hold that the sum of Rupees 250 out of the sum of Rs. 1,100 is in the words of S. 52 (1) property not divisible amongst the general body of creditors, in other words they are not entitled to that amount. Whether questions arise in regard to other secured creditors I do not know. It may be a matter for subsequent application to the Court. So far as this matter is concerned, these creditors' claim is allowed with costs.

C.R K./A.L. *Petition allowed.*

4. James Roscol (Bolton) Ltd. v. Winder, (1915) 1 Ch 62=84 L J Ch 286=112 L T 121=1915 H B R 16=59 S J 105.

A. I. R. 1937 Madras 835

BEASLEY, C. J. AND HORWILL, J.

A. M. Kuppuswami Mudaliar — Appellant.

v.

W. Ranganatha Mudaliar — Respondent.

O. S. Appeal No. 25 of 1936, Decided on 4th November 1936, from judgment of Lakshmana Rao, J., D/- 9th March 1936.

Will—Construction — *P* dying leaving behind him sons *J* and *R* and a will by which *J* and *R* to get life-estates contingent upon satisfaction of certain conditions — After death of *J* and *R* their issue to enjoy property absolutely at "proper time" — *J* dying leaving an infant son and *R* dying without issue—Subsequent adoption by *R*'s widow before *J*'s son attained majority — Suit by *J*'s son for declaration of his rights under will—Estate though vested in interest in issue of *J* at *R*'s death, yet period of distribution of estate arose at proper time, i. e. at date of majority of *J*'s son—*R*'s adopted son held entitled to half share he being adopted before plaintiff attained majority.

One *P* died leaving two sons *J* and *R*. According to his will *J* and *R* were to have a life interest in his estate contingent upon their attaining the ages of 35 and 30 respectively and upon being sufficiently educated and of good behaviour to be able to manage the estate properly. After their death, their issue were to enjoy the property absolutely at the proper time. *J* died first leaving an infant son, the plaintiff. Subsequently *R* died without any issue. A few days afterwards and before *J*'s son attained majority, *R*'s widow adopted a son. *J*'s son then brought a suit for declaration of his rights under the will and claimed the whole estate :

Held : that the words "proper time" were used to mean some time other than the death of the survivor of the testator's estate and they could mean only at "proper age" or "at majority". [P 836 C 2]

Held also : that in view of S. 119, Succession Act, though the estate vested in interest in the issue of *J* at *R*'s death, yet it did not vest in possession then but at the 'proper time', i. e. at majority of *J*'s son. *J*'s son, the grandson of the testator, then in existence on the date of *R*'s death, got a presumptive share but that share was liable to be diminished if *R*'s widow adopted a son before *J*'s son, the plaintiff, attained majority. As *R*'s widow adopted the defendant before the plaintiff attained majority, the plaintiff's share was accordingly liable to be divested pro tanto. The defendant was therefore entitled to half share in the property. [P 837 C 1]

K. Rajah Iyer and *V. Ramasami Iyer* — for Appellant.

A. Suryanarayana — for Respondent.

Beasley, C. J.—On 6th July 1911 one W. Parthasarathi Mudaliar made a will (Ex. A) and died a few days afterwards. He left two sons named Jayaram and Ramachandra. Jayaram died on 21st April

1923 leaving a son, the plaintiff in this suit, and Ramachandra died on 31st August 1923 without issue and on 14th September 1923 his widow adopted defendant 2. Clause 32 of the will according to the Court translation reads as follows :

"Should the executors think that my sons have received education, etc., are of good behaviour and have good association, and would safeguard my properties without making any wasteful expenditure, and they hand over to them all the properties remaining after paying my debts and meeting the aforesaid expenses, the whole of my estate shall be handed over after Jayaram Mudaliar, of my sons, attains the age of 35 and Ramachandra Mudaliar the age of 30. Even if so handed over, both my sons may only enjoy but shall not have the power to mortgage or sell. Only the issue of my two sons shall, at the proper time, use and enjoy absolutely with rights to gift, mortgage, exchange and sell. Neither my sons nor my other heirs have any right.

The plaintiff filed the suit under appeal praying for a declaration of his rights under the will and questioning the adoption of defendant 2 and claiming the whole estate even if the adoption should be proved. The learned trial Judge found that the adoption was proved but held that the plaintiff alone was entitled to take the estate under the will. This question depends upon what, by reason of the will, was the period of distribution of the estate. Here there is a gift to a class after the determination of what has been held in previous litigation with regard to the same will in this High Court to be a contingent life-estate, Jayaram and Ramachandra being the life-tenants. The class amongst whom the estate is to be distributed is the issues of Jayaram and Ramachandra, that is the grandsons of the testator. The difficulty in this case is caused by the adoption of defendant 2 after the death of Ramachandra. He had not been adopted on the date of Ramachandra's death and the only grandson of the testator then alive was the plaintiff. The appellant's case is that the period of distribution of the estate was, by reason of the terms of will, postponed until the attainment of majority of the plaintiff (he being the first to do so) and that this being a gift to a class, all persons who answered the description of grandsons on that date are entitled to share in the estate. On the other hand, the respondent contends that directly the contingent life-estate came to an end on the death of Ramachandra, the estate vested absolutely both in interest and possession, that that was the period of distribution and that on that date there being only the plaintiff alive and answering to the description "grandson", he alone could take the estate—the subsequently adopted son of Ramachandra therefore being excluded. The appellant contends that even if this be so, by reason of the fiction of relation back, defendant 2, although adopted after Ramachandra's death, is entitled to all the rights of his deceased father and to the estate of which he was the contingent life tenant at the date of his death.

The first question, namely, what is the period of distribution, depends upon Clause 32 of the will; and whether the words

only the issue of my two sons shall, at the proper time, use and enjoy absolutely with rights to gift, mortgage, exchange, and sell. Neither my sons nor my other heirs have any right

mean that at some time later than the death of the surviving life-tenant, the issue of the testator's sons, that is his grandsons, are to get possession of the estate. If that is the meaning of those words, then the class has got to be ascertained at sometime subsequent to the determination of the life-estate. In 29 E R 610,[1] there was a bequest of the residue to all the children of *A*, the daughters' shares to be paid at 21, or marriage, the sons at 21, or to be sooner advanced for their benefit, with survivorship and interest for maintenance. It was held that

The fund shall be divisible when the eldest attains 21, and the division shall be among those then in *esse* ;

and the Exception to Ss. 111 and 112, Succession Act (39 of 1925), embodies the rule laid down in 29 E R 610[1] and other English decisions.

It was conceded by Mr. Suryanarayana for the respondent that if the class has to be ascertained at the date of the majority of the plaintiff, then defendant 2, the adopted son of Ramchandra, though adopted after his death, would be included in the class of grandsons. What do the words "proper time" in Clause 32 of the will mean? In my view, and here I regret that I cannot agree with the learned trial Judge, these words must mean "at the proper age", that is to say "at majority." "Proper time" must in my opinion mean some time other than the date of the death of the survivor of the testator's estate. These words appear in S. 119, Succession

1. Andrews v. Partington, (1791) 29 E R 610= 3 Bro C C 402.

Act, and presumably the advocate who drew up the will had that section in view in using these words, and if that is so, then the Explanation to that section clearly covers this case. Mr. Rajah Iyer does not contend that the estate did not become vested in interest in the plaintiff at the date of death of Ramachandra by reason of possession of it being postponed until a future date, but that the estate, though it vested in interest, did not vest in possession then but at the "proper time". This, in my view, is clearly correct. The grandson in existence on the date of Ramachandra's death, namely the plaintiff, got a presumptive share but that share was liable to be diminished if Ramachandra's widow should adopt a son—certainly a possible contingency—before the plaintiff attained majority. This she did; and the plaintiff's share was accordingly liable to be divested pro tanto.

The contingency upon which the testator's sons, that is Jayaram and Ramachandra were to get into possession of the life-estate does not, in my view, put any difficulty in the way of the appellant's contention. Jayaram was to get possession of the life-estate after his 35th year and Ramachandra after his 30th year provided that the executors were of the opinion that they had received sufficient education, that their conduct and associations were good and that they would safeguard the estate; and in such case the executors would cease to exist. This it is contended on behalf of the respondent is inconsistent with an intention to postpone the vesting both in interest and possession of the estate beyond the death of the surviving son. No provision is made for executors to administer the estate during the minority of the issue of those sons and the learned trial Judge thought that the fact that no intermediate estate was created in favour of anyone else and that there was no provision for accumulation and no gift over in the event of the issue dying before majority, strongly pointed to an immediate vesting of the estate. In my view, although these matters are of some importance, they do not necessarily conclude the matter. During the minority of the issue of the sons the natural or de facto guardian would be entitled to maintain them out of the income of the property and if necessary to apply to the Court for the purpose and, should any of the issue die during minority, the presumptive share would go to their legal representatives. For the reasons I have given, the appellant is entitled to succeed upon this point; and it is therefore unnecessary for me to consider the other argument put forward by him.

The result is that the appeal succeeds and must be allowed with costs here and in the trial Court. The Original Side decree is set aside. The trustee is directed to hand over the estate to the plaintiff and respondent 2. He is discharged subject to his accounts being passed. Plaintiff is declared a major and the guardian is discharged. No order on the other petition.

Horwill, J. — One Parthasarathy Mudaliar died on 12th July 1911 leaving two sons, Jayaram Mudaliar and Ramachandra Mudaliar. According to his will, the relevant portions of which have been set out in the judgment of the learned trial Judge, Jayaram and Ramachandra were to have a life-interest contingent upon their attaining the ages of 35 and 30 respectively and upon being sufficiently educated and of good behaviour to be able to manage the estate properly. After their death, their issue were to enjoy the property absolutely at the proper time. Jayaram died on 21st April 1923 leaving the plaintiff, an infant. On 31st August 1923 Ramachandra died without issue. On 14th September 1923 the widow of Ramachandra adopted defendant 2.

The most important question to be decided in this appeal is: when did the period of distribution arise—was it at the death of Ramachandra, or was it at the "proper time"? If at the earlier date, then another question arises, viz. whether the adopted son, defendant 2, is entitled to a half share in the property because of a legal fiction that his adoption related back to his adoptive father's death, the time at which the property vested in the grandsons. The learned trial Judge held that the period of distribution was the death of Ramachandra and that there was no rule that an adoption dates back to the time of the adoptive father's death. We think that the learned trial Judge was right in holding that the property vested in the issue of Jayaram and Ramachandra on the death of the latter. In fact, this is the conclusion to which one must come from a reading of S. 119, Succession Act. We understand that the will was drawn up by an eminent advocate who presumably used the word "Yukthakalam"

(proper time) in the technical and apparently well-established sense in which it is used in this section which runs as follows:

119. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Where there is an intermediate life interest, the property would presumably vest, according to this principle, on the death of his life-tenant. The Explanation to that section begins as follows:

An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed ....

It does not however follow that because the property becomes vested in the representatives of a class (grandsons here) the membership of that class for the purpose of dividing the property has to be determined as on the day of vesting. As laid down in 28 Halsbury, Para. 1337:

There is no rule that where there is a gift to a class on a contingent event, the time of the happening of the contingency determines the individuals comprising the class.

Paragraph 1342 of the same volume lays down the rule in 29 E R 610,[1] which is to the effect that when the property is to be divided among the members of a class upon their attaining a certain age, the period of distribution is that at which a member of that class first attains that age and that the persons who are to divide the property are those who are members of that class at that time. It is unnecessary to discuss the very many English cases referred to by Mr. K. Rajah Iyer in which the rule in 29 E R 610[1] had been followed, because the Exceptions to Ss. 111 and 112, Succession Act, lay down the rules very clearly that are to be followed in India and in determining the period of distribution. Moreover, in many of the English cases, the property apparently did not vest in the class until a certain contingency arose. S. 121, Succession Act, provides for such cases in the following words:

121. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

In this appeal it is not suggested that the vesting in the members of a class was postponed to a particular age, and the use of the words "proper time" as seen above, was itself an indication that the vesting took place at the death of the last life tenant. The Exception to S. 111 runs as follows:

If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator.

The Exception to S. 112 shows even more clearly what persons are to share in the property and the proper period when the property is to be distributed. The terms of the Exception are:

If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives.

The use of the word "possession" in both these exceptions is important; for it shows that the period of distribution has no necessary connexion with the period of vesting or the acquiring of a legal title to the property. Cl. 32 of the will makes it quite clear that the issue of the testator's sons is to have possession of the property only at the "proper time", so that the period of distribution must be at the "proper time". The facts of this case are such that it does not matter whether the "proper time" was the majority of the minors or some earlier time when the grandsons of the testator should be considered by the executors sufficiently mature to manage the property (or even some earlier convenient time, whenever that might have been). No attempt has been made to show that any "proper time" arose between the date of the death of Ramachandra and the date of adoption of defendant 2 and such a contingency could hardly have arisen in the interval, because the adoption took place only 14 days after the death of Ramachandra.

Some of the arguments of Mr. Suryanarayaniah were directed to show that the use of such a vague expression as "proper

time" and the failure of the testator to provide for such contingencies suggested that the testator intended that upon the death of his sons possession also was to be with the grandsons, the executors merely managing the property and administering it until it was convenient to hand it over to the grandsons. He has emphasized, for example, the fact that the testator has made no provision for the contingency of Jayaram and Ramachandra obtaining possession of the property upon their attaining the ages of 35 and 30 respectively and then dying before their issue had attained majority. After the property had been handed over to Jayaram and Ramachandra, the trustees would of course have no further interest in the property and upon the death of Jayaram and Ramachandra, the minors would have to take possession in spite of the provisions of the will that they should not have possession until the proper time. The answer to that can only be that the eminent gentleman who drew up the will did not exercise quite the care one would expect of him and did not foresee this contingency. The contingency was however remote; because even if Jayaram and Ramachandra had died immediately upon their attaining the ages of 35 and 30 respectively, the minors would have had but five years to wait before attaining their majority. Certain other difficulties in interpreting the will so as to delay possession beyond the death of Ramachandra are not very great. If the grandsons had died before attaining majority, the property would of course have gone to their heirs, as it had already vested in them. For the same reason, they would have been entitled to provision for maintenance and education. If the trustee did not feel bound by the terms of the will to provide for education and maintenance from this property, he could have applied to the Court for directions, the Court undoubtedly having authority to provide for maintenance and education out of property that had already vested in the minors. Whatever the difficulties in carrying out the terms of the will, this document cannot be so construed as to mean that possession was to pass to the minors immediately upon their fathers' death, and it is the time at which possession is to be given to the issue of Jayaram and Ramachandra that determines the period of distribution. It is unnecessary to discuss the cases quoted by the learned advocate for the plaintiff, because they deal with the question of the time at which property vested in the legatees. Even 52 M L J 94[2] and 17 I C 754[3], referred to by the learned trial Judge, do not discuss the law governing the determination of the period of distribution as the question did not arise in those cases.

Because of some dicta in 18 W R 359,[4] 28 Mad 363,[5] 59 Bom 360,[6] 43 Bom 778,[7] 47 All 883[8] and 9 Mad 64,[9] to the effect that an adoption dates back to the adoptive father's death for the purpose of explaining why an adopted son can, in a very limited class of cases, divest property in the hands of others, Mr. Raja Iyer has attempted to establish a broad principle that an adoption always dates back to the adoptive father's death. From this he argues that defendant 2 must be considered to have been in existence at the time of Ramachandra's death and that even if the period of distribution were the date of Ramachandra's death, the adopted son would have been entitled equally with the plaintiff to a share in the property devised. It is however unnecessary to discuss this contention of Mr. Rajah Iyer in the view that we have taken of the legal effect of the will. As the class was to be determined only at some time after defendant 2 was adopted, it follows that defendant 2 is entitled to a half share in the suit property. The appeal is allowed with costs in both Courts.

C.R.K./K.B. *Appeal allowed.*

2. Arunachala Udayar v. Pachayammal, A I R 1927 Mad 292=99 I C 274=52 M L J 94.

3. Narayana Aiyar v. Anai Aiyar, (1912) 17 I C 754=23 M L J 649.

4. Jatindra Mohan Tagore v. Ganendra Mohan Tagore, (1872) I A Sup Vol 47=18 W R 359 =2 Suther 692=3 Sar 85 (P C).

5. Ethirajulu Naidu v. Mukunthu Naidu, (1905) 28 Mad 363=15 M L J 299.

6. Vijaysingji Chhatrasingji v. Shivsangji Bhimsanji, A I R 1935 P C 95=155 I C 493 =59 Bom 360=62 I A 161 (P C).

7. Pratap Sing-Shiv Singh v. Agar Singhji-Raisinghji, A I R 1918 P C 192=50 I C 457=43 Bom 778=46 I A 97 (P C).

8. Mata Prasad v. Nageshar Sahai, A I R 1925 P C 272=91 I C 370=47 All 883=52 I A 398 (P C).

9. Krishna v. Sami, (1886) 9 Mad 64 (F B).

A. I. R. 1937 Madras 840

VENKATARAMANA RAO, J.

In re Subbia Pandaram — Appellant.

Stamp Register No. 26683 of 1936, Decided on 6th May 1937, against decree of Sub-Judge, Dindigul, in A. S. No. 71 of 1935.

Court-fees Act (1870), Sch. 2, Art. 17-A (1) (as amended in Madras)—Suit by puisne mortgagee making prior mortgagee party—Prior mortgagee claiming priority—Priority not accepted and sale ordered—Appeal—Court-fee payable on memorandum is one under Sch. 2, Art. 17-A (1).

In a suit on mortgage by a puisne mortgagee, the prior mortgagee was also made a party. The prior mortgagee claimed priority in respect of his mortgage executed by one of the defendants. The trial Court held that the prior mortgagee was entitled to priority. But on appeal the Appellate Court recognized his priority only in respect of one third share of his mortgagor defendant and directed that two thirds of the property be sold first and after payment to the puisne mortgagee the balance be paid to the prior mortgagee and that one third interest of one of the defendants be sold and the proceeds be first credited towards prior mortgagee's mortgage and the balance be paid to the puisne mortgagee. The prior mortgagee appealed from this decision and paid a Court-fee of Rs. 15 as one for a relief for declaration :

Held : that the court-fee paid was sufficient. As there had already been a declaration of liability of the suit property in respect of the mortgage set up by the prior mortgagee, the only question was whether he was entitled to any priority and all that he was seeking in appeal was to get rid of the declaration made against him and to have a declaration in his favour. The relief for declaration was therefore enough and he was entitled to value the relief as one for declaration and the court-fee therefore would be sufficient under Art. 17-A (1) of Sch. 2, Madras Court-fees Amendment Act. [P 841 C 2]

Held also : that even having regard to the form of the decree the relief was one incapable of valuation and as such the court-fee paid was proper : *A I R 1919 Pat 233* ; *A I R 1918 All 79* and *A I R 1932 All 221*, *Dissent.* ; *30 Mad 96* (*F B*), *Disting.* [P 842 C 1]

K. V. Ramachandra Iyer — for Appellant.

K. S. Champakesa Iyengar for *Govt. Pleader* — for the Crown.

Order. — The question involved in this reference relates to the amount of court-fee payable on the memorandum of appeal. The appellant is defendant 11 in a suit to enforce a mortgage executed on 7th August 1920 in favour of the plaintiff's assignor by defendant 1. Defendant 11 was impleaded as a party to the suit on the ground that he is in possession of the suit property as an assignee from a purchaser at a sale in execution of a mortgage decree obtained by one Nagappa Chetty in respect of a mortgage dated 7th August 1915 executed by defendant 3 in favour of Nagappa Chetti's father Venkatachalam Chetti. One of the defences urged by defendant 11 was that he is entitled to set up the mortgage of 1915 as a shield being a mortgage prior in date to the mortgage sued on and that the priority claimed by him should be recognized. One of the issues raised in the case was "whether defendant 11 is entitled to the priority claimed and is plaintiff obliged to redeem him". There were other subsidiary questions in the case and one of them was whether the suit mortgage executed by defendant 1 is binding on all the members of the family, that is defendants 2 to 10.

A similar question also arose in respect of the plaintiff's mortgage. The learned District Munsif found that both the mortgages were binding on all the members of the family. He also found that defendant 11 would be entitled to priority to the extent of Rs. 1,784 in respect of the mortgage set up by him. He accordingly ordered sale of the property free of all encumbrances and directed that the sale proceeds should be applied in the manner stated by him in para. 4 of his decree, namely

first of all in payment to defendant 11 of a sum of Rs. 1,784 in discharge of his prior rights under the mortgage of 1915, and secondly the balance, if any, shall be paid to the plaintiff.

This was modified by the learned Subordinate Judge in appeal. The learned Subordinate Judge recognized priority only in respect of defendant 3's share and held that neither previous consent nor subsequent ratification of the mortgage by defendants 1 and 2 was proved and that it was not executed for a valid and binding joint family purpose. In the view he held, he passed the decree thus :

In the result the decree passed by the learned District Munsif is set aside and a mortgage decree in plaintiff's favour for the amount claimed with costs and subsequent interest is passed. The two thirds share of defendants 1 and 2 in the suit property will be sold and the sale proceeds credited first towards the plaintiff's claim, the balance, if any, being payable to defendant 11. The one-third interest of defendant 3 in the suit property shall be sold and after first crediting the sale proceeds towards the mortgage Ex. 1, the balance, if any, will be used to discharge the plaintiff's claim.

It is against this decree this second appeal has been preferred. The appellant has paid a sum of Rs. 15 for the memorandum of appeal. The question

is, is the court-fee paid sufficient? Of course this will depend on what in substance is the relief he claims. On the exact point in this case there is no decision of our High Court; my attention has been invited by the office to two decisions of other High Courts, one of Patna, 4 Pat L J 323,[1] and the other of Allahabad, 16 A L J 81.[2] Both those decisions seem to take the view that an ad valorem court-fee may have to be paid. During the course of the argument, another decision of the Allahabad High Court has been brought to my notice, namely 54 All 347.[3] As the matter is of some importance, I directed notice to the Government Pleader and he argues that the view taken by the Allahabad and Patna High Courts is correct and that in any view the appellant must be directed to pay either on the amount of his claim, or if it exceeds the value of the property, on the amount of the value of the property. Mr. Ramchandra Iyer, who appears for the appellant, contended before me that the relief sought is only in the nature of a declaratory relief and the court-fee paid is sufficient. In the alternative he contends that the relief must be said to be incapable of valuation having regard to the nature of the decree passed by the learned Subordinate Judge and therefore the court-fee paid by him must be held to be sufficient. Under the Civil Procedure Code where a puisne mortgagee files a suit, he is not obliged to redeem a prior mortgage; he can have a sale subject to the prior mortgage; that is, in cases where he admits the prior mortgage; but where he disputes the prior mortgage either on the ground that it does not subsist or on the ground that his mortgage should take precedence over it, he has to seek a declaration that the alleged prior mortgage is not entitled to priority. In such cases, it is clear from the forms of the mortgage decrees framed by the Legislature and found in Appx. D, Sch. 1, Civil P. C., that the Court will have to declare priority which is questioned in the suit. Cl. 2 of Form 9 in Appx. D runs thus:

> It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant 2 or (if there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively.

Vide also Cl. 2 of Form 10. It will thus be seen that in cases where the amount is not disputed and where the liability of the morgaged property is also not disputed and the only question is who is entitled to be paid the sale proceeds, so far as the prior mortgagee who is a defendant in the case is concerned, the only relief that could be got by the puisne mortgagee in the suit brought by him will be a declaratory one. In this case, the order for sale has been passed at the instance of the puisne mortgagee. The other directions necessarily follow from this order for sale by reason of the prior mortgagee being made a party to the suit. Speaking with reference to the mortgages both prior and subsequent to the mortgage sued on, Mukerji, J. observed thus in 61 Cal 320,[4] at p. 322:

> The decree, which has been or may be passed in the suit, will, no doubt, be a decree to their advantage. . . . But their position in the appeal must be that, as defendants in the plaintiff's suit, they are entitled to have certain rights of theirs protected in the decree which the plaintiff obtains or has obtained. This being the true view to take of the situation, I am unable to see how the dues on the appellant's mortgage or mortgages can be regarded as the value of the subject-matter in dispute, or how the dispute, such as there is in the appeal, may be valued in terms of such dues. . . . . It should be remembered that it has not been the policy of the law to tax with court-fees ad valorem every advantage which a party is seeking for in courts.

There has already been an order for sale; there has already been a declaration of liability of the suit property in respect of the mortgage set up by defendant 11; the only question is whether he is entitled to any priority. All that he is seeking in appeal is to get rid of the declaration made against him and to have a declaration in his favour. Therefore a relief for declaration would be in my opinion enough and he is entitled to value the relief as one for a declaration and the court-fee therefore paid by him would be sufficient under Art. 17-A (1) of Sch. 2, Madras Court-fees Amending Act. I am unable to agree with the view taken both by the Allahabad and Patna High Courts in this matter. In 54 All 347,[3] the reason assigned by King, J. is stated thus:

> The appellants obviously seek to get the decree of the trial Court modified in their favour so as to get the property sold subject to their mortgage

1. Premsukh Das v. Shah Gopi Saran, A I R 1919 Pat 233=51 I C 786=4 Pat L J 323.
2. Moti Begam v. Har Prasad, A I R 1918 All 79 =47 I C 311=16 A L J 81.
3. Kundan Lal v. Dulichand, A I R 1932 All 221 =140 I C 39=54 All 347=1932 A L J 45.
4. Akhilbandhu v. Suradhuni Debya, A I R 1934 Cal 377=148 I C 1084=61 Cal 320=58 C L J 542=38 C W N 248.

for which they claim priority. I think the substance of the relief sought, and not merely its form, must be considered. Their interest in the property is valued at Rs. 1,600 and this must be the value of the subject matter in dispute in the appeal.

The learned Judge fails to notice that where there is already an order for sale, the prior mortgagee in appeal does not seek any fresh order for sale. The order for sale is already passed at the instance of the plaintiff and the substance of the a relief sought by him is only a declaration. Mr. Champakesa Iyengar relied on 30 Mad 96,[5] and other cases which followed it. In those cases it will be noticed that either the amount of the decree or the liability of the property was in dispute and in my view they have no application to the facts of this case. Even if I am not correct in the view I have now taken, having regard to the form of the decree in this case it may be stated that the relief is one incapable of valuation. The learned Subordinate Judge has directed that two-thirds share in the property will be sold first and after payment to the plaintiff, defendant 11 will be paid the balance. How much the two-thirds share will fetch and what balance will remain payable to defendant 11 and whether it would satisfy the entire claim or only a portion of the claim it is not possible to ascertain. It may be that the balance will be enough to satisfy defendant 11's claim or may not be enough. He can only be called upon to pay the court-fee on the amount of the deficit which he will get as a result of the Subordinate Judge's decree and which is incapable of ascertainment. I think in this view that the court-fee paid is sufficient.

C.R.K./S.C. *Order accordingly.*

5. Ramakrishna Reddi v. K. Kota Reddi, (1907) 30 Mad 96=16 M L J 458 (F B).

A. I. R. 1937 Madras 842

LAKSHMANA RAO, J.

Pazhangette Unnikanna Menon — Appellant.

v.

Karimkulangara tarwad karnavan Lakshmi Vayankara Amma's son Kesavan Unni Nair and *others* — Respondents.

Second Appeal No. 202 of 1933, Decided on 15th March 1937, against decree of Sub-Judge, Palghat, in A. S. Nos. 44 and 45 of 1932.

Madras Hindu Religious Endowments Act (2 of 1927), Ss. 18 and 76—Scope—Melkanom of temple property by one of trustees not in consultation with other trustees nor act of majority is invalid — Board has no power under S. 18 or S. 76 to authorize such invalid alienation.

Where one of the trustees of a temple grants a melkanom of the temple property without the consultation of other trustees or when it is not an act of the majority, the melkanom is invalid under the general law. Neither S. 18 nor S. 76, Madras Hindu Religious Endowments Act, empowers the Endowments Board to authorize such invalid alienation of temple property by a person not competent to deal with it under the general law : *34 Mad 406* and *A I R 1935 Mad 755*, *Rel. on.* [P 842 C 2 ; P 843 C 1]

C. Unikanda Menon — for Appellant.

A. Sivarama Menon, *S. Venkatachala Sastry*, *K. Kuttikrishna Menon* and *C. V. Mahadeva Iyer* — for Respondents.

Judgment. — This second appeal arises out of a suit for redemption of a kanom granted by the trustees of the Chengattor Ayyappan temple in favour of the tarwad of defendants 1 to 29 and the sole question for determination is whether the melkanom granted by plaintiff 2, one of the five trustees to plaintiff 1 is valid. The melkanom was not granted in consultation with the other trustees nor is it the act of the majority. It would therefore be invalid under the general law : *vide* 34 Mad 406,[1] and the execution of renewals in favour of the original kanomdars by the other trustees independently of plaintiff 2 cannot possibly entitle plaintiff 2 to act by himself. The melkanom in question cannot therefore be upheld under the general law, nor does S. 76, Madras Hindu Religious Endowments Act empower the Endowments Board to authorize an alienation of temple property by persons not competent under the general law to deal with it. That section only invalidates alienations of the kind specified therein by competent persons unless sanctioned by the Board on the ground of necessity or benefit, and as pointed out in 68 M L J 178,[2] in which the powers of the Board under S. 18 of the Act as amended in 1930 were considered, the Board has no powers of interference with hereditary trustees of excepted temples, as in this case, in matters of internal management. The Act

1. Kumban v Moorthi, (1911) 34 Mad 406=7 I C 422=20 M L J 951.
2. Ramaswami Poojari v. Madras Hindu Religious Endowment Board, A I R 1935 Mad 755 =156 I C 932=68 M L J 178.

does not authorize the Board to ignore the existence of hereditary trustees or supersede them, nor does S. 18 empower the Board to authorize an alienation of temple property by a person not competent to deal with it under the general law. There was also no occasion for the exercise of any emergency powers and it follows that the Subordinate Judge was right in holding that the melkanom was invalid. The suit was therefore rightly dismissed and plaintiff 1 may enforce his claim, if any, in respect of the renewal fee for the melkanom in a separate suit. The second appeal therefore fails and is dismissed with costs of respondent 3. Leave is refused.

C.R.K./A.L. *Appeal dismissed.*

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* A. I. R. 1937 Madras 843

VENKATASUBBA RAO AND VENKATARAMANA RAO, JJ.

Ambi (Seshan Pattar's son) and *another* — Petitioners.

v.

Kelan (Thandan Kavukal Veeran's son) and *others* — Respondents.

Civil Revn. Petns. Nos. 1923 of 1929, 74, 75, 163, 164 and 172 to 174 of 1930, 219 to 246 and 581 of 1935, Decided on 15th January 1937, from decree of Dist. Munsif, Palghat, D/- 11th April 1929.

(a) Civil P. C. (1908), S. 64—Applicability—Lands attached before judgment and decree passed — Subsequent mortgage of same lands —Subsequent attachment of rents of such lands by decree-holder himself appointed receiver to collect rents—Mortgagee claiming also rents of attached lands—Claim for rent by decree-holder held was under second attachment and not first — Mortgage held was not void under S. 64 and mortgagee entitled to rents as against receiver.

Certain lands were attached before judgment in a suit and a decree was passed. Subsequent to the decree the same lands were mortgaged. Later on the decree-holder attached rents of those lands for a certain period in execution of his decree. The decree-holder himself was appointed a receiver to collect the rents. The mortgagee also brought a suit claiming rents of the attached lands on the strength of his mortgage. The receiver contended that the mortgage was void under S. 64, Civil P. C., and so he and not the mortgagee was entitled to the rents :

Held : that the claim of the receiver for the rents arose not in virtue of the first attachment but of the second. The subject matter of the second attachment was thus different from the first and the decree-holder was appointed receiver under the second attachment. The mortgage was previous to such second attachment under which the receiver claimed the rents. The mortgage was not therefore void under S. 64 and so was not affected by any claim arising under it. The mortgagee was therefore entitled to the rents of the attached property as against the receiver : *A I R 1916 P C 238, Rel. on.* [P 844 C 2]

(b) Registration Act (1908), S. 49—Unregistered partition deed is inadmissible in evidence to prove terms of partition.

Where the partition arrangement is reduced to writing but is not registered, such writing, though affording evidence of a division of status, is inadmissible for proving the terms of the partition. [P 845 C 1]

*** (c) Hindu Law—Joint family—Mortgage in favour of manager — Mortgage allotted to another member on subsequent partition—Suit on mortgage by manager dismissed but manager not filing appeal — Any member whose interest is affected by such dismissal has independent right of appeal—Such member can file appeal even if not party to suit but with leave of Court.**

Where on a partition of a joint Hindu family, a mortgage executed in favour of the manager falls to the share of a member other than the manager, but such partition deed is not registered and therefore becomes inadmissible in evidence, the effect of the partition deed being inadmissible in evidence is that the mortgage remains to all intents and purposes the property of the joint family. [P 845 C 2]

Where therefore owing to the inadmissibility of the partition deed in evidence, the manager himself files a suit on the mortgage and the suit is dismissed, any member of the joint family whose interest is affected by such dismissal has an independent right of appeal against the dismissal. If the manager does not file the appeal, any member, even if he be not party to the mortgage suit, can file an appeal with the leave of the Court. If however the member to whose share the mortgage has fallen is made a defendant in the mortgage suit, such defendant member has much more the right of appeal against the judgment negativing his right to a decree on the mortgage. [P 845 C 2; P 846 C 1]

T. S. Anantharaman, A. Ramamurti, C. S. Swaminathan, K. Kuttikrishna Menon and *C. K. Viswanatha Iyer* — for Petitioners.

P. Govinda Menon, C. Vasudeva Mannadiar, D. A. Krishna Variar and *C. V. Mahadeva Iyer* — for Respondents.

Venkatasubba Rao, J.—These are two batches of civil revision petitions and although they both arise out of similar claims, the contentions that have been put forward and therefore require to be considered are different. For a proper appreciation of the points raised, it will be necessary at the outset to set out the relevant dates : (i) On 11th November 1927 Kunjunni Nair (the respondent) in the suit

filed by him against one Ramaswami Pattar (O. S. No. 45 of 1927), attached the land in question before judgment. (ii) On 8th December 1927 a decree was made in that suit and we understand (although this is of no consequence) that in it was specifically mentioned that the attachment before judgment was confirmed. (iii) On 24th June 1928 the suit land, attached as mentioned above, was mortgaged to Ambi alias Subramania Pattar (the petitioner before us) who, on the strength of his mortgage, filed most of the suits in the Courts below claiming rent. (iv) On 12th September 1928 Kunjunni Nair, the decree-holder in O. S. 45 of 1927, attached the rents due in respect of the suit land for a portion of the year 1104 (1928 A. D.) payable in the month of Kanni. As will be observed, what was attached before judgment was the land itself; the attachment now effected was of the rents due for a period. (v) On 15th November 1928 Kunjunni Nair, the decree-holder, was appointed receiver in execution for the purpose of collecting the rents attached.

In the first batch of petitions (Nos. 1923/29, 74/30, 75/30, 163/30, 164/30 and 172 to 174 of 1930) the question raised is which of the two persons has a valid right to the rents claimed—Ambi, the mortgagee, or Kunjunni Nair, the decree-holder-receiver? As will appear presently, in the second batch of cases the mortgage in favour of Ambi was impugned as fraudulent, but that contention does not seem to have been raised in the lower Court in the present batch.

The only question therefore that arises for decision in the first batch of petitions, as already stated is, which of the two rival claimants is entitled to the rents? It was argued by Mr. Govinda Menon for the respondent that the mortgage in favour of Ambi, effected as it was during the subsistence of and contrary to his attachment, would be void. If this contention were right, Ambi's claim to rent would fail. But the learned counsel's argument ignores, as Mr. Seetharama Rao rightly points out, the effect of the cardinal words in S. 64, Civil P. C., which make it perfectly clear that any private alienation pending an attachment is to be void only "as against all claims enforceable under the attachment". The question shortly therefore is: does the claim put forward on behalf of the receiver answer this description? The transfer in favour of Ambi was made, as the dates show, subsequent to the first attachment, but what we have to decide is whether the claim now made by the respondent is one arising under that attachment, for the effect of the section is not that a private transfer is absolutely void but void only as against the claims enforceable under the attachment. If therefore the respondent's claim can in law be regarded as one made under the first attachment, it must take precedence of the mortgagee's right.

But the claim to rent which the respondent puts forward, arises not in virtue of the first attachment but of the second. It is perfectly true that the decree-holder could have taken further proceedings without effecting a second attachment, but what in actual fact happened was that the rents as distinguished from the property were attached and they were the subject matter of the second attachment and it was in furtherance of the last-mentioned attachment that the receiver was appointed. The private transfer in favour of Ambi was on a date previous to the second attachment and could not be affected by any claim arising under it. Going back to the first attachment effected of the land, granting that this was followed up by further proceedings, would the purchaser at an execution sale or, for that matter a receiver that might be appointed in execution, be entitled to the rents? It cannot admit of doubt that such a person can have no claim to the rents during the intervening period, i. e. between the date of the attachment of the land and the court-sale, or the appointment of the receiver, as the case may be.

In short, the claim of the respondent is one arising under the second and not the first attachment, and the transfer in favour of Ambi, though subsequent to the latter, was antecedent to the former and it follows from this that the respondent's contention cannot prevail. 44 I A 72=44 Cal 662[1] is an instructive case. There were two decrees and there was an attachment under each of them. The private transfer in favour of the appellant was made five years after the attachment (A) but one day before the attachment (B)

1. Mina Kumari Bibi v. Bijoy Singh Dudhuria, A I R 1916 P C 238=40 I C 242=44 Cal 662 =44 I A 72 (P C).

and it was at the sale held in pursuance of the attachment (B) that the respondent purchased the property. *Held*, that the earlier attachment, whether it was subsisting or not, did not give the respondent any right to the property as against the appellant. Referring to S. 276 of the Code of 1882, corresponding to the present S. 64, their Lordships observe:

> That section provides that when an attachment has been made as there described, any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment.

In the result, the following civil revision petitions (No. 1923/29, 74/30 and 172 to 174/30) are allowed, but we make no order as to costs here or in the Court below, in each case there will be a decree for the amount claimed. C. R. Ps. Nos. 163 and 164 of 1930 of this batch have been settled and withdrawn. Dismissed. No costs. C. R. P. No. 75 of 1930: In this, the receiver is the petitioner and not Ambi. From what we have said, it follows that this petition also should stand dismissed. There will be no order as to costs either here or in the Court below.

We now turn to the second batch (C. R. Ps. Nos. 219 of 1935 to 246 of 1935 and 581 of 1935). Here, as already observed, the mortgage in favour of Ambi alias Subramania Pattar was impeached, but the lower Appellate Court has found, differing from the Court of first instance, that the transaction is valid and we see no reason for disturbing that finding of fact.

But the question that has been argued arises in somewhat curious circumstances. Ambi, on the date of the mortgage in question, was the manager of a joint Hindu family, consisting of himself and his brothers Narayana Pattar and Rama Pattar. Subsequently there was a partition and it was to Rama Pattar that the debt evidenced by the mortgage was allotted. The partition arrangement was in writing, which however was not registered. Under the decisions, such a writing, though affording evidence of a division in status, is inadmissible for proving the terms of the partition. Ambi, realising this, filed suits for rents in his own name, impleading, however (quite unnecessarily) Rama Pattar as defendant. The first Court, holding, as already stated, that the mortgage in his favour was fraudulent, dismissed his suits.

The learned District Judge on appeal, though he reversed the first Court's finding of fact, still confirmed its judgment. It happened in this way. The appeals before him were filed not by Ambi, the unsuccessful plaintiff, but by Rama Pattar who, as already stated, was impleaded as defendant. The learned Judge held that the appeals filed by him were incompetent and dismissed them for that reason, thus upholding, though on a different ground, the first Court's judgment. The short question is, were the appeals filed by Rama Pattar incompetent? The partition arrangement not having been registered, the suits, it must be held, were properly instituted in the name of Ambi. He was not only the manager of the family but the person in whose name the mortgage was taken. So he rightly instituted the suits as plaintiff; but should the Court hold that the writing was admissible, the right would vest in Rama Pattar, in whose favour alone a decree could be passed. Therefore it is not surprising that Ambi claimed that a decree either in his favour or in favour of Rama Pattar, in the alternative, should be passed. But, whether the procedure was right or wrong, he was there on the record as a party and the judgment dismissing the suits negatived his right.

We fail to see why in these circumstances he should not have an independent right of appeal. Ambi, who had nothing to lose by the adverse judgment, was content to leave the matter there. But does that prevent any member of the family, whose interest is imperilled, from filing an appeal? To all intents and purposes, the mortgage still remained the property of the joint family; that is the effect of the partition arrangement being inadmissible in evidence. If this be so, it ought to be open to any member of the joint family to challenge the judgment negativing its right. Rama Pattar was one such member and even had he not been on the record, it would have been open to him, with the Court's leave, to file an appeal. But, owing to what must now be regarded as an accident, he was on the record as a party and that, if at all, should be an

additional ground for holding that the appeal was competent.

The lower Court observes that had Rama Pattar applied to it to be transposed as plaintiff, his application would have been barred by limitation. This question does not really arise, but we must point out that the learned Judge's view is wrong. The general rule enacted in S. 22, Limitation Act, as to the effect of substituting or adding a new party is subject to certain exceptions mentioned in Cl. (2) of that provision, one of them being that the rule of limitation enacted in the main part does not apply where there has been a transposition of the parties already on the record. In the result, except as regards the petition to be mentioned, all the other petitions are allowed; in each case the plaintiff will have a decree for the amount claimed. There will be no order as to costs either here or in the Courts below. As to C. R. P. 581 of 1935, it is dismissed but without costs.

We have now to make orders in respect of certain matters which are common to both sets of civil revision petitions. The need for those orders has thus arisen. In the first place, the tenants have not been represented in this Court. Secondly, while general questions have been argued, the counsel have not been in a position to deal with such facts as are peculiar to each case. The following order is made by consent: 1. Mr. Govinda Menon believes that in some cases to which Ambi or his brother has been a party, the claim of his client has been affirmed to rents due from some tenants. If any such judgments are produced in three weeks from today, the decrees in the concerned cases will be vacated; otherwise they will stand. 2. If in any one of the cases before us the tenants have pleaded that rents had previous to the suits been paid to the respondent, to that extent there will be no decrees against the tenants and this will be taken note of by the office when drafting the decrees. 3. If the respondent, in pursuance of the lower Court's decrees, has before this date been paid by any of the tenants any rents, the petitioner or his brother will not be entitled to have restitution of those rents. It is stated that wherever there has been such receipt of rents, it has been under orders of Court.

C.R.K./A.L. *Order accordingly.*

A. I. R. 1937 Madras 846

VENKATASUBBA RAO AND CORNISH, JJ.

Balabhadra Srirangam and *another* — Appellants.

v.

Madhyanapu Rangarao and *others* — Respondents.

Appeal No. 71 of 1935, Decided on 7th April 1937, against decree of Sub-Judge, Nellore, in O. S. No. 56 of 1934.

Minor—Decree against—Suit by minor to set aside on ground of collusion and negligence of guardian—Onus of proof is on minor—Burden is not discharged by merely showing that guardian-ad-litem did not persist in defence raised — He must show existence of good ground of defence which guardian failed to substantiate.

Where a minor ward seeks to get the decree obtained against his guardian-ad-litem set aside on the ground that the guardian-ad-litem, though he has filed a written statement, does not appear at the trial and allows the suit, so far as the minors are concerned, to proceed ex parte and further alleges that the decree is vitiated by negligence of the guardian and collusion between the mortgagees and the guardian, it is the duty of the mortgagor to prove the collusion and the neglience set up by him; the burden lies upon him of proving his allegations and that burden is not discharged by merely showing that his guardian-ad-litem, who had put forward a defence, did not appear to substantiate it. The defence might have been untenable or worthless and it does not follow that merely because a guardian-ad-litem chooses to raise a defence, he is bound to persist in it, whether good or bad, to the end. In this respect there is no difference whatsoever between a guardian failing to raise a defence and abandoning a defence which has been raised. If at the very outset the guardian thinks that there is no available defence to the action, he may refrain from defending it; likewise, if after filing an untenable defence the guardian realizes that the defence put forward is bad or worthless, there is nothing in law to compel him to proceed with or persist in it. Hence the burden of proving that circumstances exist which vitiate the decree is upon the mortgagor and it is an element in that proof, without which the mortgagor's case would amount to nothing, that there was an available good ground of defence which the guardian failed to put forward at the hearing: *14 M I A 393 (P C)*; *6 C L J 448* and *A I R 1922 Mad 273*, *Rel. on.* [P 847 C 1, 2]

B. Somayya — for Appellants.

P. Somasundaram — for Respondents.

Venkatasubba Rao, J.—The plaintiff's suit is a frivolous one and the learned Judge in decreeing it has disregarded certain well-settled principles of law. The plaintiff has brought this suit with a view to have it declared that the decree obtained

by defendants 5 and 6 against himself and defendants 1 to 4 (the members of his family) in O. S. No. 21 of 1931, is not binding upon him and should be set aside. Defendant 1 acting for himself and his minor sons, of whom the plaintiff was one, had executed in favour of defendants 5 and 6 a deed of mortgage on 2nd July 1926; it was to enforce this mortgage that the suit mentioned above had been brought by defendants 5 and 6. To the suit were impleaded as defendants, the plaintiff's father, plaintiff himself and his two brothers, the last mentioned three having been represented in the action by their mother as their guardian-ad-litem. During the pendency of that suit, one of the three brothers attained majority and was declared a major. In due course, on 24th August 1931, judgment was delivered decreeing the suit brought by the mortgagees, i. e. the present defendants 5 and 6.

The plaintiff seeks to get the decree set aside on the ground that his mother, though she had filed a written statement, did not appear at the trial and allowed the suit, so far as the minors were concerned, to proceed ex parte. He further alleges that the decree was vitiated by collusion between the mortgagees and his mother. In a case of this sort, it is the duty of the plaintiff to prove the collusion and the negligence set up by him; the burden lay upon him of proving his allegations and that burden is not discharged by merely showing that his mother, who had put forward a defence, did not appear to substantiate it. The defence might have been untenable or worthless and it does not follow that merely because a guardian-ad-litem chooses to raise a defence, she is bound to persist in it, whether good or bad, to the end. In this respect there is no difference whatsoever between a guardian failing to raise a defence and abandoning a defence which has been raised. If at the very outset the guardian thinks that there is no available defence to the action, he may refrain from defending it; likewise, if after filing an untenable defence, the guardian realises that the defence put forward is bad or worthless, there is nothing in law to compel him to proceed with or persist in it. These are principles of law which are well established and the learned Judge has entirely ignored them. For the plaintiff to succeed, he must show that he had an available defence, which, if substantiated in the previous suit, would have led to a different result, in other words, as their Lordships point out in 14 M I A 393,[1] the burden of proving that circumstances exist which vitiate the decree, is upon the plaintiff and it is an element in that proof, without which the plaintiff's case would amount to nothing, that there was an available good ground of defence which the guardian failed to put forward at the hearing (p. 399). The same principle has been laid down in 6 C L J 448[2] at p. 449, which has since been repeatedly followed in numerous decisions. As the Judges observe there:

> It is not every kind of negligence nor any amount of negligence which would render proceedings, otherwise regular and proper, liable to be opened up; it must be such negligence as leads to the loss of a right which, if the suit had been conducted or resisted with due care, must have been successfully asserted.

See also 45 Mad 425.[3] The question therefore is, has the plaintiff here established that his guardian sacrificed his interest by failing to substantiate a good ground of defence which was available to him? On this point there can be no doubt whatever that the defence first put forward and later abandoned was a thoroughly false and worthless defence.

As already stated, O. S. No. 21 of 1931 was brought to enforce a mortgage granted by the minors' father. There had been dealings extending over a long period between him on the one hand and the mortgagees on the other. There were at least three settlements of account, one in 1922, another in 1923 and the final one in 1926. If proof were needed that these settlements were bona fide, it is furnished by the fact that some of them were attested by the minors' maternal uncles. One defence raised in the previous suit was that these settlements were not intended to be final, but there was some kind of understanding that when the time arrived for payment, account should again be looked into and examined. So far as this ground of defence is concerned, the lower Court does not even notice it, as no one

1. Baboo Lekraj Roy v. Baboo Mahtab Chand, (1872) 14 M I A 393=10 Beng L R 35=17 W R 117=2 Suther 536=3 Sar 43 (P C).
2. Parmeswari Pershad Narayan Singh v. Sheo Dat Rai, (1907) 6 C L J 448.
3. Punnayyah v. Virannah, A I R 1922 Mad 273 =70 I C 669=45 Mad 425=42 M L J 429.

appears to have treated it seriously. The suit was defended on a further ground, namely that the debt incurred in the course of the trade referred to above, which formed the consideration for the mortgage, was not binding upon the minors. In dealing into this, the learned Judge has completely misdirected himself. Relying upon 59 I A 300,[4] he says that the father had no right to start a new trade, but the Judge forgets that the point before him was not whether the trade was a new one or not, but whether the debt in question could or could not support the mortgage. He ignores the fundamental fact that the debt, by the date of the mortgage, had become an antecedent one and that it was not suggested (and indeed could not be) that it was either illegal or immoral. Beyond a shadow of doubt, it had become antecedent in time as well as in fact and Mr. Somasundaram, the minor's counsel, properly enough, did not press this point before us.

It is thus clear that there was no valid defence which could have been put forward by the minor's mother in the previous suit. She raised a defence which ought never to have been put forward and the law does not require that a false or untenable defence should be persisted in. The lower Court's judgment cannot stand and is set aside. The suit is accordingly dismissed as against defendants 5 and 6 and their appeal is allowed with costs throughout. The court-fee payable upon the plaint to the Government will be recovered from the plaintiff. The property has been valued at Rs. 11,364-7-0, and the court-fee on the plaint will be paid upon a fifth of that sum. The advocate's fee will also be calculated upon the same amount.

C.R.K./R.W. *Appeal allowed.*

4. Benares Bank Ltd. v. Hari Narain, A I R 1932 P C 182=137 I C 781=59 I A 300=54 All 564 (P C).

A. I. R. 1937 Madras 848

BEASLEY, C. J.

Addepalli Satyanarayanamurthy — Petitioner.

v.

Vadlamannati Venkateswararao — Opposite Party.

Civil Revn. Petn. No. 88 of 1935, Decided on 27th November 1936, from order of Sub-Judge, Narasapur, D/- 2.8.1934.

Civil P. C. (1908), O. 21, Rr. 46 and 58 — Existence of debt owed by garnishee to judgment-debtor cannot be challenged in execution proceedings—But garnishee is entitled to prove debt owed to him by judgment-debtor for purpose of set-off — Executing Court can investigate such matters.

A decree-holder sought to attach some moneys owing to his judgment-debtor from a third party. The third party objected to the attachment on the ground that the judgment-debtor owed him a sum or sums of money which extinguished his debt to the judgment debtor and further contended that the set-off had been recognized in other cases by the Court. He claimed therefore to have the question of set-off considered. The executing Court refused to investigate into the question :

Held* : that though the existence of the debt due by the garnishee to the judgment-debtor could not in execution proceedings be challenged, yet the garnishee was entitled to give evidence to prove that there was a debt owing to him by the judgment-debtor either diminishing or extinguishing the debt in question and such matters could be gone into in execution proceedings : *A I R 1914 Bom 299, Foll.*; *A I R 1932 Mad 169* and *A I R 1936 Mad 152, Disting. [P 849 C 1]

G. Lakshmanna and *G. Chandrasekhara Sastri* — for Petitioner.

Respondent in person.

Order. — The position arising in this civil revision petition can, I think, best be expressed as follows : *A* is the respondent here and *B* is his judgment-debtor. *C* is the petitioner here. *C* owed *B* some money secured on two mortgage bonds executed by *C* in favour of *B*. *A* sought to attach the debt to *B* owing on these mortgage bonds. *C*, the petitioner, objected to the attachment on the ground that *B* owed him a sum or sums of money which extinguished *C's* debt to *B*, and he further stated that this set-off had in other cases been recognized by the Court. He claimed therefore that he was entitled in these execution proceedings to have the question of that set-off considered. The learned Subordinate Judge relying upon some rulings which he does not refer to, says :

The plea of discharge by the garnishee and its validity is not gone into in this execution proceedings, as according to the decided rulings it should not be investigated in the execution proceedings. The attaching decree-holder may take such further steps in execution as he likes.

No decided rulings having been cited by the learned Subordinate Judge; the learned counsel for the petitioner, the respondent being unrepresented although served with notice of this petition, has done his best to put me in possession of the rulings to which he thinks the learned Subordinate Judge was referring, and I am very much

obliged to him for having done so. It is sufficient to say that the two rulings to which he has drawn my attention as possibly being thought by the Subordinate Judge to cover this question, namely, 61 M L J 863[1] and 70 M L J 20,[2] do not touch the point here. There the decision turned upon whether or not in execution proceedings the garnishee is entitled to deny the existence of the debt. That is quite a different thing to admitting its existence but seeking to wipe it out by proving a set-off as here. It is clear that the existence of the debt cannot in execution proceedings be challenged. These two decisions however do not say that whilst admitting the debt, the garnishee is not to be entitled to give evidence to prove that there is a debt owing to him by the judgment-debtor either diminishing or extinguishing the debt in question. There is clear authority upon this point that in execution proceedings such matters can be gone into and that is 38 Bom 631,[3] and my attention has not been drawn to any case in which the principle laid down there has not been followed or has been dissented from. This civil revision petition must therefore be allowed and the case remanded to the Subordinate Court for disposal according to law. The petitioner is entitled to his costs of this petition.

C.R.K./K.B. *Revision allowed.*

1. Alwar Aiyangar v. Subramania, A I R 1932 Mad 169=136 I C 837=61 M L J 863.
2. Butchaya v. Krishnamachari, A I R 1936 Mad 152=59 Mad 966=70 M L J 20.
3. Tayaball Ghulam Hussein v. Atmaram, A I R 1914 Bom 299=38 Bom 631=16 Bom L R 520.

A. I. R. 1937 Madras 849

VENKATARAMANA RAO, J.

Tadepalli Ramiah — Appellant.

v.

Madala Thathiah and *another* — Respondents.

Second Appeal No. 150 of 1935, Decided on 15th February 1937.

Civil P. C. (1908), O. 2, R. 2—Suit for mesne profits accruing subsequent to suit for possession—Cause of action in such suit is different from that of suit for possession—Suit for mesne profits only is therefore not barred under O. 2, R. 2.

The claim for mesne profits accruing subsequent to the institution of the suit for possession is a separate cause of action and not one arising out of the same cause of action on which the claim for possession is based. In a claim for possession it is the specific restitution of the property that is sought, but in an action for mesne profits the claim is for all loss suffered during the period of dispossession. The cause of action arises from day to day and is a continuing one and under the common law of England an action for mesne profits would not lie until after the plaintiff had re-entered and recovered the possession of the land. Evidence required to prove the claim for mesne profits is different from that which is required to base the claim for possession of the property dispossessed. Therefore a separate suit for mesne profits alone would not be barred under O. 2, R. 2, Civil P. C.: *AIR 1931 P C 229, Distinguished and explained; Case law discussed.* [P 850 C 2; P 851 C 1, 2]

B. Somayya — for Appellant.

M. Ramchandra Rao — for Respondents.

Judgment.—This second appeal arises out of a suit instituted by the plaintiffs for recovery of mesne profits for Faslis 1337 to 1339 from the defendants. The District Munsif of Guntur gave a decree but it was reversed by the Subordinate Judge of Guntur on the ground that the action is barred by O. 2, R. 2, Civil P. C. The plaintiffs filed a suit (O. S. No. 1013 of 1927) on the file of the District Munsif of Guntur for recovery of possession of the land in respect whereof the mesne profits are claimed. They also claimed in that suit mesne profits both past and future, but while giving a decree in plaintiff's favour, the District Munsif did not pass a decree for mesne profits subsequent to suit and the reason given by him is thus stated in para. 30 of his judgment in the said suit:

> No provision is made for recovery of subsequent profits, as it was represented that plaintiff 1 had filed a suit in the Sub-Court, Guntur, for recovery of them.

The suit referred to in the said order was filed by the plaintiffs during the pendency of the above action in the Sub-Court, Guntur, for recovery of mesne profits for the said three Faslies and for damages, but after the decree in O. S. No. 1013 of 1927 the claim for damages was given up in consequence whereof the Sub-Court, Guntur, returned the plaint filed before it for presentation to the District Munsif of Guntur on the ground that it had no jurisdiction to try the suit, and accordingly the plaint was re-presented and filed before the District Munsif of Guntur and it was there numbered as O. S. No. 637 of 1931. It is this suit which has now come up in second appeal.

According to the decisions of our High Court, the suit would be sustainable, but the learned Subordinate Judge was of the opinion that the recent decision of the Privy Council in 61 M L J 294[1] was conclusive on the matter. The construction

1. Naba Kumar Hazra v. Radhashyam Mahish, A I R 1931 P C 229=134 I C 654=61 M L J 294 (P C).

placed by him on the said decision was that a claim for mesne profits such as laid in the plaint in this suit arises out of the same cause of action for possession. He therefore felt himself compelled to decide against the plaintiffs. This view is also pressed by Mr. Jagannadha Das on behalf of the respondents before me, and he contends that the Privy Council decision must be held to have overruled all the decisions of this High Court as well as the other High Courts on this point. It is therefore necessary to see if the decision of the Privy Council leads to the said result. On a careful reading of the said case it seems to me that no question of mesne profits was involved in the said case at all. The facts of the said case were as follows: A pleader who was appearing for judgment-debtors in a mortgage suit had the decree in the said suit purchased benami in the name of his wife and began to execute it. The judgment-debtors having come to know the said fact, filed a suit to have it declared that it was really a purchase benami for the pleader and that the pleader was the real purchaser and prayed for appropriate reliefs in the action. During the pendency of the suit, the property was sold, in consequence whereof necessary amendments were permitted to be made in the plaint in and by which they were enabled to claim a conveyance of the said decree and the said property with necessary accounts and the plaintiffs in that suit were given a decree for possession and it was pointed out in the judgment of the Privy Council that the claim for accounts was abandoned.

Subsequent to the decree for possession, some of the judgment-debtors instituted an action for recovery of rents and profits of the property received by the purchaser after the purchase and before the conveyance. The question was whether this claim was barred under O. 2, R. 2, Civil P. C. Their Lordships of the Judicial Committee were of the opinion that it was a relief which could have been claimed in the previous suit. The basis for their Lordships' opinion was that by reason of the purchase of the decree and the property the purchaser became a trustee for the judgment-debtors and the claim for rents and profits formed part of the claim arising out of the cause of action in the former suit. The action was not construed as one for mesne profits. There was no question of wrongful possession by the purchaser, because he must be deemed to have been in possession on behalf of the judgment-debtors and his possession was their possession. The claim was in substance to recover the property which was held by the purchaser on their account and the claim for profits was only as part of the claim for restoration of their property. It is one and the same claim and the cause of action was considered to be one and the same. Mr. Jagannadha Das laid considerable emphasis on the following observations of their Lordships of the Privy Council in that case:

> The cause of action in the present suit is, their Lordships think, clearly the same as in the previous suit; the right to the rents and profits vested on the same foundation of facts and law as the right to have the purchases of the decree and of the properties declared to be purchases for the mortgagors.

The argument of Mr. Jagannadha Das is that the claim for mesne profits in this case must be deemed to rest on the same foundation of facts and law as the right to seek possession of the property and the suit must be held to be barred. It seems to me that this contention is untenable. A claim for possession and a claim for mesne profits are distinct causes of action. In the Full Bench decision in 38 Mad 829,[2] in explaining the history and development of an action for mesne profits, the learned Judges observe:

> Claims for possession and claims for mesne profits have always been treated as separate causes of action in the Code of Civil Procedure, following in this the English law. At common law, claims for ejectment and for mesne profits were separate causes of action.

In an action for ejectment it is the specific restitution of the land that is sought, but in an action for mesne profits what is recovered is all loss suffered by him during the period of his dispossession. The cause of action arises from day to day and is a continuing one. Salmond in his book on the Law of Torts thus explains the nature of the action and the doctrine on which it is founded:

> The action for mesne profits was a particular form of the action of trespass *quare clausum fregit*; its proper title was the action of trespass for mesne profits. Whether the dispossession had or had not been effected by way of trespass, the claim for mesne profits was always in form a claim for damages for a continuing trespass upon the land. Such a claim was based upon and rendered possible by the doctrine of trespass by relation. . . . That is the ordinary doctrine on which actions for mesne profits are founded; you look to

2. Ponnammal v. Ramamirda Iyer, A I R 1915 Mad 912=27 I C 679=38 Mad 829=28 M L J 127 (F B).

the date of the title; and after entry consider the party entitled to have been then in possession.

He further points out that:

The action would not lie until after the plaintiff had re-entered and recovered the possession of the land. This re-entry might be by his own act, or it might be by way of judgment in ejectment and execution issued thereon. But one mode or the other was an essential condition precedent to the action.

Of course the rigour of Common law was modified by the Common Law Procedure Act and the rules of the Supreme Court, whereby a claim for mesne profits has been permitted to be combined in an action for ejectment, but still the principle holds good that an action for mesne profits will not lie without an action of ejectment and before the recovery of the land. Whatever might have been the opinion of the High Courts in regard to the claim for past profits, so far as the claim for profits subsequent to the institution of the suit is concerned, there was never any doubt and almost all the High Courts have taken the view that it does not arise out of the same cause of action as a claim for possession. In the Full Bench decision in 41 Mad 188,[3] where a person claimed past profits, that is, profits prior to the institution of the suit and future mesne profits, that is, profits subsequent to the institution of the suit, and the decree was silent as regards the future mesne profits, a second suit was held to lie in regard thereto. Since the decision of the Privy Council in 61 M L J 294,[1] the same view had been taken in most of the High Courts, namely, even though a prior suit had been instituted for possession, a second suit for mesne profits accrued since the institution of suit would lie: *vide* 71 M L J 677[4] at p. 681; 59 Bom 454[5] and 53 All 951.[6] In the Allahabad case Sir Sulaiman, C. J. clearly explains the nature of the action and why Order 2, Rule 2, Civil P. C., will not apply. He observes thus at p. 957:

The objection of O. 2, R. 2 is the prevention of the splitting up of one cause of action and not to compel the plaintiff to seek all the remedies which he can claim against the same defendants on account of several causes of action in one and the same suit. In one case, the multiplicity of suits is to be avoided and, in the other, multifariousness of the causes of action. It is also clear that the bundle of facts which would constitute the cause of action in favour of the plaintiff would not necessarily be identical in a suit for recovery of possession and in a suit for mesne profits. In a suit for possession the plaintiff need only prove his possession within 12 years and the defendant's occupation of the property without right. In a suit for mesne profits he has, in addition, to prove the duration of the whole period during which the dispossession continued, including the date on which it terminated, as well as the amount to which he is entitled by way of damages. Evidence to prove these latter facts would undoubtedly be different from that which would be required to prove the first set of facts.

It will thus be seen that the claim for mesne profits does not rest on the same foundation of facts and law as that for possession. I do not think that the Privy Council intended to depart from the principle underlying the action for mesne profits recognized both in English and Indian law and overrule a body of case law in India and laid down a different principle. Sir Dinshaw Mulla who was himself a party to the decision in 61 M L J 294,[1] in his book on Civil Procedure published since, does not treat the said decision as laying down a contrary view from that taken by the High Courts on this point. I am therefore of the opinion that 61 M L J 294[1] would not apply to the facts of this case and the view of the learned Subordinate Judge is wrong. The suit is therefore not barred by O. 2, R. 2, Civil P. C. Two other points were also argued by Mr. Somayya: (1) The claim for mesne profits for Fasli 1337 is not barred by limitation, and (2) The amount of mesne profits awarded by the learned Subordinate Judge is not proper. In regard to the first point, the view taken by the learned Subordinate Judge is that the claim for mesne profits for Fasli 1337 is barred by limitation. I see no reason to differ from his view. In regard to the amount of mesne profits, the learned Subordinate Judge awarded only at the rate of Rs. 200 a year. Mr. Somayya complains that in arriving at that figure the learned Subordinate Judge has omitted to consider important evidence. Mr. Somayya points out that the defendants themselves filed Exs. 1 and 1-A for proving that in Fasli 1337, the amount of mesne profits was Rs. 490. Therefore on the admission of the defendants Rs. 490 must be taken to be the amount of gross profits. Defendant 2 in his deposition has admitted this fact. He stated that Rs. 200 would be required for cultivation expenses

3. Doraiswami Iyer v. Subramania Aiyar, A I R 1918 Mad 484=42 I C 929=41 Mad 188=33 M L J 699 (F B).
4. *In re* Kantheeswaram Ekanthalingan Swami Koil, A I R 1937 Mad 46 = 165 I C 972 = I L R (1937) Mad 294=71 M L J 677.
5. Rama Kallappa v. Saidappa, A I R 1935 Bom 306=59 Bom 454=37 Bom L R 336.
6. Ram Karan v. Nakchhad, A I R 1931 All 429 =133 I C 298=53 All 951 (S B).

and therefore the net profits would be Rs. 290. In my opinion, the learned Subordinate Judge should have considered this admission on the part of defendant 2, but he seemed to have placed much reliance on a lease by the defendants in 1929 since the date of the institution of this suit according to which the profits worked out at Rs. 270. It has not been shown that since Fasli 1337 there has been a decrease in the yield of the crop of the land. In my opinion the justice of the case will be met by awarding mesne profits at the rate of Rs. 250 a year.

In the result, the decree of the learned Subordinate Judge is reversed and the plaintiff is given a decree for Rs. 500 with interest at 6 per cent. from the date of the plaint. I direct the parties to bear their own costs in this second appeal; but in both the Courts below, the defendants 1 and 2 will pay the cost calculated on the amount of Rs. 500 decreed therein. (Leave refused).

C.R.K./S.C. *Decree modified.*

A. I. R. 1937 Madras 852

VENKATASUBBA RAO AND CORNISH, JJ.

Hindu Religious Endowments, Madras

v.

Thadikonda Koteswara Rao.

Appeals Nos. 25, 119 to 137, 295 to 297, 299, 455, 456 and 458 of 1934, Decided on 22nd January 1937, against orders of Dist. Court, Guntur, D/- 13th April 1933.

(a) Madras Hindu Religious Endowments Act (2 of 1927), Ss. 69 and 70—Assessments under, are same as decrees of Civil Court—Petitions to recover assessments partake of character of execution petitions.

The assessments made under Ss. 69 and 70, Hindu Religious Endowments Act, stand upon the same footing, by some sort of fiction, as decrees of Civil Courts; from that it follows that petitions filed by the Board to recover the amounts so assessed, partake of the character of execution petitions filed for enforcing such decrees, and are governed by the rules of law applicable to them. [P 853 C 1]

(b) Grant — Inam — Intention— Specified charitable payments exhausting income at date of gift—Intention is to devote to charity — Charitable payments not exhausting income—Charitable trust is limited to specific payments and donees take beneficially subject to them.

Where specified charitable payments exhaust the income of the property at the date of the gift, the intention is to devote the whole to charity, but where they do not so exhaust the income, the charitable trust is limited to the specific payments and subject to that the donees take beneficially. If the property or the whole of the income arising from it is given to charity, any subsequent increase in the value of the property accrues to the charity : *A I R 1934 Mad 258, Ref.* [P 853 C 2 ; P 854 C 1]

(c) Grant—Construction —Nithya Naivedya Deeparathana involves dual liability of supplying material and performing services.

The words "Nithya Naivedya Deeparathana" used in a grant involve a dual liability on the part of the archakas : first to supply material and secondly the performance of services. [P 854 C 1]

(d) Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (13) — Archaka taking possession of temple property and conducting himself as if he were trustee — His position is that of trustee de son tort.

When the archaka takes possession of the property of the temple or a part of it and conducts himself for all practical purposes as if he were a trustee, his position is that of a trustee *de son tort* or *de facto* trustee, especially when as is natural in the case of village temples, there is no properly constituted or *de jure* trustee. [P 856 C 2]

(e) Madras Hindu Religious Endowments Act (2 of 1927), S. 70 (2) — Court cannot enter into propriety or validity of demand by Board.

A Court under S. 70 (2), Hindu Religious Endowments Act, must execute the demand made by the Board as if it were a decree and cannot enter into questions of its validity or propriety : *A I R 1935 Mad 217* and *A I R 1935 Mad 396, Rel. on.* [P 857 C 1]

(f) Grant—Construction — Deed directing archaka to take possession on behalf of institution and reciting that donee was to be in possession hereditarily — Deed held made gift absolute, making deity grantee.

The question whether the grant is to an institution represented by its manager or to a named individual who fills a certain character, is one of construction, depending in each case upon the terms of the particular instrument. [P 857 C 2]

Where the gift deed directed the archaka to take possession on behalf of the institution and contained a recital that the donee was to be in possession hereditarily :

Held : that the donor intended that the deity was to be the grantee and the gift was to be made absolute : *A I R 1934 Mad 381, Ref.* [P 857 C 2]

K. Subba Rao — for Appellant.

K. Kameswara Rao — for Respondent.

Venkatasubba Rao, J.—The principal question that has been argued in this batch of appeals is whether the property in question in each case is held upon the trust for the deity or whether the archakas possess in it any beneficial interest. S. 69, Madras Hindu Religious Endowments Act, provides for payment of contributions by temples in order that certain expenses may be met. The amount of the contribution depends on the income of the temple and for the purpose of determining what the income is, the question becomes important under S. 70, whether a

particular property belongs to the institution or not. The last mentioned section has since been amended, but the provision as it stood before the amendment governs the present cases. The contribution, the section enacted, was to be assessed on and notified to the trustee, who would be bound to pay the amount within a certain prescribed time from the funds of the temple concerned. "In default of his doing so," the section went on to enact:

> the Court shall, on the application of the President of the Board or Committee, recover the amount as if a decree had been passed for the amount by the Court against the religious endowment concerned.

The result of the decisions which have construed Ss. 69 and 70 is that the assessments made under the sections stand upon the same footing, by some sort of fiction, as decrees of Civil Courts; from that it follows that petitions filed by the Board to recover the amounts so assessed, partake of the character of execution petitions filed for enforcing such decrees, and are governed by the rules of law applicable to them. In the Guntur District, there seems to be numerous village temples and more than 200 execution petitions have been filed by the Board. In some cases, the question of the deity's title was put in issue even at the initial stage and decided by the Court; in the remaining cases, owing to reasons which it is unnecessary to state, the decision of the question was postponed, but when upon attachment of crops the archakas preferred claims, the question of title came to be considered as upon claim petitions and in each case a finding as to the ownership of the property was given. It may be observed that the bulk of the cases was tried by Mr. Lobo, to whom we are indebted for the large amount of material which he has carefully collected and analysed in his exhaustive judgment. He was succeeded by Mr. Chandrasekara Ayyar as District Judge, who heard a few of the cases and who, in one of the two judgments he delivered, has fully set out what he regards as the true principles governing this subject. The question, as already stated, is whether the claim made by the archakas, on the particular facts of each case, is well founded. On their behalf the argument has been put thus: that the properties were given to their ancestors subject to or burdened with the performance of certain services or in the alternative, that the gifts were annexed to the office of archaka, that is to say, were made to particular individuals for the time being filling that office. On the other hand, for the Board it is contended that the property in each case was dedicated absolutely to the deity concerned. In other words, each side taking its stand on the three-fold classification adopted in 39 M L W 389 same as A I R 1934 Mad 258,[1] has sought to show either that the property was a gift to the God (that is the Board's contention) or was an archaka service inam, which expression is used as embracing both the categories where the donees take beneficially (that is the contention of the archakas). In that case it was observed:

> There are three possible views that may be taken of grants of this kind; first that the land was granted to the institution; secondly that it was intended to be attached to a particular office and thirdly that it was granted to a named individual, burdened with service, the person so named happening to be the office-holder at the time of grant.

Excepting in one case, the original grant has not been produced. The archakas contend that the trusts were created, limited to the purpose of 'nithya naivedya deeparathana', that is to say, they were intended to be the donees who were to take beneficial interest, subject to particular payments or the performance of particular services. Were the deeds of gift produced, the question would be one of construction, whether the donee in trust is a trustee in respect of the whole property given or only in respect of the part that is given to the deity. In the latter case, the donee has beneficial interest subject to a particular purpose; in the former the gift is for a particular purpose with no intention that he should take beneficially: *see* Godefroi on Trusts, Edn. 5, p. 122, Ch. 10; Resulting Trusts and Tudor on Charities, Edn. 5, Ch. 2, S. 2, headed "Creation of a Valid Charitable Trust". Where specified charitable payments exhaust the income of the property at the date of the gift, it has been held in several cases that the intention is to devote the whole to charity, but where they do not so exhaust the income, the charitable trust has been limited to the specific payments and subject to that the donees have been held to take beneficially. As is observed in Halsbury, where at the date of the gift the property given is more

1. Subramanya Odayar v. Vaikunta Kailasanatha Swami Koil, A I R 1934 Mad 258=150 I C 1115=39 M L W 389.

than sufficient to satisfy the purposes specified, the surplus does not go to charity, but either goes beneficially to the donee to whom the property is given in trust for the charitable purposes, or results to the donor and those claiming under him : *vide* 4 Halsbury, Chapter on Charities, paras. 291 and 292. It of course follows from this that if the property or the whole of the income arising from it is given to charity, any subsequent increase in the value of the property accrues to the charity (ibid). In these cases, as already observed, the instruments of gift are not forthcoming ; that renders the decision of the question difficult enough, and it is equally impossible to apply the test of income as no evidence has been offered in that respect. Moreover, even if such evidence were available, the matter would still present some little difficulty in view of what "nithya naivedya deeparathana" imports. It involves a dual liability on the part of the archakas ; first, the supply of material and secondly, the performance of services. As Mr. Chandrasekhara Ayyar points out in his judgment:

> Daily offerings in the shape of cooked rice have to be made, cocoanuts and fruits and betel leaves and nuts and flowers have to be offered ; camphor has to be waved and incense burnt ; and lights have to be lit. All these have to be met from the income from the properties. It is true that the archaka has to maintain himself and the members of his family and there is no separate remuneration by way of wages or salary fixed for him. But the problem never perhaps troubled the minds of the grantors, because the substantial offerings to the deity always come back to the archaka and would be utilised by him for his maintenance. There is no need to make any special arrangement for his support ; what was offered to God was practically his. The only items that meant an expenditure without any personal benefit to the archaka were things like camphor, incense and oil.

This accurately describes the effect of the oral evidence adduced to show what the duties of the archakas are. As regards the quantity of the food to be offered, it is impossible to fix it, depending as it does upon the needs of the household of the archaka. Then again, as regards the services of the archakas, the difficulty lies in finding their money equivalent. The question arises, what then is the evidence bearing on the nature of the grant? No oral evidence has been adduced and that is natural enough, the grants having been made long ago, sometimes during the Moghul period and in many cases long before the British conquest. The lower Court has had therefore to rely exclusively upon the effect of the inam proceedings in order to find out the nature of the original grant. That enquiry has been described by the Privy Council as a great act of State and the entries then made by responsible officers furnish the most cogent evidence as to the character of the endowment. In these cases Mr. Lobo has had the unusual advantage of being able to study as many as 88 fair inam register extracts and this has enabled him to compare the terminology adopted by individual officers and to understand the significance of the words used. He has been able to show that different sets of words have been frequently employed to convey the same idea. Where, as in some instances, the inam statements have been produced in addition to the inam registers, greater light is thrown on the question at issue.

Taking by way of example some cases in which both inam statements and extracts from the inam registers are available, what is disclosed may be shortly stated. In C. M. A. No. 299 of 1934, the inam statement signed by the ancestor of the present archaka mentions the deity in Col. 1 headed inter alia "Name of the Present Enjoyer". Likewise, in Col. 11, the deity is shown under the heading "Particulars of the Present Enjoyment". There can be no doubt therefore on these admissions that the gift was to the God. Turning to the corresponding inam register, in Col. 8, it is mentioned that the grant was "for the worship of the idol in the pagoda". In Col. 13 the original grantee is shown as the deity; in Col. 14 the name entered in inam's register is likewise that of the deity. The same remark applies to Col. 15, which is headed : "Name entered in subsequent accounts". In spite of these entries, reliance is placed by the archakas on Col. 16, where under the heading "The present owner" the following entry appears: "Sri Viswaraswami (worshipper) Tangalur Venkatasivadu." Here the word 'worshipper', as is conceded, means 'archaka'. What is contended is that the coupling of the name of the archaka with that of the deity shows that the gift was made to the archaka burdened with service. It is this entry in Col. 16 which has made such an argument possible, but it is perfectly clear that in the face of the admissions and the entries already referred to, such a contention cannot prevail.

There is one matter to which in this connexion attention may be drawn. In regard to Col. 8, it was contended for the archakas that the words 'For the worship of the idol' materially differ from the terminology 'for nithya naivedya deeparathana,' the argument being that in the latter case there is a stronger presumption that the grant was intended to be a service inam. That this contention is untenable is shown beyond doubt by a comparison of the entries in Ex. J. the inam statement and Ex. H-1, the inam fair register in C. M. A. 121 of 1934. Both these documents relate to the temple of Sri Seetharamaswami at Nandivelugu. In the inam statement, signed by the archakas' predecessors-in-interest, the object of the grant is stated to be "for the offering of daily naivaidyam and deeparathana" (*see* Col. 6). The corresponding entry in the inam register is 'for the worship of the idol in the pagoda'. Thus, the statement and the register employ two different sets of words to convey the same idea. It may here be observed that having regard to the scheme of the register, the most decisive entries are those appearing in Cols. 13 to 16, for, it is here that provision is made for the entering of the name of the grantee, as shown in the relevant ancient records at different stages from the date of the grant to the date of the preparation of the register—this period covering in some cases more than a century. Again, a distinction has been sought to be made on the basis of the entries in Col. 21. The phraseology of the Deputy Collector's recommendation was not uniform. In some cases it merely ran 'to be confirmed'; in certain other cases, the language used was "to be confirmed and continued so long as the service is regularly performed". That no difference was in fact intended is shown by a comparison of the registers in C. M. As. Nos. 299 and 120 of 1934. The entries in the statement and those in the register in C. M. A. No. 299 of 1934 make it perfectly clear that the grant was made to the deity; the recommendation in Col. 21, there was "to be confirmed". In C. M. A. No. 120 of 1934 the admissions of the previous archakas and the entries in the register show likewise indubitably that the grant was intended to be to the deity, but in Col. 21 we find that the recommendation, although based on data similar to what existed in the previous case, was differently worded —which fact shows, as already stated, that this difference in the phraseology is immaterial.

There is yet another contention that has been advanced which may be conveniently noticed here. It has been suggested for the archakas that there is another difference in the wording of the recommendation that has an important bearing. The difference lies in this, namely, whether the reference in Col. 21 is to the service or to the worship. It is argued that if the recommendation is to the effect that the grant is "to be confirmed so long as the service is performed", that is a service grant, but if it says 'so long as the worship is performed', that is a grant to the deity. In the first place, it is significant that the final order in either case is merely 'confirmed'. Secondly, a comparison of the entries in the three out of the four registers filed in C. M. A. No. 131 of 1934 is sufficient to show that this contention is unfounded. Although there is no material difference in the entries in the other columns, the recommendation in the one case refers to the continuance of the worship, whereas in the other two cases, to the performance of the services. Lastly, there is another piece of evidence to which we may refer. In some cases extracts from the settlement register have been filed and they show that the lands were entered in the name of the god. Mr. Rangachari, counsel for some of the archakas, in his argument stressed the distinction between the two classes of grants, namely (1) those made to specified individuals who at the time happened to be archakas and (2) those made to the archakas for the time being, i. e. gifts annexed to the archaka office.

His argument is that although the evidence falls short of showing that the grants here belong to the former category, it must still be held that they fall under the latter group. As between the two contentions, it would probably be easier to make out, were the material forthcoming, that the gifts were intended to be annexed to the office, but in the present cases the only possible conclusion at which we can arrive is that the gifts were intended for the deity. For the archakas reliance has been placed upon 39 M L W 513=A I R 1934 Mad 381,[2] where the entries in the inam fair

2. Sami Ayyangar v. Venkataramana Ayangar, A I R 1934 Mad 381=39 M L W 513.

register were construed as evidencing a grant burdened with service. But that case is easily distinguishable by reason of the peculiar wording of the entry in Col. 21, which ran thus "to be confirmed to the party in Col. 16, so long as he continues the performance of the services". The reference here is to a "party" and there can be no ambiguity in the expression "he continues", which must necessarily refer to some individual as distinguished from the deity; and when this entry is read in conjunction with what appears in Col. 16, where the name of the archaka is given, though preceded by that of the God, it would be legitimate to infer that the grant was in favour of the archaka. As observed in that case, whatever ambiguity might attach to the words in Col. 16, the words in Col. 21 were explicit and unequivocal.

It has been contended, not without justification, that the effect of our judgment would be to unsettle prevalent notions and to deprive the archakas as a class of what has always been assumed without question to be their private property. But this result, though unfortunate, cannot be helped and in fact, but for their long and continued enjoyment, the claim made on their behalf would have found little support in the material on the record. The resulting hardship will, we have no doubt, be redressed partially at any rate by the Religious Endowment Board fixing proper and adequate remuneration for the archakas' services; this would be some recompense for the loss by the archakas of the lands which, though wrongly, they came to treat as their own. Then remains a contention which has been put forward relating to the service of the notices. Under S. 70, Hindu Religious Endowments Act, the notice of assessment has to be served upon the trustee of the institution concerned. In most of these cases there was no legal trustee; where a trustee could be found, he was either a nominal or self-constituted trustee. What was more significant—the early property that could be called temple property was in the majority of the cases property claimed by the archakas as their own, so that if their claim was well founded, the temple would be left without a cent of land. The question that arises is whether the requirement of S. 70 is fulfilled by the notice being served upon the archaka on the ground that he is the de facto trustee. When the archaka takes possession of the property of the temple or a part of it and conducts himself for all practical purposes as if he were a trustee, we fail to see why his position is not that of a trustee *de son tort* or de facto trustee, especially when, as is natural in the case of such village temples, there is no properly constituted or de jure trustee. S. 9 (13) runs thus: "Trustee" means

> a person, by whatever designation known, in whom the administration of a religious endowment has vested and includes any person who is liable as if he were a trustee.

In Halsbury's Laws of England the expression "trustee *de son tort*" is thus defined:

> A person who, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, makes himself a trustee de son tort—a trustee of his own wrong, or, as it is also termed, a constructive trustee: 28 Halsbury (1914 edn.), para. 197, p. 91.

Such a trustee or a de facto trustee clearly falls within the definition given in the Act. We therefore agree with the Court below that in every case the service has been sufficient. In some few cases another point has been raised, namely, that under S. 69 the authority that should make the assessment is the Board itself and where a subordinate officer has been deputed to perform that function, there has been no valid assessment. But it has been found on examination that this question is not material, as there has been in each one of the cases at least one demand, i. e. the demand for one fasli which is not open to this attack; it has therefore been agreed that no useful purpose will be served by pressing this point. The result is that in the following cases the judgments of the Court below are confirmed and the appeals are dismissed with costs; the advocate's fee in each case is fixed at Rs. 25: C. M. Appeals. Nos. 299/34, 119/34, 120/34, 122/34, 126/34, 127/34, 130/34, 132/34, 134/34, 455/34, 456/34, 121/34, 123/34, 128/34, 129/34, 131/34 & 458/34.

The following two appeals filed by the archakas have not been pressed and are dismissed with costs; the advocates' fee in each case is fixed at Rs. 25: in C. M. Appeals Nos. 124 of 1934 and 133 of 1934.

As regards C. M. A. 125 of 1934 also filed by the archakas, so far as the main part of the case is concerned, their claim fails; but in regard to the 18 acres referred to in the lower Court's judgment, the case

stands on a different footing. In the inam register the total extent shown as the deity's land is 20 odd acres, but according to the present contention of the Board, the extent of the land claimed is 47·4 acres and comprises five Survey Nos. 422, 547, 563, 569 and 625/3 : *see* Ex. G, the preliminary report. According to the re-settlement register, only three of these plots, namely those bearing Nos. 422, 547 and 563 are shown as belonging to the institution and these three together are of the total extent of nearly 32 acres, that is to say, more than what is shown in the inam register. It follows that the claim of the archakas that they are entitled to the plots bearing the remaining two numbers, namely, 569 and 625/3, of the total extent of 18 odd acres cannot be dismissed as being unfounded. The omission of these numbers in the re-settlement register supports their contention that the deity is not entitled to them. Although the archakas have not been able to make out how they acquired these lands, we must on the evidence hold that their claim has been established. To this extent the lower Court's finding is varied; otherwise the appeal stands dismissed. In this case we direct that each party shall bear his costs throughout.

C. M. A. No. 25 of 1934
(E. P. 176 of 1930)

So much for the appeals, filed by the archakas. Turning now to the appeals filed by the Board, C. M. A. 25 of 1934, with which we shall first deal, raises no question of title. The respondent admits that his possession is that of a trustee but contends that the temple in question is a private and not a public one. The learned District Judge has upheld his contention on the ground of res judicata but as has been held in several cases, a Court under S. 70 (2) of the Act must execute the demand made by the Board as if it were a decree and cannot enter into questions of its validity or propriety : *see* 58 Mad 760[3] and 58 Mad 764.[4] We must therefore set aside the order of the Court below but this decision will not preclude (we make this observation with the consent of both sides) the question whether the temple is private or public, from being raised under S. 84 of the Act, and being dealt with under its provisions. In the circumstances we direct each party to bear his costs throughout. (Their Lordships then considered C. M. A. No. 135 of 1934 (E. P. 204 of 1930), and C. M. A. No. 297 of 1934 and after allowing them, proceeded).

This case differs from the rest, as the deed of gift is here forthcoming; also in another respect, namely that the gift is of a recent date. The donee under the deed is Narayanacharlu, archaka of Sri Konthandaraswami. As observed in 39 M L W 513,[2] the question whether the grant is to an institution represented by its manager or to a named individual who fills a certain character, is often a difficult one. Three constructions are possible : first, that the religious trust was intended to attach to the whole property in which case the archakas hold it in trust for the deity; secondly, that it was intended to attach to a part of it; in other words, that the gift was to the archakas burdened with service; that the gift was intended to be annexed to the archaka office : *see* 39 M L W 389.[1] The question is one of construction, depending in each case upon the terms of the particular instrument. The gift was made, as the deed recites, on the occasion of the installation of the deity. This supports to some extent the Board's contention, but apart from that, the decisive words in our opinion in the deed are those which direct the archaka to take possession on behalf of the institution. The expression 'on behalf of' clearly indicates that the donor intended that the deity was to be the grantee. It is contended that the recital that the donee was to be in possession 'hereditarily' is inconsistent with the idea that the land was to be taken by the deity. This expression shows no more than that the gift was intended to be absolute; it was with the same object that the other recital was made, namely, that the donee was to enjoy the land in any manner he pleased. Lastly remains the fact, though this by itself may not amount to much, that the property was described in the deed as being worth only Rs. 600 which would go to show that the income would be just sufficient for the purposes specified in the deed, namely, nithya naivedya deeparathana. In the result, the lower Court's decision is reversed and the appeal filed

3. President of the Board of Commissioners for Hindu Religious Endowments, Madras v. Shirur Mutt, A I R 1935 Mad 217=156 I C 747=58 Mad 760=68 M L J 200.
4. Ramiah v. Hindu Religious Endowments Board, Madras, A I R 1935 Mad 396=157 I C 818=58 Mad 764=68 M L J 494.

by the Board is allowed with costs; the advocate's fee is fixed at Rs. 25.

C. M. A. 137 of 34 (E. P. 118/30) and C. M. A. 295 of 34 (E. P. 82/31)

In these cases the decisions of the lower Court have not been shown to be wrong and they are accordingly confirmed and each of the appeals is dismissed with costs, the advocates' fee in each case is fixed at Rs.25.

C. M. A. 296/34 (E. P. 128/31)

Mr. Subba Rao, the Board's counsel, reports that the appeal has abated and it is dismissed.

V.B.B./R.K. *Order accordingly.*

A. I. R. 1937 Madras 858

VENKATARAMANA RAO, J.

Champion Automobiles, Ltd.

v.

Chartered Bank of India, Austrelia, and China, Esplanade, Madras.

Civil Revn. Petn. No. 956 of 1935, Decided on 10th March 1937.

Banker and Customer—Collecting banker—Liability of—Invoice of contract of sale of goods from foreign merchants drawn through Bank—Shipment of goods to be through post parcel and payment to be 30 days after sight-documents against payment—Bill of exchange properly presented and payment duly made by purchaser—Bank not intimating date of arrival of goods or date within which goods to be cleared—Goods returned as unclaimed—Bank held liable for loss sustained by purchaser.

The plaintiffs indented for certain goods from a foreign merchant through his representative; the terms of contract being the invoice was to be in the name of the plaintiffs, the bill to be drawn on them through the Chartered Bank of India, the defendant, and the shipment to be by post parcel and payment was to be 30 days after sight-documents against payment. On 12th December 1932 the defendant Bank presented the bill of exchange and it was accepted by the plaintiffs on the same date. The bill was payable on 14th January 1933 on which date the plaintiffs paid the amount and took delivery of the documents from the Bank. When the plaintiffs applied to the post office for delivery of the parcel, it was discovered that the parcel had been returned to the sender on 12th January 1933 as not claimed as the defendant Bank to whom the parcel was addressed had not taken delivery of it in spite of intimation to them to that effect. The defendant Bank had not intimated to the plaintiffs that the parcel would be returned to the sender on 12th January 1933 if delivery was not taken by that date though they were aware of it. The plaintiffs sued to recover the amount as money had and received by the Bank for its use without consideration.

Held: that though under the general law the Bank was under no obligation to keep the goods till payment was made by the plaintiffs, yet it was under a duty to see that by any act or omission on its part the plaintiffs were not prevented from taking delivery of the goods; the Bank was however guilty of negligence in not intimating to the plaintiffs the date of arrival of the goods and the date within which it ought to be cleared from the post office and hence the Bank was liable for the loss sustained by the plaintiffs: *Leather v. Simpson, (1871) 11 Eq 398* and *Guaranty Trust Co. of New York v. Hannay & Co. (1918) 2 K B 623, Disting.* [P 860 C 1, 2]

M. Chelva Iyengar and *P. G. Raghavendra Rao* — for Petitioners.

T. S. Venkatesa Iyer and *V. Krishnan* — for Respondents.

Order.—The material facts necessary for the decision of the points involved in this revision petition are these. The plaintiffs, who are a firm of merchants carrying on business under the name of the Champion Automobiles, Ltd., entered into a contract with Eis Manufacturing Co., New York, through their representatives the Automatic Products Co., in and by which they indented for certain goods. Under the terms of the contract, an invoice had to be sent in the name of the Champion Automobiles, Ltd., the bill to be drawn on them through the Chartered Bank of India and the shipment of goods to be by post parcel and the condition as regards payment to be 30 days after sight-documents against payment.

On 12th December 1932 the Chartered Bank of India presented a bill of exchange drawn on the plaintiffs by Eis Manufacturing Co. and endorsed in their favour in and by which the drawees ought to pay the amount within 30 days after sight and it was accepted by the plaintiffs on 12th December 1932. The bill became due and payable on 14th January 1933 adding the customary days of grace and which date was stamped on the bill itself. On 14th January 1933 the Bank presented a memorandum of the amount payable by the plaintiffs and in accordance therewith the plaintiffs paid a sum of Rs. 214-1-0. The defendants delivered an invoice and a second bill of exchange. The plaintiffs complained that these documents would not enable them to obtain delivery of the post parcel and thereupon the defendants gave a letter of authority enabling the plaintiffs to obtain delivery of the goods from the post office on 17th January 1933. In pursuance thereof when the plaintiffs applied to the post office to deliver them, the post office authorities replied by their letter dated 24th January 1933 that the parcel arrived on 12th December 1932, that due intimation thereof was given to the defendant Bank but the Bank re-

quested them to keep in deposit by a letter dated 16th December 1932, and as the parcel was not taken delivery of within the prescribed period, namely, 30 days, it was returned to London on 12th January 1933 with remarks "Not claimed." The suit is therefore brought for the recovery of the amount paid to the defendants on the ground of failure of consideration and as money had and received for their use. The defendants denied liability alleging that they were only a collecting Bank, that by letters dated 23rd December 1932 and 6th January 1933 (Exs. C and D) they duly intimated the arrival of the parcels to the plaintiffs, that they were under no obligation to keep the parcel in the post office, that they were not liable for the payment of the amount and that there was no cause of action as against them. The learned third Judge of the Small Cause Court, who tried the case, gave a decree in favour of the plaintiffs on the ground that the defendant Bank was guilty of negligence in not keeping the parcel till the due date of payment. On appeal to the Full Bench, the learned Judges of the Full Bench reversed this decision on the ground that the Bank was under no obligation to keep the parcel and that there was no warranty given by them about the genuineness of these documents or the usefulness of the documents which they delivered to the plaintiffs. It is against this decision that the civil revision petition has been filed.

The question in this case is, is the Bank liable to refund the amount paid by the plaintiffs? Before deciding this question, it is necessary to find out exactly what the relative rights of the parties are, under the terms of the contract and the obligation of the defendants in relation thereto. The contract was not with the Bank, but with the Eis Manufacturing Company through their agents the Automatic Products Co. On a fair reading of the contract it is clear that the plaintiffs are entitled on payment to have delivery of all the documents which would enable them to have delivery of the parcel consigned to them. The due date in this case was 14th January 1933. Therefore, as soon as the payment was demanded and made, the bank was bound to have put the plaintiffs in possession of all the customary documents. If this were an ordinary c. i. f. contract, there can be no doubt what the plaintiffs would have been really entitled to. "The essential feature of an ordinary c. i. f. contract", as observed by McCardie, J. in (1919) 1 K B 198[1] at p. 202

> rests in the fact that the performance of the bargain is to be fulfilled by delivery of the documents and not the actual physical delivery of goods by the vendor. All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty.

He later on observes :

> It is also clear that he can make an effective tender even though he possesses at the time of tender actual knowledge of the loss of the ship or goods. For, the purchaser in case of loss will get the documents he bargained for; and if the policy be that required by the contract, and if the loss be covered thereby, he will secure the insurance moneys. The contingency of loss is within and not outside the contemplation of the parties to a c. i. f. contract.

In such a case therefore the bill of lading represents the goods and the transfer of the bill of lading is enough to pass the property in the goods and entitle the buyer to take delivery of the goods and in case of loss he gets the policy of insurance which will compensate him in case he is not able to get the goods. In this case there is no bill of lading because the goods are to be sent by parcel post; there is no policy of insurance to cover any question of loss. Even giving effect to the said principles, so far as they can be applied to the facts of this case, when the parties contemplated shipment by parcel post, it must be presumed that the buyer is entitled to a tender of all the customary documents which would be effective enough to obtain delivery of the goods. No evidence of what the customary documents are, has been given in this case. From the correspondence it appears that a letter of authority from the bank to the post office authorizing the post office to deliver the goods to the plaintiffs was apparently treated as one of the documents which the plaintiffs were entitled to get from the bank on payment. It will be seen that the post parcel was consigned to the Chartered Bank of India and without such a letter there could be no valid tender. What happened in this case is that on the 14th January the defendant bank did not tender such a letter and not until the 17th such a letter was tendered. It may be contended by the non-delivery of such a letter on the 14th, the bank did

1. Mambre Saccharine, Co. v. Corn Products Co., (1919) 1 K B 198=88 L J K B 402=120 L T 113=35 T L R 94=24 Com Cas 89.

not perform what was expected of them and there was a breach of the terms of the contract or obligation which the bank must be deemed to have undertaken on behalf of the sellers; but as the plaintiffs did not complain of any such breach, and the bank did deliver such a letter on the 17th, the bank must be deemed to have tendered this letter on 14th January 1933. But the point in controversy between the parties is whether the bank is under any obligation to keep the goods in the post office till the date of payment; and if the bank is not, are they liable? Mr. Venkatesa Ayyar's argument is that the bank is a collecting bank and the law fastens no obligation on them. The rule in regard to the liability of a collecting bank is thus stated in Hart on Banking :

> The Collecting Banker is under no special duty, as such, to protect the interests of the person to whom he presents a draft for acceptance or payment. So long as he does not give any personal undertaking or make any misrepresentation, he incurs no responsibility to him.

So it may be that the bank is under no obligation to keep the goods but they are under a duty to see that by any act or omission of theirs the buyer is not prevented from taking delivery of the goods. As one of the terms of the contract is that the shipment is to be by parcel post, it may be assumed that it was in the contemplation of the parties that such a parcel according to the rules of the post office could only be kept for a specified period and after the lapse of that period, the goods will not be available for delivery until steps are taken to keep the property without being returned. So, it may be that the plaintiffs must be deemed to have been aware of the fact that the goods cannot be kept more than thirty days after the arrival at the post office if they have not been cleared in the meanwhile, and if the plaintiffs are apprised of the date of arrival, an obligation may be said to have been cast on them for taking steps to see that the goods are not sent back, but before such an obligation is cast upon the plaintiffs, it is, in my opinion, the duty of the bank to inform the plaintiffs that the goods arrived on the 12th so that the plaintiffs may be aware of the fact that, if the goods were not cleared by 12th January, they would be sent back. The letter of 23rd December 1932 simply states that the parcel relating to the bill arrived at the post office and that the plaintiffs are required to take delivery of the parcel at an early date. Ordinarily, one would understand that the goods arrived on that date or at about that date and the plaintiffs may well have thought that the goods would be cleared within a month from that date. Even in the letter of 6th January 1933 except the bare intimation that if the goods were not cleared at an early date, the parcel would be returned to the senders by the post office, no intimation of the date of arrival was given therein. It seems to me that the bank was clearly guilty of negligence in not intimating the date of arrival to the plaintiffs.

Mr. T. S. Venkatesa Ayyar relied on 11 Eq 398[2] and (1918) 2 K B 623,[3] for the position that the banks in those cases were held not responsible when the bill of lading turned out to be a forgery, because they did not give any personal undertaking as to the bill of lading being genuine. But still, if the bank had done anything with reference to that bill of lading by which the buyer is prevented from taking delivery of the goods, could the bank say that they are not responsible? To take a concrete illustration, if by some act or omission of the bank a sheet of the bill of lading is torn or burnt and that the document delivered would not identify the goods that were shipped to the consignee, could the bank escape responsibility? The omission of the bank in not intimating the date of arrival would stand on a similar footing and their conduct in taking the money when they were aware or must be deemed to have been aware that the goods were sent back to the consignors amounts to a misrepresentation within the meaning of the rule enunciated by Hart and referred to above by me. I therefore reverse the decision of the Full Bench and restore that of the trial Judge. In the result the civil revision petition is allowed, but in the circumstances of the case I direct each party to bear his own costs throughout.

C.R.K./V.B.B. *Petition allowed.*

2. Leather v. Simpson, (1871) 11 Eq 398=40 L J Ch 177=24 L T 286=19 W R 431.

3. Guaranty Trust Co. of New York v. Hannay & Co., (1918) 2 K B 623=87 L J K B 1223=119 L T 321=34 T L R 427=20 Com Cas 399.

A. I. R. 1937 Madras 861

VENKATASUBBA RAO, J.

Muthu Goundan and *another* —

Appellants.

v.

Chinniah Goundan and *others* —

Respondents.

Second Appeal No. 371 of 1933, Decided on 19th March 1937, against decree of Sub-Judge, Salem, in A. S. No. 227 of 1931.

Evidence Act (1872), S. 157—Corroboration —Evidence sought to be corroborated must be given before corroborative evidence.

Ordinarily before the corroborative evidence is admissible, the evidence sought to be corroborated must be given. [P 862 C 2]

Where in support of the plaintiff's case a witness for the plaintiff produces a letter written to him by the plaintiff but before the production of such letter the witness does not make any statement whatsoever, which is sought to be corroborated by the letter, the letter cannot be admissible in evidence under S. 157, Evidence Act. [P 862 C 1]

N. C. Vijayaraghavachariar —

for Appellants.

C. S. Venkatachariar —

for Respondents.

Judgment.—Mr. Ramaswami Ayyangar has strenuously argued that the lower Court's judgment is correct, but I am afraid I cannot agree with him. The question is simply: are there grounds for my interference with the lower Court's decision in second appeal? I am clearly of the opinion that there are such grounds. The property in question was brought to sale in pursuance of a decree obtained by one Murugappa against Karungannan, the father of defendant 10. The property was purchased by Venkatasubbier, the agent of Murugappa, at the Court auction held in 1915. This man who is examined as P. W. 6 played a prominent part in the transactions that led up to the action. In 1917, he obtained symbolical delivery of the land that he had purchased. As regards Murugappa the evidence shows that he was in financial difficulties and that defendant 1, Mr. V. S. Narayanaswami Ayyar, a Vakil, was appointed receiver of his properties. It is common ground that in spite of the Court's sale, the land continued to be in the possession of Karungannan and after his death, his son defendant 10. No steps were taken, it is further admitted, to get the patta transferred in the name of the purchaser; on the contrary after Karungannan's death about 1926, the patta was renewed in the name of his son. Venkatasubbier paid the kist from 1919 to 1923 but made default in 1924. Thereupon the land was brought to sale for the arrears of land revenue. Venkatasubbier purchased it and Karungannan got the sale set aside by paying up the arrears due. From that time onwards, the kist was paid first by Karungannan and after his death by his son. The latter, on 6th February 1929, purporting to be the owner of the land, sold it to defendant 2 for Rs. 1,500. The receiver one month later sold the same land to the plaintiff for the low sum of Rs. 400, a circumstance that shows that they were both conscious of the fact that the vendor had a very doubtful right to the property. The plaintiff brought this action on 10th February 1929 and the point that had to be decided was, was he or his predecessor-in-title in possession of the land in question within 12 years of the suit?

The plaintiff rested his case upon an alleged tenancy which, if proved, would establish his title to the property. It was asserted that immediately after Venkatasubbier obtained symbolical possession, there was an agreement in virtue of which Karungannan became his tenant. The learned District Munsif who has written a careful judgment, has found that with a view to make out this case, Venkatasubbier did not scruple to forge, falsify and fabricate documents. The lower Appellate Court has agreed with that view and the documentary evidence on which the plaintiff relies stands therefore condemned. The trial Court finding that the case of the tenancy set up is utterly false, has dismissed the suit. It has very naturally and rightly attached great importance to the proceedings that took place in connexion with the revenue sale. If the property really belonged to Murugappa (what has been alleged is that Venkatasubbier conveyed the property to this man), how is that circumstance reconcilable with the fact that Venkatasubbier himself purchased it at the revenue sale? Again, if Karungannan did not believe himself the owner, is it in the least likely that he would have paid up the arrears and got the revenue sale set aside? Basing his finding inter alia on this ground, the District Munsif has, as already observed negatived the plaintiff's claim.

The Subordinate Judge however has reversed his decision in view mainly, if not

solely, of the inference he has drawn from a post-card marked Ex. F, dated 20th December 1918. It is supposed to have been written by Venkatasubbier to P. W. 3, the plaintiff's brother. There the former complained that persuaded by P. W. 3 he had let the property to Karungannan, who had failed to pay the rent and P. W. 3 was therefore requested to intervene and see that Karungannan behaved justly. That is the purport of the letter and the learned Judge thinks that it probabilises the case of the tenancy that has been set up ; in other words, he has treated Ex. F as substantive evidence and if that is wrong, his judgment cannot stand. It seems not a little strange that it has occurred to none in the lower Courts to challenge the genuineness of this card. Why a man in the position of P. W. 3 has chosen to preserve this apparently unimportant letter for over 13 years, no one seems to have elicited. From 1918 when the letter was written, to 1929 when his brother became the owner, this post-card could possess no significance whatsoever to the witness.

I should have thought that in a case of this sort, where almost every document produced for the plaintiff had been forged, fabricated, or tampered with, a post-card of this description would not have been left unchallenged. Moreover, the manner in which this document came to be produced in Court ought to have excited suspicion. Venkatasubbier, curiously enough, was not examined in the regular order, his evidence being postponed till the witnesses on both sides had been examined. The letter was produced by P. W. 3 without requisition and without summons and he formally proved it by swearing that Venkatasubbier had sent it to him. The contents of Ex. F are clearly hearsay or second hand evidence and although proof has been offered to show that it has been written by Venkatasubbier, I fail to see how it advances the plaintiff's case. The mistake lies in the lower Court having treated it as substantive evidence which could be acted upon. Under S. 157, Evidence Act, the testimony of a witness may be corroborated by a former statement made by him about the time of the occurrence. Thus it could have been properly used to corroborate Venkatasubbier, had he deposed there was a lease as alleged in this letter. But strangely again, neither does Venkatasubbier refer to this particular lease said to have been granted in the circumstances mentioned in Ex. F nor, what is even more strange, does he allude to the letter itself. The lower Court seems to have entirely ignored this aspect of the case. In the first place Ex. F as already observed is not substantive evidence ; secondly it cannot be used to corroborate the testimony of P. W. 3 granting that he has referred in his evidence to the lease mentioned in it and thirdly, the witness, in corroboration of whose evidence alone this post-card was admissible, has made no statement whatsoever which it could have corroborated. I may further observe that "Ordinarily before corroborative evidence is admissible the evidence sought to be corroborated must have been given". The Court has no doubt a discretion to allow evidence to be given out of the regular order, though such a course will be found in most cases inconvenient : Woodroffe and Ameer Ali's Indian Evidence Act, 9th Edn., p. 1026. If this post-card has been excluded, as it ought to have been, the question remains: would the lower Court have reached the conclusion which it did ? A perusal of his judgment shows that it was influenced almost solely by the Ex. F, which, as already observed, ought never to have been acted upon. I am satisfied that independently of this letter which has been wrongly admitted, there is not sufficient evidence to justify the lower Court's reversal of the well considered decision of the District Munsif. In the result, the second appeal is allowed and the judgment of the first Court is restored. Plaintiff shall pay the costs of defendants 2 and 7 in the lower Appellate Court, but as to costs here I make no order. Leave to appeal is refused.

C.R.K./K.B. *Appeal allowed.*

A. I. R. 1937 Madras 862

VENKATARAMANA RAO, J.

Panchumarthi Appamma and *others*—Appellants.

v.

Madamanchi Bhujangarayudu and *others*—Respondents.

Second Appeal No. 631 of 1933, Decided on 22nd March 1937, against decree of Dist. Court, Guntur, in A. S. No. 22 of 1932.

Civil P. C. (1908), S. 92 — Dharmadhayam grant—Grantee described as Dharmakartha and grant subject to condition of 'tope' being preserved and produce applied to charity—Tope utilized as place of shelter for villagers and cattle — Grant held public charitable trust and S. 92 therefore applied.

Where the fair inam register showed that a certain grant was a dharmadhayam grant and the grantee was a person who was described therein as Dharmakartha and the grant was subject to the condition of the tope being preserved and the produce applied to charity and it was in evidence that the tope was being utilized as a place of shelter for the villagers, for the cattle and for the wayfarers:

Held : that both from the nature of the grant and from the enjoyment in regard thereto, it must be inferred that the tope was dedicated to the use of the public, i. e. the villagers and wayfarers, who resorted thereto during the course of their travel and that therefore S. 92, Civil P. C. applied to it : *A I R 1917 Mad 704, Disting.*

[P 863 C 1, 2]

Ch. Raghavarao and *Sriramamurthy*— for Appellants.

S. Ramachandran and *V. Govindarajachari* — for Respondents.

Judgment.—The main point argued by Mr. Raghava Rao in this second appeal is whether the suit property can be the subject matter of a public charitable trust so as to attract the provisions of S. 92, Civil P. C. It is a 'tope' inam consisting of 13.78 acres in the village of Paladugu. Both the Courts have taken the view that a public charitable trust was created in respect thereof and framed a scheme in regard thereto. Tope inams are a familiar class of charitable grants made by ancient rulers for the benefit of the public or a section of the public, for example the villagers of a particular locality. The date of the original grant is not known and the grant has not been produced. All that we have in this case is an extract of the fair inam register and an inam title deed issued at the time of the enfranchisement of this inam. A reference to the inam fair register shows that the grant was a dharmadayam grant and the grantee was a person known as Anidi Venkata Narasu who was described therein as Dharmakartha. In the remarks column appears the following statement: "subject to the condition of the tope being preserved and the produce applied to charity". The evidence also shows that this tope was being utilized as a place of shelter for the villagers, for the cattle and for wayfarers. Therefore, both from the nature of the grant and from the enjoyment in regard thereto, the suit property must be intended to have been dedicated to the use of the public, i. e. the villagers and wayfarers who resort thereto during the course of their travel. It will, in my opinion, be a clearly public charitable trust, and there is nothing to preclude the application of S. 92, Civil P. C. to it. I find that the same view was taken with regard to a similar grant by Ramesam and Venkatasubba Rao, JJ. in Appeal No. 231 of 1926. Mr. Raghava Rao relied on a case in 32 I C 947[1] where there was a grant to an individual subject to his performing certain duties to the public, and it was there held that the mere fact that the grantee was enjoined to perform certain duties for the benefit of the public, would not make it a public charity. In this case it has been found that the produce of this tope was being distributed among the villagers. This negatives the idea of any beneficial ownership in any individual, but tends to support the view that the grant was intended for the benefit of the public. Therefore, the view taken by the learned District Judge in para. 4 of his judgment seems to me to be correct, and I see no reason to differ from it.

Mr. Raghava Rao contended that the provisions of scheme as framed in Appeal No. 231 of 1926 in and by which a portion of the land was allowed to be cultivated and the produce taken by the members of the family of original Dharmakartha subject to their utilizing the produce for the preservation of the tope, may be adopted in this case. I am not inclined to introduce any such provision in the scheme framed in the case. No doubt the nature of the original grant in this case is not known, but such enjoyment as is known seems to point to the entire village having the beneficial use of the property and not a single individual. The scheme as framed seems to be reasonable except that it requires a modification, viz. that in case the adoption of defendant 6 is established in the separate proceedings which I understand are pending, he will be entitled to be a trustee along with the plaintiff and the defendants. Subject to this modification, this second appeal fails and is dismissed with costs. (Leave refused).

C.R.K./D.S. *Appeal dismissed.*

1. Venkatasubbiah v. Murugula Sheik Silar Sahib, A I R 1917 Mad 704=32 I C 947.

A. I. R. 1937 Madras 864

BEASLEY, C. J.

Janaki Ammal — Petitioner.

v.

Marudai Chetti — Respondent.

Civil Revn. Petn. No. 1617 of 1935, Decided on 26th January 1937, from order of Dist. Court, Trichinopoly, D/- 2nd July 1935.

Execution — Attachment — Deed settling property on widow—Estate granted only for life — Settlor and his heirs to be maintained by widow—Decree against widow — Widow not having power of disposition—Such property held could not be attached — But decree-holder is entitled to have receiver of income of property.

A settlement deed settled the property on a widow out of whose income she had to maintain the settlor himself, and his other relatives. It also provided that the widow was not to alienate the property and that subsequent to her death it was to devolve on settlor's and settlee's heirs. It did not contain any provision for the maintenance of the widow. The property was sought to be attached in execution of a decree against the widow, and the execution was contested on the ground that the property was not attachable under S. 60 (n), Civil P. C.:

Held: that the document did not confer on the widow anything more than a life-estate and since there was a restraint on alienation imposed, the property was not property over which the widow had a disposing power and therefore it could not be attached in execution of a decree against her. But the decree-holder was entitled to have a receiver of the income of the property, although he could not bring that property to sale: *A I R 1931 Pat 364, Foll.* [P 864 C 2]

K. V. Srinivasa Iyer — for Petitioner.

V. Satyanarayana — for Respondent.

Order. — The petition must be dismissed with costs, though the lower Court's order must be modified very materially. I find that the settlement deed in question settled the property sought to be attached on the settlor's widow, the judgment-debtor, and out of its income she had to maintain the settlor himself, his mother and the child then born and it had in view the maintenance also of subsequent born children. The settlor died and so did his mother and, contrary to anticipations, there were no further children. Therefore the only child alive is the one in existence at the date of the settlement —a daughter—who is now of age. The settlement contains the all-important provision that the widow was not to alienate the property. She became a judgment-debtor and the plaintiff sought to execute his decree on that property and the point was raised that it was not attachable under S. 60 (n), Civil P. C., it being a right to maintenance.

As has been very properly pointed out by the learned counsel for the respondent, there is no provision whatsoever in the settlement deed for the maintenance of the widow. Therefore what was sought to be attached here was not her right to maintenance. What was sought to be attached was her property out of which she was to pay the maintenance of other persons. The position in my opinion therefore is that the settlement gave to the widow a life-interest in the property. There is a provision for the property going subsequent to her death to "our heirs". I take this to mean the heirs of the settlor and the settlee. I cannot spell out of this document anything more than the provision for a life-estate and since there clearly is a restraint on alienation imposed, it seems to me that this property was not property over which the petitioner judgment-debtor, has a disposing power and upon this point I agree with the observations of Macpherson, J. in 10 Pat 582[1] at p. 587 where he says :

Property is not liable to sale by the Court unless the judgment-debtor has a disposing power over it for his own benefit. The measure of liability to involuntary alienation is the power of voluntary transfer.

Therefore this property was not liable to attachment. There is however another remedy open to the decree-holder, the respondent, namely the relief of indirect execution, that is to say, he is entitled to have a receiver of the income of the property, although he cannot bring that property to sale. I therefore modify the lower Court's order by giving him that relief and in order to save expense, as this is a small estate, I appoint him, viz. the decree-holder, receiver. There must however be a condition imposed upon his appointment and that is that the directions of the lower Court must be taken as to the payment of some allowance to the judgment-debtor in order to maintain her. Subject to these observations, as I have stated before, this civil revision petition is dismissed with costs.

C.R.K./B.D. *Order modified.*

1. Khitnarain Sahi v. Surju Seth, A I R 1931 Pat 364=132 I C 868=10 Pat 582=12 P L T 508.

* A. I. R. 1937 Madras 865

VENKATARAMANA RAO, J.

Poovankulathil Thottam Puthiya Purayil Abdullah — Appellant.

v.

Kakkat Valappil Moidin Kutty and *others* — Respondents.

Second Appeal No. 1137 of 1932, Decided on 23rd February 1937, against decree of Sub-Judge, Tellichery, in A. S. No. 163 of 1931.

(a) Malabar Law—Devaswom — Kanom by half of uralans without reference to rest is invalid—Subsequent ratification by rest will not validate it.

In the case of public trusts, the act of the majority is held to be the act of the whole number. But the act of the majority can only be binding on the trust if done after giving the minority an opportunity to state their views. Where therefore there could be no majority or the act was done by some of the trustees without reference to a co-trustee or trustees, the act will be invalid. [P 866 C 2]

Where half of the uralans for a devaswom execute a kanom kuzhikanom demise without reference to the rest, the kanom is invalid and subsequent ratification by the rest cannot validate that which is invalid at its inception : *34 Mad 406* and *A I R 1919 Mad 351, Rel. on.* [P 866 C 2; P 867 C 1]

*** (b) Landlord and Tenant — Estoppel—Lease by some uralans for devaswom—Subsequent kanom kuzhikanom by same uralans with right to recover rent and possession from lessee—Execution of subsequent kanom duly notified to lessee—Lessee paying rent to transferee during lease but refusing to hand over possession on expiry, pleading want of right in uralans to grant kanom—No evidence that lessee cognizant of defective title in transferee during lease—Lessee held not estopped from doing so.**

Where the facts do not amount to a fresh taking of the lease and the old lease subsists and payment of rent is made to another in pursuance of the terms of the old lease, to a person who has got authority to collect the rent from the landlord either by virtue of an assignment of the reversion or otherwise, mere payment of rent in such cases will not operate as an estoppel but will only amount to an admission which will be capable of explanation. [P 867 C 1]

Some of the uralans for a devaswom granted a lease at the expiry of which possession was to be surrendered. Four years thereafter, the same uralans executed a kanom kuzhikanom (which they alone could not execute) with right to recover the rent due from the lessee and also possession at the expiry of the lease. Due notice of the execution of this kanom was given to the lessee who continued to pay the rent to the transferee. But at the expiry of the lease the lessee refused to hand over possession on the ground that the kanom was invalid as some of the uralans had no power to execute it. There was no evidence that the lessee was cognizant of the transferee's defective title during the lease :

Held : that the lessee was not impeaching the title of his landlord, but his plea was that the uralans had no title to grant the kanom in question, and the lessee was not estopped from disputing the transferee's title, as the payment of rent by him might be deemed under a mistake and in ignorance of the defect in title : *Doe d Higginbotham* v. *Barton, 11 Ad & E 307* and *Doe d. Oliver* v. *Powell and Pyne, 1 Ad & E 531, Rel. on; Doe d. Marlow* v. *Wiggins, 114 E R 937* and *A I R 1917 Mad 789 (F B), Disting.* [P 867 C 1; P 869 C 1]

O. T. G. Nambiar and *C. Govindan* — for Appellant.

A. Achuthan Nambiar — for Respdts.

Judgment.—This second appeal arises out of a suit in ejectment to recover possession of the suit land with arrears of rent and future profits from defendant 1 who was in occupation thereof. Defendants 2 to 5 were impleaded in the suit as assignees of defendant 1. The suit property admittedly belonged to a devaswom known as Puthankottan Devaswam. The uraima right was held, according to the findings of both the lower Courts, by four uralans who are the karnavans for the time being of four different tarwads, namely Neelangapurath, Edavan Puttalath, Erambala and Thiyancheri Kaloth. Defendant 1 occupied the land under a marupat dated 24th June 1912, Ex. A, granted by the uralans Neelangapurath Appa alias Chidan Nambiar and Edavan Puthalath Krishnan Nambiar, the then karnavans of their respective tarwads. It was to run for a period of 12 years and at the end of the term, defendant 1 undertook to surrender possession on payment to him of the kuzhikur value. Four years thereafter the same two uralans executed a kanom kuzhikanom demise in favour of the plaintiff under a deed dated 5th July 1916, Ex. B, for a period of 16 years from the said date with power to recover the rent due from defendant 1 in accordance with the terms of the marupat and also possession of the land at the end of the term. Subsequent to this deed the plaintiff was receiving rent from defendant 1 until 1928. After the expiry of the term fixed in the marupat, the plaintiff demanded possession from defendant 1 and he having declined to do so gave him notice to quit and brought the present suit for possession and profits, past and present.

The main defence of defendant 1 was that the kanom deed was invalid and conferred no title on the plaintiff as it was executed only by two uralans without reference to the other uralans and giving

them an opportunity of consulting them. He also pleaded non-joinder of the uralans. To satisfy this objection as to non-joinder, Neelangapurath Koman Nambiar and Edavan Puthalath Kunhakutti Nambiar, defendants 6 and 7, were impleaded as party defendants as the then karnavans of their respective tarwads, the previous karnavans and parties to both Exs. A and B having died in the meanwhile. They contended that the kanom demise in favour of the plaintiff was invalid and not binding on the devaswom and further pleaded that it was not executed for a valid necessity of the devaswom and the plaintiff had no right to recover possession of the devaswom property from defendant 1. Both the lower Courts have non-suited the plaintiff on the ground that the plaintiff's title was defective in that the deed in his favour was not executed for or by all the uralans of the devaswom and further that it was not executed for a valid necessity, and also negatived the plea of estoppel raised on behalf of the plaintiff which was sought to be invoked against defendant 1 by reason of the payment of rent by him during the currency of the lease.

Two questions have been argued by Mr. Nambiar in this second appeal on behalf of the plaintiff: (i) The kanom demise in favour of the plaintiff is valid though it was executed by two uralans because it was subsequently assented to by the Karnavan of Erambala tarwad in 1928 and it does not appear that Thiyancheri Keloth tarwad appeared to have taken part in the management; (ii) Defendant 1 himself having obtained the lease from the two uralans from whom the plaintiff obtained the kanom and subsequently paid rent to him without any protest, is estopped from disputing his title and is bound to surrender possession to him.

In regard to the right of trusteeship of the devaswom, it is not open to Mr. Nambiar in second appeal to canvass the finding of fact arrived at by both the lower Courts that it is vested in four uralans being the karnavans for the time being for the four different tarwads already referred to. So this case must be dealt with on the footing that there are four uralans for the devaswom. It is also clear from the evidence that the kanom demise in favour of the plaintiff was executed by the two uralans without reference to the remaining two uralans. The question under such circumstances is, is the kanom valid and does it confer any right on the plaintiff? In the case of private trusts it is the accepted principle of law that the act of the majority of the trustees cannot bind the minority or the trust estate and in order to bind it, the act must be the act of all. Any transfer or alienation of trust property by a majority of the trustees cannot confer any right in the transferee or alienee, even though made in the interests of the trust estate. In Perry "On Trusts" the law is thus stated:

> It seems well to note an important difference between cases where a trustee ignored his co-trustee in attempts to dispose of or bind the trust property and cases where he assumed to act as agent for his co-trustees since the necessary participation of all the trustees may be by agency of one. The attempted disposal in cases of the former kind is entirely nugatory. Thus a lease of trust property signed by only one of two trustees is inoperative and cannot be ratified, since it does not purport to bind the other joint tenant. The same is true of an assignment of a bond and mortgage by less than the whole number of trustees: Vol. 1, p. 661, S. 411, footnote (a).

However, an exception is made in the case of public trusts; the act of the majority is held to be the act of the whole number. But as pointed out in 34 Mad 406,[1] it does not appear to follow from the exception that they may transact the affairs of the trust without any reference to the minority. The act of the majority can only be held to be binding on the trust if done after giving the minority an opportunity to state their views. Where therefore there could be no majority or the act was done by some of the trustees without reference to a co-trustee or trustees, the act will be invalid. The same principle which applies to the case of a private trust would apply to a disposition or transfer made by such trustees. In 34 Mad 406,[1] it was held that a renewal granted by a majority of the uralans of a devaswom was held to be invalid on the ground that the plaintiff who was one of the uralans was not consulted. In the present case only two of the uralans executed the kanom in favour of defendant 1. Even the rule of the majority will not apply: *vide* 42 Mad 335,[2] where one of the two trustees of a public trust was held incompetent to execute a valid demise when the other co-trustees refused to assent to it. Even assuming that there were only three

1. Kumban v. Moorthi, (1911) 34 Mad 406=7 I C 422=20 M L J 951.
2. Parambil Parakum v. Narayanan Nambudiri, A I R 1919 Mad 351=50 I C 371=42 Mad 335=36 M L J 295.

uralans for the suit devaswom, as the kanom was executed without reference to the third uralan, the kanom must be held to be invalid and subsequent consent or ratification by the third uralan cannot validate that which at its inception is void. The plaintiff cannot therefore be deemed to have acquired a valid right thereunder.

The next question is whether defendant 1 is estopped from denying the title of the plaintiff and therefore precluded from resisting the plaintiff's claim for possession. The ground of estoppel is based on the fact that defendant 1 was paying rent from 1916 to 1928, that is, during the period of his lease. It is no doubt the general rule that a tenant is estopped from disputing the title of the landlord from whom he received possession, the principle being that he ought not to be permitted to deny the state of facts which he has agreed and which shall be taken as the basis of the arrangement under which he got possession. This rule is also extended even to cases where the tenant has not been actually let into physical possession but entered into an agreement with the assignee of his original landlord or his legal representative so as to operate as a fresh demise or a fresh taking of the lease; in such cases the tenant is deemed to have got into possession under him but the law has always permitted the tenant to show that the attornment was under a mistake or misrepresentation or in ignorance of the defect in title of such assignee or representative. But in cases where the facts do not amount to a fresh taking of the lease, and the old lease subsists and payment of rent is made to another in pursuance of the terms of the old lease, to a person who has got authority to collect the rent from the landlord either by virtue of an assignment of the reversion or otherwise, mere payment of rent in such cases will not operate as an estoppel but will only amount to an admission which will be capable of explanation. In the present case, there was no fresh demise. Defendant 1 continued to pay the rent because under the kanom-deed power was given to the plaintiff to collect rent and defendant 1 was given notice of the execution of the said kanom. It does not appear from the evidence that defendant 1 was cognizant of the defect of title of the plaintiff. In such circumstances payment of rent may well have been deemed to be under mistake and in ignorance of the defect of title.

This case is in my opinion covered by the decision in 11 Ad & E 307.[3] In that case one Mathew Morton owned a freehold. He mortgaged it to Thomas Marriott in 1821. In spite of the mortgage Morton was allowed to remain in possession though he had no legal estate. In 1826 Morton let the premises to Barton as tenant from year to year and subsequently in 1829 Morton assigned the premises by way of mortgage to Higginbothams, the lessor of the plaintiff. After the mortgage to Higginbothams, Morton paid rent from time to time to Higginbothams. Higginbothams also demised the rest of the land to one Bullock and realised rent from him. Bullock subsequently underlet the premises to Warburton. In 1835, Woodhead, the assignee of Marriott, the original mortgagee, gave notice to Barton and Warburton to pay him the rents who accordingly paid him thereafter. On demand by Higginbothams, the lessor of the plaintiff, both Barton and Bullock refused to pay the rent; thereupon notices to quit were given to them and a suit in ejectment was filed. The defence was that Morton had no right to execute a mortgage in favour of Higginbothams and the latter acquired no right thereunder and the plaintiff was therefore not entitled to sue in ejectment. The question was whether Barton and Warburton or any of them was estopped from impeaching the title of Higginbothams. Lord Denman, C. J. held that Barton was not estopped though Warburton might be. The following passage in his judgment is instructive:

> Barton is precluded from denying that Morton had a title; but he is at liberty to deny that the lessor of the plaintiff ever had any derivative title from Morton, unless the payment of rent concludes him. We do not think that he is so concluded, because, he being tenant to Morton, and having notice of a subsequent mortgage by Morton to the lessor of the plaintiff, had no right to question it, nor, until he received notice from Woodhead or the prior mortgagee, had he any reason to doubt that the legal estate had passed to the lessor of the plaintiff. He may truly be said to have paid the rent under a mistake; and then he may show, not that Morton had not a title by which he, Barton, would be estopped as against Morton himself, but that Morton's title was not such a one as would enable him to pass a legal estate to the lessor of the plaintiff .... And this we think he was at liberty to show, though, if there had been a demise in the declaration by Morton himself, it might have been otherwise .... As to Warburton, he is bound

3. Doe *d.* Higginbothams v. Barton, (1840) 11 Ad & E 307=3 P & D 194=9 L J Q B 57=113 E R 432=4 Jur 432.

to admit that the lessor of the plaintiff had a title when he (Warburton) was let into possession. In truth, the lessor of the plaintiff was mortgagor in possession (for he can be in no better situation than Morton).

It will be seen from this case that the rent was paid by Morton to Higginbothams because he received notice of the subsequent mortgage in favour of Higginbothams from Morton. In this case defendant 1 paid rent to the plaintiff because he had notice of the kanom. It may be that the plaintiff could not have denied their title as Denman, C. J. pointed out in the case of Barton if the uralans had sued, but it does not preclude defendant 1 from showing that the two uralans could not confer a valid title on him under the said kanom. Further, in this case the lease had expired. The original uralans are dead. The question is in whom the reversion vested. It had been established in this case that the reversion is in the devaswom and not in the plaintiff and under such circumstances the lease having expired and the two uralans who gave him the lease being dead, it is open to defendant 1 to show that the title of the uralans under whom he got possession expired, and the persons in whom the title now vests were the persons to whom he should deliver possession.

Mr. Nambiar relied very strongly on 114 E R 937.[4] In that case the tenant was holding the land under one Samuel Simpson. Pending the tenancy, Simpson died leaving the premises to Marlow. Marlow gave Thompson notice to quit which would have expired in 1840. Subsequent to the notice to quit and before the actual expiry of the term the tenant agreed to take of William Marlow the same land from the expiry of the term on a certain rental until March 1841, and surrender possession thereafter. It was held under such circumstances that the tenant was estopped from disputing the title of Marlow. The ground of the decision was that there was a fresh demise and the legal effect of the arrangement was that he became a tenant of Marlow from the expiry of the term. Mr. Nambiar also relied on the Full Bench decision in 40 Mad 561.[5] It will be seen from that case that the tenant executed the lease in favour of his landlord's vendee and it was considered to be a fresh taking under him. Even then it was held that he was only estopped from denying his title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title. Phillips, J. at p. 578 points out the distinction between a case where there is an agreement between a tenant and a landlord which constitutes a new tenancy and a case where a tenant holds under his old lease and merely continues payment of rent in accordance with the claim put forward by the assignee of the landlord under whom he came into possession. In the present case, as has been already pointed out, the tenant was holding under the old lease and was merely continuing payment of rent in ignorance of the fact that the two uralans were not competent to execute the kanom in question.

Mr. Nambiar contended that inasmuch as defendant 1 claimed under the same uralans from whom the plaintiff got the kanom, it ought not to lie in the mouth of defendant 1 to impeach their title, but it will be seen that defendant 1 was not impeaching the title of his landlords, but his plea is the landlords had no title to grant the kanom in question to him on the date on which they purported to do so. The lease in favour of defendant 1 is not in question. It may be that the said lease might have been granted by the said uralans in consultation with the other uralans and be a valid lease binding the devaswom though the kanom cannot be. In 1 Ad & E 531[6] a similar question arose. A company owned certain premises and they sold it to one Pope in 1818. He became bankrupt and the assignee in bankruptcy sold it to Oliver. The defendants claimed it under a conveyance in 1824 from the same company. In a suit in ejectment against the defendants, the defendant sought to let in evidence to show that, at the time of the conveyance of 1818, there was an outstanding legal estate in a trustee for the company and therefore the company had no legal estate to convey to Pope. The trial Judge refused to admit the evidence on the ground that it was not open to the defendants to impeach the title of the company under whom they claimed. The judgment of the trial Court

4. Doe *d.* Marlow v. Wiggins, (1843) 114 E R 937=4 Q B 367=3 G & D 504=12 L J Q B 177=7 Jur 529.
5. Venkata Chetty v. Aiyanna Goundan, A I R 1917 Mad 789=36 I C 817=40 Mad 561=31 M L J 712 (F B).
6. Doe *d.* Oliver v. Powell and Pyne, (1834) 1 Ad & E 531=3 N & M 616=110 E R 1311.

was reversed by a strong Court of Appeal presided by Lord Denman, C. J. They observe thus:

> The evidence ought to have been admitted. The outstanding term might have been called in between 1818 and 1824, so that the company might have had a good title at the latter time, and a bad one at the former.

I would apply the principle of the said decision and overrule the contention of Mr. Nambiar. The contention of estoppel therefore is not sustainable. The decision of the lower Court is correct. In the result, the second appeal fails and is dismissed with costs of 4th and 8th respondents—one set. (Leave to appeal refused).

C.R.K./V.B.B. *Appeal dismissed.*

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* A. I. R. 1937 Madras 869

VENKATARAMAÑA RAO, J.

Kona Adinarayana — Appellant.

v.

Dronavalli Venkata Subbayya and *another* — Respondents.

Second Appeal No. 726 of 1935, Decided on 25th March 1937, against decree of Sub-Judge, Masulipatam, in A. S. No 27 of 1935.

*** (a) Minor — Contract by karta on behalf of joint Hindu family including minor—Principle that minor cannot sue on such contract on attaining majority is not applicable — Minor member can enforce contract on attaining majority.**

Want of mutuality in the case of a contract entered on behalf of a minor is based on the personal incapacity of the minor to enter into the contract at the time the contract was entered into, and subsequent affirmation by the minor after attaining majority is immaterial. This principle however does not apply to the case of a minor in a joint Hindu family. There the family owns and possesses property and there is no minor's estate as such. The manager represents the family; he enters into contract on its behalf; a contract of sale entered into by him must be deemed to be on behalf of every member of the family, adult or minor. It is wrong therefore to dismiss a suit for specific performance brought by a minor in a joint Hindu family after attaining majority on the ground that the contract lacks mutuality having been made by or on behalf of minors who were not competent to contract: *A I R 1917 Pat 478* and *A I R 1934 All 1019*, *Rel. on*; *39 Cal 232*, *Expl.* [P 870 C 2]

(b) Hindu Law — Joint family — Karta — Contract of sale signed by karta for himself and separately as representing minor — Other adult member signing by way of concurrence — Contract held entered into on behalf of entire family.

The eldest brother of a joint Hindu family as karta entered into a contract of sale of an item of joint family property wherein he signed it for himself and as representing the minor brother. The second brother also signed the contract by way of concurrence in the sale. In a suit for specific performance of the contract by the brothers, it was contended by the vendees that the contract could not be said to have been entered into on behalf of the family and all the members of the family were not parties as the minor was separately represented by the karta:

Held: that karta alone could represent the minor member. In fact he alone could represent by himself the entire family. Therefore the karta must be deemed to have represented the entire family and the other brother signed only by way of concurrence: *A I R 1934 All 1019* and *25 All 407 (PC)*, *Rel. on.* [P 871 C 1, 2]

(c) Contract — Enforcement of — Karta contracting sale of joint family property for self and minor member — No legal necessity established — Purchaser not repudiating contract — Suit by both brothers for specific performance on minor's attaining majority held should be decreed.

A karta entered into a contract for sale of joint family property for himself and on behalf of a minor member. It was discovered that the sale was not for necessity and as such was not binding on the minor. Due to this defect in the contract the vendee could have repudiated the contract before the defect was cured but he did not. Later on the karta along with the minor who had attained majority sued for specific performance of the contract:

Held: that although the contract was not binding on the minor at the time of the contract, yet as on the date of the suit the plaintiffs were able and willing to give a valid title to and convey the property, specific performance should be granted: *Hoggart* v. *Scott*, (*1830*) *1 Russ & My 293*; *Salisbury* v. *Hatcher*, (*1842*) *2 Y & C Ch 54*; *26 Mad 74* and *32 Mad 320*, *Rel. on.* [P 871 C 2; P 872 C 1]

P. Somasundaram — for Appellant.

P. Satyanarayana Rao — for Respondents.

Judgment.—This second appeal arises out of a suit for specific performance of a contract of sale of immoveable property. The contract is dated 4th August 1930 and the property agreed to be sold thereunder was an extent of 75 cents of seri dry bapat wet land bearing Re-survey No. 276/3 with the paddy crop thereon in the village of Krishnapuram, Kistna District. The sale price was Rs. 1,500. The contract was executed in favour of defendant 1 by plaintiffs 1 and 2 and plaintiff 3 represented by plaintiff 1 as elder brother and guardian as he was then a minor. Plaintiffs 1 to 3 are members of an undivided Hindu family of which plaintiff 1 is admittedly the manager. The purpose recited in the contract of sale was to discharge a debt alleged to be due by the family. In pursuance of this contract, an advance of Rs. 25 was paid by

defendent 1 and possession of the property was given over to him on the said date and ever since defendant 1 has continued in possession. This suit has been instituted on 4th August 1933 by the three plaintiffs after plaintiff 3 attained majority for specific performance of the said contract and for recovery of the balance of purchase money with interest thereon alleging that they were ever ready and willing to perform the contract. They have also impleaded defendants 2 to 4 along with defendant 1 as they are the sons of defendant 1. The main defence was that the purpose recited in the document was untrue; the contract was not binding on the minor plaintiff; there was thus want of mutuality and hence the contract was unenforceable. Two issues were raised in the case namely :

(1) Whether the suit contract is binding on minor plaintiff 3 ? (2) Whether the contract is unenforceable for want of mutuality ?

It was found that a purpose recited in the document was not true; there was no legal necessity such as would justify the sale of the joint family property. The first Court nevertheless gave a decree in favour of the plaintiff on the ground that question was immaterial as plaintiff 3 also sued for specific performance. The learned Subordinate Judge on appeal was of the opinion that on the date of the contract it could not be enforced against the minor; there was a lack of mutuality; his subsequent affirmation was immaterial and the contract could not be enforced against him following the decision in 39 Cal 232.[1] He nevertheless gave a decree by directing specific performance in respect of 2/3rd share in the plaint schedule property. Both parties have preferred appeals against this decision, the plaintiffs on the ground that specific performance as prayed for by them should have been decreed and the defendants on the ground that the decree as given is unsustainable in view of the fact that what was decreed was not what was bargained for and the contract was an indivisible contract and could not be split up in the manner directed by the learned Subordinate Judge. The question, therefore, is : is the principle of the decision in 39 Cal 232[1] applicable to this case ? In the said case, a minor after attaining majority sued to enforce a contract of sale of immoveable property entered into by the guardian during the minority. It was held he could not sue. Their Lordshipps of the Judicial Committee expressed themselves thus :

It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain a specific performance of the contract.

The want of mutuality, it will be seen, is based on the personal incapacity of the plaintiff to enter into the contract at the time the contract was entered into, and subsequent affirmation by the minor after attaining majority was held immaterial. Can this ground be available at all with reference to contracts entered into by a joint family which may consist of minors as well as adults and the family as such is treated as one entity in its relations with the outside world? The family owns and possesses property and there is no minor's estate as such. The manager represents the family ; he enters into contract on its behalf; the contract of sale entered into by him must be deemed to be on behalf of every member of the family, adult or minor. If the transaction is one for a purpose binding on the family, the minor's interest in the property is also bound and it is within the competence of the manager to bind so unlike the manager of a minor's estate or the guardian of a minor who is not competent to bind the minor's estate by such a contract, even though it may be for his benefit. No question therefore of lack of mutuality arising from incapacity to contract arises at all. I agree with Chamier, C. J. who delivered the leading judgment of the Full Bench in 2 Pat L J 513=40 I C 142,[2] where he says that contracts made not by the minors but by persons who have power to make contracts on behalf of a joint family do not appear to come within the scope of the ruling in 39 Cal 232[1] and it is wrong to dismiss a suit for specific performance on the ground that the contract lacks mutuality having been made by or on behalf of minors who are not competent to contract. The same view was taken by a Bench of

1. Mir Sarwarjan v. Fakruddin Mohammad, (1912) 39 Cal 232=13 I C 331=39 I A 1 (PC).

2. Hari Charan Kaur v. Kaula Rai, A I R 1917 Pat 478=40 I C 142=2 Pat L J 513 (F B).

the Allahabad High Court in 57 All 374.[3] It is contended by Mr. Somasundaram that the suit contract could not be said to have been entered into on behalf of the family as all the members of the family were not parties and plaintiff 3 was separately represented by plaintiff 1. I do not agree with this contention. The property sought to be sold was admittedly joint family property. The purpose alleged was joint family purpose. Plaintiff 1, as manager and as the elder brother of the family, represented plaintiff 3 because he only could represent him. If plaintiff 1 alone had executed the contract as manager, he must in law be deemed to have represented plaintiffs 2 and 3. The fact that it is expressly stated in the contract that plaintiff 1 represented plaintiff 3 cannot take away the representative character of plaintiff 1: *vide* 57 All 374.[3] The association of plaintiff 2 in the contract was for the purpose of obtaining his concurrence therein. I may usefully refer in this connexion to a decision of the Privy Council reported in 25 All 407.[4] In that case there were three undivided brothers, Khalak Singh, Jangli Singh and Jai Singh. On the date of their father's death, Jangli Singh and Jai Singh were minors and their mother obtained a certificate of guardianship from the Court. For discharging debts due by the family after Jangli Singh attained majority, a mortgage was executed and the parties to the mortgage were Khalak Singh, Jangli Singh for themselves and Jai Singh represented by his mother as guardian. In a suit to enforce the mortgage, the plea was that Jai Singh was admittedly a minor and member of a joint family; the mother could not be appointed guardian; her representation in the mortgage of the minor was not a valid representation and Khalak Singh did not represent him in fact and therefore the mortgage could not be enforced as against the minor. Their Lordships accepting the contention that the mother could not have been appointed guardian of the minor in respect of the joint family property, nevertheless, held that the mortgage must be deemed to have been made on behalf of the family and observed thus:

> Their Lordships think that the mortgages under consideration were not mortgages by the guardian, assuming the mother to have been a guardian, but mortgages by the family, entered into by the karta of the family, with the concurrence of Jangli, the only other adult member of the family.

In this case therefore the contract of sale must be deemed to have been entered into by plaintiff 1 as the karta of the family with the concurrence of the adult male member, plaintiff 2.

The next contention of Mr. Somasundaram is that in view of the finding of the learned Subordinate Judge that the attempted sale was not for the purpose binding on the family and therefore the minor's interest could not have been validly conveyed in pursuance of the said contract, no decree for specific performance can be passed on the basis of such a contract. There is no doubt that the legal effect of the said finding is that plaintiffs 1 and 2 could not have conveyed the entirety of the property sought to be sold. I will assume that the contract is indivisible and the vendors, plaintiffs 1 and 2, could not have compelled defendant 1 to take a conveyance of their shares subject to payment of compensation; but it would not have precluded defendant 1 from insisting upon a conveyance of their shares, if he so desired, subject to payment of compensation. Under such circumstances, it is very doubtful if, on the basis of lack of mutuality, a decree for specific performance can be refused at all. However, it was open to the purchaser to repudiate the contract on discovering a defect such as this but before repudiation or on discovery of the defect, if the purchaser omits to repudiate the contract and the vendor, the karta, cures the defect by obtaining also the concurrence of plaintiff 3 and is able to convey the entire property, it is competent to the Court to decree specific performance. In my opinion the principle of the decision in (1830) 1 Russ & My 293,[5] would apply. The said principle is this:

> The plaintiff in a bill for the specific performance of a contract is entitled to a decree, if at the hearing he can shew a good title, although he had not such title at the time of the contract; but the defendant might, if he had thought fit, have retired from the contract as soon as the want of title was discovered, and was not bound to wait till the plaintiff could acquire a good title.

A similar principle was applied in (1842) 2 Y & C Ch 54,[6] where specific performance

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3. Dhapo v. Ram Chandra, A I R 1934 All 1019=154 I C 235=57 All 374=1934 A L J 1028.
4. Gharibullah v. Khalak Singh, (1903) 25 All 407= 30 I A 165=8 Sar 483 (P C).
5. Hoggart v. Scott, (1830) 1 Russ & My 293=9 L J Ch 54=31 R R 112=(1830) Tamlyn 500.
6. Salisbury v. Hatcher, (1842) 2 Y & C Ch 54= 12 L J Ch 68=6 Jur 1051=60 R R 26.

of a contract for sale of an estate in fee simple was decreed in favour of a vendor who at the time of the contract was tenant for life only; the purchaser not having rejected the purchase, as soon as he had ascertained the real interest of the vendor, and the vendor being able by means of the consent of the parties interested in remainder to make a good prima facie title to the fee simple at the hearing. In this case, though defendant 1 according to him discovered within six months after the date of the contract that the recital in the contract of sale that the property was sold for the purpose of discharging a debt in favour of Butchayya was not true, still he continued in possession of the lands and did not repudiate the contract and surrender possession thereof. The right to repudiate must be deemed to have been waived by defendant 1. It is after all an equitable right and cannot be enforced in favour of a person who has no equity in his favour. There is nothing in Hindu law or in the Specific Relief Act which prevents the application of the principle of the said cases to the present case. The cases in 26 Mad 74[7] and 32 Mad 320[8] seem to suggest that a contract such as this is capable of ratification by persons who are not parties to the contract of sale by a manager and it can be enforced by the purchaser against them after such ratification. If it could be enforced against them, it must also be capable of enforcement by them. Further, as on the date of suit, the plaintiffs in this case are able and willing to give a valid title to and convey the property agreed to be conveyed under Ex. 1, they are entitled to a decree for specific performance as prayed for. I therefore reverse the decree of the learned Subordinate Judge, allow the memorandum of objections with costs and restore the decree of the District Munsif. As a result of this judgment, the second appeal fails and is dismissed, but I make no order as to costs in the second appeal. Leave to appeal granted.

C.R.K./B.D. *Appeal dismissed.*

7. K. Ramaraju v. I. Ramalingam, (1903) 26 Mad 74=12 M L J 400.

8. Srinivasa Reddi v. Sivarama Reddi, (1909) 32 Mad 320=4 I C 506.

A. I. R. 1937 Madras 872

VARADACHARIAR, J.

Official Receiver, Trichinopoly — Petitioner.

v.

Muhammad Meera Sahib and *another* — Respondents.

Civil Revision Petn. No. 15 of 1935, Decided on 26th April 1937, from order of Dist. Court, Trichinopoly, D/- 15th January 1934.

(a) Provincial Insolvency Act (1920), Ss. 53 and 54 — Fraudulent preference — Insolvent selling last part of his property to respondent 1, part of consideration being that transferee should pay one of insolvent's debts to respondent 2 — Transaction proved to be result of pressure from respondent 2 and also to secure some advantage for insolvent — Insolvent getting no extra advantage —Transaction held could not be impeached as fraudulent preference.

An insolvent by a document purported to sell the last part of his property to respondent 1 making it a part of the consideration for the sale that the transferee should pay one of the debts due from the insolvent to respondent 2. The said transaction was impeached as being a fraudulent preference of one of the creditors. On evidence it was found that the transaction was not the result of the desire or intention on the part of the insolvent to prefer respondent 2, but the result of pressure from the creditor, respondent 2, and also of a desire on the part of the insolvent to secure a certain benefit to himself :

Held : that as the insolvent entered into the transaction mainly with a view to secure some advantage to himself—real or fancied—it could not be impeached as amounting to a fraudulent preference and it did not matter that the advantage was not obtained by the insolvent by payment in cash directly by the preferred creditor and that the insolvent did not succeed in getting the extra advantage : *In re Arnott; Ex parte Bernard, 6 Morrell 215, A I R 1932 Mad 459* and *A I R 1935 Mad 300, Ref.* [P 873 C 1, 2]

(b) Provincial Insolvency Act (1920), S. 53 — Whether bona fide transferee from transferee of insolvent can claim protection (*Quaere*).

Quaere.—Whether a second transferee who bona fide takes a transfer for value from one whose transfer offends S. 53, Provincial Insolvency Act, may invoke the protection of the equitable rule in favour of transferees for value without notice ? [P 874 C 1]

T. V. Muthukrishna Iyer — for Petitioner.

S. T. Srinivasagopalachari — for Respondents.

Order.—In this case I am asked, under S. 75, Provincial Insolvency Act, to set aside the decision of the Courts below which upheld a mortgage (Ex. 1) in favour of respondent 2. The circumstances of

the case clearly invite scrutiny; but, after an investigation, both the Courts have held that the transaction was not the result of a desire or intention on the part of the insolvent to prefer respondent 2, but the result of pressure from the creditor and also of a desire on the part of the insolvent to secure a certain benefit to himself. I do not find myself in a position to say that this concurrent finding is vitiated by any underlying errror of law or misdirection.

Exhibit 1 was put through in a form, not always adopted, in that it was executed not directly by the insolvent but by respondent 1 to whom the insolvent by a document of even date purported to sell the last part of his property, making it part of the consideration for the sale that the transferee should pay one of the debts due from the insolvent to respondent 2 There can be little doubt that a sum of Rs. 1,000 at least was due from the insolvent to respondent 2 and probably another sum of Rs. 700 was also due to her under two other transactions. I see no reason to doubt the correctness of the finding that pressure and indeed genuine pressure was brought to bear on the insolvent on behalf of respondent 2. It has no doubt been held that in certain circumstances, the pressure from the creditor may be feigned or purposeless and in such cases the mere appearance of pressure will not prevent a transaction being a fraudulent preference. But I have no reason to think that in this case that was the situation. Whether the insolvent was at the time of that transaction actually in insolvent circumstances or not, it does not appear that he or his creditors thought that the insolvency was inevitable. This is shown by the fact that respondent 2 herself filed a suit against him, subsequent to the date of Ex. 1, on another promissory note and other creditors of the insolvent also instituted suits and applied for attachment before judgment. It is in this connexion that the method adopted by the insolvent is also of some significance. He purported to transfer most of his properties to respondent 1 for a sum of Rs. 2,500 and both the Courts have found that the object of this transaction was to enable the insolvent to secrete at least a sum of Rs. 900 or portions of the property worth that amount, for his own advantage. Considering these facts in the light of the rule that where an insolvent does an act not mainly with a view to prefer a creditor but with a view to securing some real or fancied advantage to himself, the transaction will not be set aside on the ground of fraudulent preference though in fact it may amount to a preference, I think the Courts below were justified in coming to the conclusion that the two documents must be looked upon as part of one and the same transaction and that so far as the mortgage which the insolvent got executed by respondent 1 in respondent 2's favour is concerned, it was the result of pressure and that the insolvent's purpose in going through this set of transactions was to secure if possible some advantage to himself.

In some of the cases cited, it has no doubt happened that the advantage was obtained by payment of additional cash, by the preferred creditor himself : *cf.* A I R 1932 Mad 459[1] and A I R 1935 Mad 300.[2] But this, I think, is not a part of the rule itself, but only a matter of detail. In (1889) 6 Morrell 215[3] the arrangement between the insolvent and the preferred creditor was that the preferred creditor should raise from elsewhere a sum of money on the security of the property and give it to the debtor. This was considered by Cave, J. to be sufficient to bring the case within the rule that the dominant object of the insolvent was to secure his own benefit. I may also add that the circumstance that in most of the reported cases the insolvent did in fact succeed in getting the extra advantage whereas in the present case he has failed to secure it, ought not to make a difference in the rule of law. Here again the decision in (1889) 6 Morrel 215[3] is itself a relevant authority because it happened in that case that the extra loan of £250 stipulated for was in fact not paid over by the solicitor to the insolvent before the act of bankruptcy was committed and was ultimately directed by the Court to be paid into the hands of the receiver.

In the above view, it is unnecessary to consider whether in the circumstances of the present case it will be possible to treat respondent 2 as a bona fide transferee for value from one who took a transfer which is itself voidable under S. 53,

1. Ramaswami v. Chinnathambi, A I R 1932 Mad 459=140 I C 463.
2. Gangappa v. Official Receiver, Bellary, A I R 1935 Mad 300=159 I C 541.
3. *In re* Arnott; *Ex parte* Bernard, (1889) 6 Morrell 215.

Provincial Insolvency Act. Though there is no clause to be found in S. 53 corresponding to Cl. 2 of S. 54, the reason for the difference has been explained in (1893) 2 Q B 377;[4] and following that decision, it has been held in several cases that a second transferee who bona fide takes a transfer for value from one whose transfer offends S. 53, may invoke the protection of the equitable rule in favour of transferees for value without notice : *see* (1893) 2 Q B 381;[5] (1897) 1 Ch 776;[6] (1912) 3 K B 6[7] and 57 All 900.[8] It is possible in view of the observations in (1893) 2 Q B 377[4] that this principle can be invoked only by a person who has parted with consideration subsequent to the date of the transfer by the insolvent to the intermediate transferee; but it is unnecessary to pursue that question in the present case. The revision petition fails and is dismissed with costs of respondent 2.

C.R.K./V.B.B. *Petition dismissed.*

4. *Ex parte* Brown; *In re* Vansittart (No. 2), (1893) 2 Q B 377=62 L J Q B 279=5 R 280 =68 L T 233=41 W R 286=10 Morrell 44.
5. *In re* Brall ; *Ex parte* Norton, (1893) 2 Q B 381=62 L J Q B 457=5 R 440=69 L T 323 =41 W R 623=10 Morrell 166.
6. *In re* Carter and Kenderdine's Contract, (1897) 1 Ch 776=66 L J Ch 408=76 L T 476 =45 W R 484=4 Manson 34.
7. *In re* Hart; *Ex parte* Green, (1912) 3 K B 6= 81 L J K B 1213=107 L T 368=19 Manson 334=56 S J 615=28 T L R 482.
8. Ahmir Ahmad v. Syed Hasan, A I R 1935 All 671=155 I C 684=57 All 900=1935 A L J 573.

A. I. R. 1937 Madras 874

VENKATARAMANA RAO, J.

Sri Sri Rajah Krishna Chandra Gajapathi Narayana Deo Garu, Rajah of Parlakimedi—Appellant.

v.

Kuppili Ramajogi Dora—Respondent.

Second Appeal No. 421 of 1933, Decided on 29th April 1937, against decree of Sub-Judge, Berhampore, in A. S. No. 68 of 1930.

(a) Madras Forest Act (5 of 1882), Ss. 32 and 67—Ss. 4 to 19 and 26 made applicable under S. 32 to certain estate — S. 67 not expressly applied—S. 67 cannot be made applicable by necessary implication.

Where Ss. 4 to 19 and S. 26, Forest Act, which confer certain rights are made applicable to a certain estate by notification under S. 32 but S. 67 is not made expressly applicable, it cannot by necessary implication be made applicable even though it confers remedies for effectuating the rights given by Ss. 2 to 19 and 26. Power under S. 67 cannot be invoked unless it is made expressly applicable. [P 875 C 2]

(b) Madras Forest Act (5 of 1882)—Rules under, Rr. 8 and 9—Rules applied to certain estate—Person collecting forest produce and attempting to remove it without permit or payment of seigniorage — Obstruction to removal and detention of produce by estate owner—Neither permit taken nor seigniorage paid for long period—Produce sold by auction by estate owner as it was getting deteriorated—Detention held not wrongful and sale was bona fide and proper — Person held could get sale price less seigniorage.

Where a person is entitled to detain the goods and prevent the same being taken away without certain conditions being complied with by the owner of the said goods and if they are of perishable nature and are about to be lost to the owner unless immediate steps are taken to preserve it, it is certainly competent to the person who detains the goods to have them sold and have the sale proceeds in deposit for the use and benefit of the owner of the goods. [P 876 C 1]

Rules under the Forest Act were made applicable to a certain estate. A person collected forest produce in such estate and attempted to remove it without obtaining a permit or paying any seigniorage. The officials of the estate owner obstructed the removal and detained the produce in the forest till payment of seigniorage. Neither the permit was obtained nor seigniorage paid for a long time and the produce was getting deteriorated. The produce was then sold by public auction with the permission of the estate owner. In a suit brought by the person to recover the value of the produce wrongfully sold :

Held : that the detention of the produce was not wrongful and the sale was bona fide and proper : [P 876 C 1]

Held further : that the person in such cases could recover only sale price less seigniorage. [P 876 C 2]

K. Subba Rao—for Appellant.

D. Ramaswamy Aiyengar —for Respondent.

Judgment.—This second appeal arises out of a suit filed by the plaintiff for recovery among other things of a sum of Rs. 316 made up of Rs. 300 being the value of two garces of vippa kernel and Rs. 16 being the value of 32 gunnies, which according to him were wrongfully sold by the agents of defendant 1. A few facts may be stated to appreciate the claim put forward by the plaintiff. This forest produce was admittedly collected in the forests of defendant 1. Under the rules framed in virtue of the provisions of the Forest Act to regulate the management of the forest lands in the Parlakimedi Estate, the plaintiff is not entitled to remove the said produce without a permit being obtained from the forest officials of the estate or paying the seigniorage therefor.

On 11th October 1927 the plaintiff had this produce loaded in four carts and without obtaining a permit or paying the seigniorage was about to remove the same from the forest. Thereupon the forest officials obstructed and stopped them. For nearly eight months thereafter the plaintiff neither obtained the permit nor paid the seigniorage and removed the said produce. The officials of the zamindar found that the produce was getting deteriorated and if it was kept any longer, it was likely to perish. Thereupon, they obtained permission from defendant 1 to have it sold in public auction. Accordingly notices were issued, the produce was sold in public auction and a sum of Rs. 75 was realized.

So far as the public auction is concerned, nothing has been alleged against its bona fides. What the plaintiff alleged was, as the forest produce belonged to him, defendant 1 had no right to meddle with it and sell it and the public auction was therefore wrongful and defendant 1 is liable to him as and for damages for wrongful conversion of his goods. The plea raised by defendant 1 was that he had a right to seize the goods under S. 67, Madras Forest Act; even otherwise he had a right to prevent the produce being taken away out of the forest without the seigniorage being paid therefor and as the plaintiff had no right to the goods in respect of which he had not paid seigniorage, the plaintiff had no right to claim the value thereof. A further plea of defendant 1 was that as the bags were being eaten away by white ants he ordered the goods to be sold in auction. The District Munsif took the view that S. 67, Madras Forest Act, did not apply to the case, that the sale was wrongful, that the plaintiff was not bound by the auction and that the proper price of the goods was Rs. 156; he therefore gave a decree for the said sum in favour of the plaintiff. The learned Subordinate Judge was of the opinion that S. 67 would apply to the case but that defendant 1 was not a District Forest Officer within the meaning of the section, that he had no right to seize the goods and sell the same and he therefore confirmed the decree of the learned District Munsif.

This decision is canvassed as unsound on behalf of defendant 1. Three contentions were raised on his behalf: (1) that S. 67 applied to the case and defendant 1 was a District Forest Officer within the meaning of the said section; (2) that even if S. 67 was not made expressly applicable, it must be deemed to be applicable by necessary implication by virtue of Ss. 4 to 19 and 26, Forests Act having been made applicable to the case; and (3) that as defendant 1 had a right to detain the goods when no permit was taken from his officials and as the goods were not removed for a period of eight months and they were about to perish, he was within his rights in selling the goods and he can be made accountable if at all only for the amount realized by him at the auction sale less the seigniorage, which was due to him before the removal of the goods.

In regard to the first point whether S. 67 would apply to the case, I am of opinion that unless it is made expressly applicable, the power under S. 67 cannot be invoked. Under S. 32 the owner of any land may with a view to the formation or conservation of forest thereon represent in writing to the Collector his desire that all or any of the provisions of this Act or Rules made thereunder be applied to such land, and the Government may by notification in the Fort Saint George Gazette apply to such land such provisions of this Act as it thinks suitable to the circumstances thereof and as may be desired by the applicants. It has been brought to my notice that by virtue of such a notification in the Gazette, Ss. 4 to 19 and 26 have been made applicable; but no other provision of the Act has been made expressly applicable to the locality wherein the subject matter of the suit claim for the said forest produce has been collected. S. 67 has therefore been made not applicable.

The next question is whether S. 67 can be deemed to have been made applicable by necessary implication. The contention is put thus: Ss. 4 to 19 have been made applicable expressly; they are provisions which confer rights and when a right is conferred, all the remedies for the purpose of effectuating those rights must also be deemed to have been conferred; S. 67 only confers a remedy for non-payment of money due in respect of the forest produce and therefore would apply by necessary implication. I am unable to accept this argument. S. 32 clearly provides that before any section of the Act can be made applicable, it must be distinctly so done by means of a notification in the Gazette, and when the statute states that a parti-

cular thing should be provided for expressly, it must be taken that that power by necessary implication was not intended to be conferred.

The last argument on behalf of the appellant deserves consideration. Under R. 8 of the Rules made under the provisions of the Forest Act applicable to this Estate, the felling, the removal of trees, the collection or removal of the forest produce can be effected in one or other of the ways provided therein. One of the ways mentioned in the said rule is that it cannot be collected or removed without a permit issued by the authorized person. Again, R. 9 provides that such permits should be obtained before the collection or removal of the goods is commenced. It is thus clear that no person is entitled to collect or remove the forest produce from and out of defendant 1's forest without a permit or paying the seigniorage due in respect thereof. Therefore when the plaintiff attempted to remove the produce in his carts, defendant 1's officials were perfectly in order in obstructing the removal and detaining them in the said forest until the permit was obtained or the seigniorage paid before its removal. The detention cannot therefore be said to be wrongful. In this case the goods were not sought to be removed for a period of nearly eight months. The plaintiff would not take the permit or pay the seigniorage and on the evidence I must take it that the officials of defendant 1 with the bona fide belief that the produce was getting deteriorated took his permission and had the properties sold in public auction. Where a person is entitled to detain the goods and prevent the same being taken away without certain conditions being complied with by the owner of the said goods and if they are of perishable nature and are about to be lost to the owner unless immediate steps are taken to preserve it, it is certainly competent to the person who detains the goods to have them sold and have the sale proceeds in deposit for the use and benefit of the owner of the goods, and the method of sale adopted by the zamindar, I think, is the proper and rightful method in order to prevent the bona fides of the sale being attacked later. As rightly observed by the learned Subordinate Judge, if the goods had been sold eight months later and that too in public auction, they might have fetched a lower amount. That it fetched only a sum of Rs. 75 cannot be attributed to any act or default on the part of defendant 1. This sum of Rs. 75 defendant 1 will have no right to keep from the plaintiff. He is in equity bound to return the same to the plaintiff.

The next question is, is defendant 1 entitled to claim any seigniorage and if he is entitled to the said sum of money, whether he can pay the balance alone to the plaintiff? It seems to me that the plaintiff will only be entitled to get the value of the produce less the seigniorage, but no claim in respect of seigniorage has been specifically put forward by the zamindar, no issue raised relating thereto and finding given. I must therefore disallow the claim raised on behalf of the zamindar. In the result, the decree of the lower Appellate Court is modified by awarding Rs. 75 plus Rs. 16 to the plaintiff. In the circumstances, I direct each party to bear his own costs in the second appeal. (Leave to appeal asked for is refused.)

C.R.K./S.C. *Decree modified.*

A. I. R. 1937 Madras 876

VENKATARAMANA RAO, J.

Narayanaswami and *others* — Petitioners.

v.

Swaminatha Iyer and *others* — Respondents.

Civil Revision Petn. No. 275 of 1937, Decided on 14th April 1937, from order of Sub.Judge, Mayavaram, D/- 15th January 1937.

(a) Court-fees Act (1870 as amended by Madras Act 5 of 1922), Sch. 2, Art. 17-A (i) —Suit for partition by sons—Creditors made parties and binding nature of debts questioned—Injunction claimed against creditors restraining them from proceeding against sons' shares — Neither suits instituted by creditors nor decrees obtained at date of suit—Real relief held was one for declaration although framed in form of injunction—Separate fixed court-fees in respect of each debt should be paid.

The principle to be kept in view in determining the proper court-fee is what in substance is the relief which the plaintiffs seek and not the form in which it is couched. [P 877 C 2]

A suit was brought for a partition of joint family property by the sons against the father, and the creditors were also made parties. The sons in this suit questioned the binding nature of debts which were contracted by the father and to which sons were not parties and claimed injunctions against the creditors restraining them from seeking any relief against their share of the

family property. No suits in respect of any of the debts except one were brought by the creditors on the date of the suit nor any decrees obtained:

Held: that the real relief claimed was one for declaration that the debts were not binding on them. The mere fact that the relief was framed in the form of an injunction did not make an action any the less an action for a declaration. The injunction was claimed as a substantive relief and not a mere consequential relief. The court-fees therefore to be paid were separate fixed court-fees in respect of each debt under Art. 17-A (i) of Sch. 2, Court-fees Act: *A I R 1935 Mad 419, Foll.* [P 877 C 2; P 878 C 1]

(b) Court-fees Act (1870 as amended by Madras Act 5 of 1922), Sch. 2, Art. 17-A (i) —Suit for partition filed in Sub-Court—Creditors impleaded and declaration that their debts are not binding on plaintiffs' share claimed—Suits in respect of such debts cognizable by Munsif's Court—Still declaratory relief in respect of each debt is cognizable by Sub-Court—Fixed court-fee for that Court must be paid for each debt.

Where a partition suit to which the creditors are made parties is filed in the Sub-Court and the plaintiff claims a relief by way of declaration, in respect of his share in the joint family properties sought to be recovered, that his share is free from the claims in respect of the debts of such creditors, such a claim for declaratory relief in respect of each of the debts sought to be impeached in the suit is cognizable by the Sub-Court even though suits in respect of such debts are cognizable only by the Munsif's Court and the court-fee payable is that which is prescribed by Art. 17-A (i) of Sch. 2 for the Sub-Court on each such debt. [P 878 C 1]

T. R. Venkatarama Sastri, S. Panchapakesa Sastri and *K. R. Krishnaswamy Iyengar* — for Petitioners.

Govt. Pleader, C. A. Seshagiri Sastri, R. Viswanatha Iyer and *S. Thyagaraja Ayyer* — for Respondents.

Order.—The question raised in this revision petition relates to the amount of court-fee leviable on the plaint in the suit. The suit is for a partition of joint family properties of the plaintiffs and their father defendant 1. The plaintiffs who are entitled to a two-third share therein, seek partition and delivery of their separate share and also an account of the income of the properties. So far as the prayers relating thereto are concerned, the plaint has been properly valued, but the controversy has arisen in regard to the relief they seek in respect of the debts contracted by defendant 1. Defendants 2 to 14 are his creditors and the plaintiffs are questioning the binding nature of the said debts. The material allegations relating thereto are as follows:

The next friend of the plaintiffs learnt that defendant 1 had even afterwards been persisting in his former habits and he was giving out that he was indebted to the other defendants to the extent of Rs. 60,000 having borrowed from time to time on promissory notes. He seems further to have stood surety to his son-in-law Vanji Aiyar to the extent of Rs. 30,000 to defendant 9. The next friend submits that these debts are not binding on the minor plaintiffs as there was no necessity to borrow on behalf of the family, nor defendant 1 had any right to give the surety bond so as to bind the minors .... The plaintiffs are entitled to a division of the immoveable properties of the family by metes and bounds corresponding to their two-third share and to be put in separate possession of the same without any liability for the debts in favour of the other defendants. They are entitled to an injunction against the defendants restraining them from seeking any relief against the plaintiff's share of the family properties.

The prayer in para. 12 (f) of the plaint is as follows:

That defendants 2 to 14 may be restrained by permanent injunctions from proceeding against the properties of the plaintiffs for the debts contracted by defendant 1.

The relief is valued thus:

Rupee 1-1-0 for each of the 13 injunctions sought for against defendants 2 to 14 under Sch. 7 (iv) (d) and (f), Court-fees Act.

The learned Subordinate Judge was of the opinion that the relief should be valued as one for a declaration under Art. 17-A of Sch. 2, Court-fees Act, and directed that a sum of Rs. 2,100 for the 13 declarations in respect of the debts of the 13 defendants should be paid. The question is, is this view correct? The principle to be kept in view in determining the proper court-fee is what in substance is the relief which the plaintiffs seek and not the form in which it is couched. From the allegations in the plaint it appears that the debts were contracted by the father and the plaintiffs were not parties to the said deeds or documents evidencing the same. If a suit were to be brought on the said documents, the creditor will have to make out that the debts were such as under Hindu law would be enforceable against the plaintiff's share in the joint family properties. No suits in respect of any of the debts save in respect of a debt due to defendant 12 were on the date of the suit instituted by any of the creditors nor any decrees obtained. In the circumstances, the relief which the plaintiffs have to seek is for a declaration that the said debts are not binding on them and on their share of the properties. On the allegations in the plaint, no cause of action is disclosed which could support the relief of injunction. The fact that the plaintiffs

choose to frame the relief in the form of an injunction would not make an action any the less an action for a declaration. It will be seen that the injunction is claimed as a substantive relief and not as a mere consequential relief. This case therefore would be governed by the decision of Venkatasubba Rao, J. in 58 Mad 821,[1] which has been followed by the learned Subordinate Judge and which in the present state of the law I see no reason to differ from. No arguments have been advanced by Mr. Venkatarama Sastri showing that the view of the learned Judge expressed in the said decision is unsound.

I shall now deal with the arguments of Mr. Venkatarama Sastri based on S. 17, Court-fees Act. It is this. Six of the debts are much less than Rs. 2,500 and the suits in respect of them are cognizable by a District Munsif's Court and therefore the proper court-fee for each of the claims should be Rs. 15. This contention is against the plain language of the sections of the Act relied on. S. 17 says:

> Where a suit embraces two or more distinct subjects, the fee chargeable would be the aggregate amount of fee to which the plaint in suits embracing separately each of such subjects would be liable under the Act.

This section does not deal with the forum in which the plaint should be filed. In the case of a declaratory suit, under Art. 17-A (i) of Sch. 2 of the Act, the amount of court-fee payable is dependent on the Court in which the plaint is presented. If the plaintiff chooses to present his plaint in a Sub-Court or a District Court and the claim is cognizable by that Court, the plaintiff will have to pay the stamp duty prescribed for presentation of such a claim in that Court. The claim for a declaratory relief in respect of each of the debts sought to be impeached in this case is cognizable by the Sub-Court in view of the fact that the said relief is claimed in respect of the plaintiff's share in the joint family properties sought to be recovered in the suit freed from the claims in respect of the said debts. I therefore overrule the contention and hold that the court-fee is Rs. 100 on each of the six debts.

In the result, the civil revision petition fails and is dismissed with costs of the Government Pleader. Time for payment of the court-fee extended for a month till after the re-opening of the Court after the summer recess.

C.R.K./S.C. *Petition dismissed.*

1. Perraju v. Subbarao, A I R 1935 Mad 419=156 I C 625=58 Mad 821=68 M L J 376.

A. I. R. 1937 Madras 878

LAKSHMANA RAO, J.

K. Kandappa Chetti — Appellant.

v.

Lakshmammal and *others* — Respondents.

Second Appeal No. 446 of 1933, Decided on 2nd April 1937, against decree of Sub-Judge, Chingleput, in A. S. No. 34 of 1932.

Mortgage—Mortgagee consenting to sale of portion of mortgaged property — Property sold and mortgagor receiving money—Portion paid to mortgagee towards simple debts —Such payment cannot be treated as payment in deduction of mortgage debt.

Money received by a mortgagee by virtue of the mortgage or sale of the security should be applied in reduction of the mortgage debt and cannot be appropriated towards amounts due on any other account. But where the mortgagee does not make his security directly available for the mortgage, the rule will not apply. If the mortgagee joins in the conveyance to the purchaser merely for the purpose of assurance and is not unwilling that his security should be diminished and having confidence in the mortgagor allows him to receive the money, then though it may be paid to him the next hour, such payment cannot be treated as payment in deduction of the mortgage debt as the mortgagee would in that case receive the money not by means of security but by the voluntary act of the mortgagor: *Young* v. *English*, (*1843*) *7 Beav 10* and *A I R 1920 Mad 1026*, *Ref.*

[P 879 C 1]

T. M. Krishnaswami Iyer and *T. D. Srinivasachariar* — for Appellant.

K. Narasimha Iyer, *V. Krishnamachariar* and *A. S. Nataraja Iyer* — for Respondents.

Judgment.—The plaintiff is the appellant and the suit is for recovery of the balance of principal and interest due under a mortgage executed by the husband of defendant 1 in his favour, by sale of the plaint A and B schedule properties. The mortgage was of the plaint A, B and C schedule properties and it is found by the Courts below that with the concurrence of the plaintiff, the mortgagor sold the C schedule properties piecemeal, appropriated a portion of the proceeds himself, paid a portion to the plaintiff in full satisfaction of simple debts due to him and paid the balance to the plaintiff towards the mortgage. Nothing will be due under the mortgage if, as held by the Courts below,

the amounts paid towards the simple debts have to be applied in reduction of the mortgage debt, and the sole question for determination in this second appeal is whether those amounts have in law to be so applied. The law is that money received by a mortgagee by virtue of the mortgage or sale of security should be applied in reduction of the mortgage debt, and the sale in this case was by the mortgagor. The price too was received by him and it was not pleaded that the sale was on the terms of receiving the purchase money in part reduction of the mortgage debt. There is no evidence either to that effect, and as pointed out in Ghose on Mortgages, p. 510, the rule that money received by the mortgagee from sales of the mortgaged property must be applied in reduction of the amount secured by the mortgage, and cannot be appropriated towards amounts due on any other account, will not apply where the mortgagee does not make his security directly available for the mortgage. Thus, says the learned author, if the mortgagee joins in the conveyance to the purchaser merely for the purpose of assurance and is not unwilling that his security should be diminished and having confidence in the mortgagor allows him to receive the money, then though it may be paid to him the next hour, such payment cannot be treated as payment in reduction of the mortgage debt as the mortgagee would in that case receive the money, not by means of his security but by the voluntary act of the mortgagor. The mortgagee is bound to apply the money in reduction of the mortgage debt only when he stands between the mortgagor and purchaser and takes the money immediately out of the purchaser's hands, which amounts to his saying, "I will not allow my security to be reduced without a corresponding payment" or as expressed in (1843) 7 Beav 10=49 E R 965,[1] the sale must be on the terms of receiving the purchase money in reduction of the mortgage debt.

The decision in 40 M L J 126[2] does not enunciate a different rule and as pointed out therein, it is only money paid to the mortgagee for releasing the security that has to be applied towards the mortgage. The mortgagee is entitled to release any portion of the security and enforce his entire claim against the other portion and as stated already it was not even alleged that there was any bargain in this case that the purchase money or any portion thereof should be paid towards the mortgage debt. The mortgagee did not join the conveyance though he agreed with the mortgagor not to proceed against the C schedule properties, and in the absence of any bargain regarding the purchase money, he cannot be said to have received the amounts by virtue of the mortgage or security. The amounts paid by the mortgagor in satisfaction of the simple debts need not therefore be applied in reduction of the mortgage debt and the view of the lower Courts is untenable. The amount claimed in the plaint would in this view be due to the appellant and the dismissal of the suit on the ground that the mortgage has been discharged is unsustainable. The second appeal is therefore allowed and the suit is remanded to the trial Court for passing the usual preliminary decree for sale after considering issues 3, 4 and 6 which were reserved. Costs upto date will as usual be included in the preliminary decree. Leave is refused.

C.R.K./S.C. *Case remanded.*

1. Young v. English, (1843) 7 Beav 10 = 13 L J Ch 76=64 R R 5=49 E R 965.
2. Lakshmanan Chetty v. Muthaya Chetty, A I R 1920 Mad 1026=62 I C 833=40 M L J 126.

A. I. R. 1937 Madras 879

VARADACHARIAR, J.

Gangamma — Appellant.

v.

Mahabala Bhatta and *another* — Respondents.

Second Appeal No. 796 of 1933, Decided on 29th April 1937, against decree of Sub-Judge, South Kanara, in A. S. No. 1 of 1933.

(a) Civil P. C. (1908), S. 47 — Decree for possession of property — Damages in respect of property arising subsequently — Suit for damages is not barred by S. 47.

A claim for damages in respect of a property arising subsequent to the decree for possession of the property is not a claim which arises under S. 47, Civil P. C., and separate suit will lie therefor : *A I R 1923 Bom 391* and *A I R 1933 Mad 825, Disapproved but not expressly dissented; A I R 1917 Mad 79, Approved.* [P 880 C 2; P 881 C 1]

(b) Mesne Profits — Suit for — Decree for possession passed on award — *A* allowed to recover mesne profits from *B* from date of deposit made by him in favour of *B* — No decree passed in conformity with O. 20, R. 12, Civil P. C.—Subsequent suit for mesne profits by *A* against *B* — Award did not

provide enquiry of mesne profits in execution — Second suit for mesne profits held maintainable.

A decree for possession passed on an award given by the arbitrators provided that *A* was entitled to recover mesne profits from *B* till recovery of possession at the rate to be ascertained if necessary after a deposit made by *A* in favour of *B*. No decree in conformity with O. 20, R. 12, Civil P. C. was drafted. *A* subsequently filed a suit for mesne profits and *B* pleaded bar of suit under S. 47, Civil P. C.:

Held : that the award merely declared the rights of *A* to mesne profits as from the date of deposit and that it did not provide for an enquiry into mesne profits in execution. [P 881 C 2]

Held also : that the mere omission to award the claim for mesne profits will not bar the maintainability of a second suit for the same : *A I R 1930 Mad 30, Disting.* [P 881 C 2]

(c) Transfer of Property Act (1882), S. 108 (1) — Decree directing *Y* to remain in possession if *X* did not deposit certain amount in his favour by certain date — *Y* raising crop because deposit by *X* was not made in time — Later *X* recovering possession — *Y* held entitled to take away crop, and was not bound to account for it.

Where the effect of an award and the decree passed thereon in a suit for possession of land was that if *X* did not deposit the money payable to *Y* before certain date, *Y* was entitled to remain in possession and he raised crops on the land :

Held : that *Y* was entitled to the benefit of S. 108 (1) and *X* was not entitled to insist that *Y* should hand over possession of the crops to *X* along with the land or pay the value of the crops. [P 882 C 1]

B. Sitarama Rao — for Appellant.

K. Y. Adiga and *K. P. Sarvothama Rao* — for Respondents.

Judgment.—This second appeal arises out of a suit in which the plaint comprised 3 heads of claim and the Courts below have dismissed the suit in respect of all those claims on grounds of law. It is much to be regretted that the questions of fact arising in the case remain to be investigated hereafter, after the lapse of several years.

The following are the circumstances that led up to this suit. The plaintiff instituted O. S. No. 90 of 1924 on the file of the Mangalore Sub-Court, for recovery of possession of certain properties with mesne profits and certain alienees were impleaded as parties thereto. The defendants to the present suit were defendants 8 and 9 in the former suit. That suit was referred to arbitrators and an award was passed on 13th September 1926 to the effect that the plaintiff would be entitled to take possession of the properties in the possession of the present defendants on depositing into Court on the next Vishu Shankramana day (middle of April 1927) a sum of Rs. 2,600 for payment to the defendants as compensation for improvements effected by them. The award went on to add that the plaintiff was not entitled to any mesne profits until the deposit was made and it was next observed that :

Defendants 8 and 9 being in possession under the term lease are liable to pay rent for the two years ending Vishu Shankramana next, viz. Rs. 100 in all to the plaintiff; . . . . . from the date of deposit into Court the plaintiff is entitled to recover mesne profits from defendants 8 and 9 till recovery of possession at the rate to be ascertained if necessary after the deposit.

On the filing of this award into Court, a decree was passed on 28th September 1926 merely to the effect that the award be made a decree of Court. No formal decree with various clauses corresponding to the provisions of the Civil Procedure Code was drawn up. The money directed to be deposited was deposited only on 31st August 1927, and the plaintiff obtained possession through Court on 17th October 1927.

Nearly 3 years later, the plaintiff filed this suit for recovery of (1) Rs. 270 odd representing the value of arecanuts, cocoanuts, cashewnuts etc., alleged to have been collected by the defendants between 31st August 1927 and 17th October 1927; (2) Rs. 300 being the value of the crops on the land at the time of delivery which the defendants harvested away without handing over the crops with the land to the plaintiff, and (3) Rs. 122-8-0 being damages for waste committed in respect of a building on the land between the date of the decree and the date of delivery of possession. Several objections were raised to the plaintiff's claim on the merits, but two preliminary objections were also raised, one a plea of res judicata (issue 1) and the other an objection of bar under S. 47, Civil P. C. (issue 2). Issue 4 raised the question whether the plaintiff was entitled to the value of the crops.

The District Munsif as well as the learned Subordinate Judge found against the plaintiff on these 3 issues and dismissed the suit. Hence the second appeal. It is conceded before me that issue 1 cannot possibly cover the claim for damages said to have been caused subsequent to the date of the decree. The objection to that part of the claim can only be under S. 47, Civil P. C. The applicability of S. 47 to a claim for damages of this kind

is supported by the decision of the Bombay High Court in A I R 1923 Bom 391,[1] followed by a Division Bench decision of this Court in 57 Mad 49[2] at p. 68. There is an expression of opinion to the contrary in 33 I C 520[3] and I am free to confess that my own inclination is against the view taken in the Bombay case and in the recent Madras case. But as the amount involved under this head is very small, it does not seem to me worthwhile to dissent from the later judgments or refer this question for consideration by a Bench. I accordingly confirm the decree of the Courts below so far as the claim for Rs. 122.8-0 for damages as per Sch. B to the plaint is concerned; but in respect of the other two heads of the plaint claimed, I am unable to agree with the view taken by the Courts below.

The present claim is only in respect of what must be described as future mesne profits from the point of view of the former suit. Future mesne profits were no doubt claimed in the plaint in the former suit. But, it has been held in more than one case in this Court that the mere omission to award the claim for future mesne profits will not bar the maintainability of a second suit for the same. I rather think what is referred to as a plea of res judicata even in this connection is substantially a plea of the bar under S. 47, Civil P. C. The award, far from negativing or even ignoring the plaintiff's claim to mesne profits, recognized it. Hence it is, I think, the objection to the present suit, if at all, can only be that the plaintiff should have recovered future mesne profits by further proceedings in that suit and not by instituting a separate suit therefor. But further proceedings could have been for the purpose in that suit only if the decree had been drawn up in the terms contemplated by O. 20, R. 12, that is, if the decree had directed an enquiry as to mesne profits. As I said before, the Court did not take the trouble of drafting a decree in conformity with the provisions of the Code and the arbitrators did not do either. If the plaintiff had applied for an enquiry into mesne profits in that suit, I am almost certain that in view of the terms I have already set out from the award, the defendants would have raised the objection that there was no direction in the decree for such enquiry; and there are authorities in this Court holding that in the absence of such a direction in the decree, no further proceedings either in the suit or in execution can be taken. The decision in 57 M L J 728[4] affords no true analogy to the present case, because the decree then under consideration contained an express direction that mesne profits shall be ascertained in execution. On a careful consideration of the terms of the award, I very much doubt whether the arbitrators contemplated an enquiry into mesne profits in execution. They apparently hoped that the deposit will be made on the Vishu Shankramana day and possession will be given upon that date. The use of the words 'if necessary' in the passage that I have already quoted indicates that they left the contingency of an enquiry into mesne profits unprovided for. In these circumstances, the more reasonable construction of the award seems to me to be that it merely declared the right of the plaintiff to mesne profits as from the date on which she made the deposit as directed in the award. There is therefore no force in the objection that the present suit is not maintainable either on the ground of res judicata or on the ground of any supposed bar under S. 47. The finding of the Courts below on issues 1, 2 and 4 in so far as they relate to the claim under the first two heads in the plaint must be set aside.

As regards the claim to arecanuts, cocoanuts, cashewnuts etc., the written statement raised the contention that the defendants did not cut or receive any income under that head between 31st August 1927 and 17th October 1927. This is a question of fact which must be enquired into and determined by the trial Court. As regards the claim for Rs. 300 being the value of the crops standing on the land at the time of the delivery, I cannot agree with the grounds on which that claim had been negatived by the Courts below. The claim for mesne profits under the first head does not relate to the same subject matter as the claim

1. Hari Shridhar v. Sakharam, A I R 1923 Bom 391=73 I C 443=25 Bom L R 449.
2. Dhanarajagerji v. Parthasarathy, A I R 1933 Mad 825=148 I C 356=57 Mad 49=66 M L J 263.
3. Ramu Shettithi v. Manniappu Shettithi, A I R 1917 Mad 79=33 I C 520.
4. Kemgamswamy v. Subbamma, A I R 1930 Mad 30=124 I C 290=53 Mad 838=57 M L J 723.

under the second head. I therefore fail to see the appropriateness of the observation of the first Court that the plaintiff cannot get both, mesne profits and the value of the standing crops, and it is difficult to say what exactly the lower Appellate Court has held on this point. I must however observe that the plaintiff's claim for Rs. 300 is not tenable in the particular form in which it has been made. The effect of the award is that if the deposit of money payable to defendants 8 and 9 is not made on the Vishu Shankramana day, the defendants are entitled to remain in possession, presumably as tenants, and if while so remaining in possession they raise crops on the land, I do not see why they should not be held entitled to the benefit of S. 108 (1), Transfer of Property Act: *cf.* 26 M L J 348.[5] The plaintiff will not therefore be entitled to insist that the crops should be handed over to her or their value paid. But, as the defendants are treated as tenants for this purpose, they must also be liable for rent in respect of that period, i. e. the period between Vishu Shankramana day, i. e. April 1927 and 17th October 1927. The rent for that period will have to be apportioned in accordance with the principle underlying S. 36, Transfer of Property Act.

The decree of the Courts below will be modified in accordance with the above directions and the case sent back to the trial Court for disposal in due course. Only three-fourths of the court-fee paid on the appeal memo both in this Court and in the lower Appellate Court will be refunded to appellant, as the second appeal has failed in respect of one of the items. Likewise, the appellant will be entitled to three-fourths of her costs in this Court and in the lower Appellate Court. In the Court of first instance the parties will bear their respective costs.

C.R.K./B.D. *Case remanded.*

5. Narayanan Nambudripad v. Krishna Pattar, A I R 1914 Mad 225=22 I C 515=26 M L J 348.

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* * **A. I. R. 1937 Madras 882**

FULL BENCH

VARADACHARIAR, BURN AND PANDRANG ROW, JJ.

Arumugham Chetti and *others*

v.

Subramaniam Chetti and *others.*

Appeal No. 103 of 1925, Decided on 26th November 1936, against Decree of Additional Sub-Judge, Sivaganga, in O. S. No. 10 of 1923.

(a) Transfer of Property Act (4 of 1882), Preamble — Policy — Form of transfer is material only when writing is necessary (*Stone, J.*).

Stone, J. in the Order of Reference. — The policy underlying the Transfer of Property Act appears to be not to require a transfer of property to be in any particular form except in those cases in which the Act expressly requires the transfer to be in writing. [P 885 C 2 ; P 886 C 1]

(b) Lease—Writing, necessity of—English 'lease' is different from Indian 'lease'—Lease to be in writing must be lease as defined by Transfer of Property Act (*Stone, J.*).

Stone, J. in the Order of Reference.— The term "lease" is a term having a very definite meaning in English law and a meaning by no means the same as "lease" as used in the Transfer of Property Act. In considering whether a transaction requires, as being a "lease" to be in a particular form, i.e. in writing, one has therefore not to have in mind whether it is a "lease" in the English law sense but whether it is a 'lease' as defined by S. 105, T. P. Act. [P 886 C 1]

(c) Adverse Possession—Lease — Term of lease outstanding—Possession by stranger—Possession cannot be deemed adverse to lessor (*Varadachariar* and *Stone, JJ.*).

Varadachariar and *Stone, JJ. in the Order of Reference.* —Possession by a stranger should not be held to be adverse to a lessor as long as there is a term outstanding, because the lessor would not prima facie be entitled to sue for possession before the expiry of the term : *15 I C 146, Ref.* [P 888 C 2]

(d) Landlord and Tenant—Estoppel—Denial of lessor's title—Lessee cannot deny lessor's title so long as lease subsists—Lessee, before entering lease, knowing defect in lessor's title, taking new lease under real owner—Such lessee can deny first lessor's title (*Varadachariar* and *Stone, JJ.*).

Varadachariar and *Stone, JJ. in the Order of Reference.* —So long as a tenancy is subsisting and a tenant is in possession, he cannot deny the title of the lessor and set up the title of a third person, but where before the lease is to take effect the lessee knows that lessor had no good title and therefore takes up a new lease from the real owner and enters into possession thereunder, he is not estopped from denying the first lessor's title : *A I R 1926 Mad 187, Rel. on.* [P 889 C 2 ; P 890 C 1]

*** * (e) Lease— Registration — Impartible estate—Grant of village by zamindar to junior members in lieu of maintenance—Annual payment by junior member to zamindar — Grant not registered — Such grant amounts to family arrangement and need not be in writing or registered.** (Per *Full Bench; Burn, J. dissenting*).

Per *Varadachariar* and *Pandrang Row, JJ.*— The transfer of the right to enjoy immoveable

property in perpetuity made by the holder of an impartible zamindari to a junior member on terms, or in pursuance of an arrangement, that the junior member will give up all claims for present or future maintenance and will pay annually to the zamindar a sum of money, does not amount to a lease within the meaning of the Transfer of Property Act so as to be without effect unless in writing registered. Such a transaction should be regarded as a family arrangement and is effective though oral : *Case law discussed.* [P 888 C 2 ; P 892 C 2]

Per *Burn, J.* — Such a transfer cannot be considered in general terms. It is quite conceivable that the transfer of the right to enjoy immoveable property in perpetuity made by the holder of an impartible zamindari to a junior member on terms, or in pursuance of an arrangement, that the junior member will give up all claims for present or future maintenance and will pay annually to the zamindar a sum of money, might amount to a lease within the meaning of the Transfer of Property Act, so as to be without effect unless in writing registered. If a transaction is in fact a lease as defined in S. 105, T. P. Act, the requirements of the law regarding registration cannot be evaded merely by calling it a family arrangement. The answer as to whether a transaction is a lease or not would vary in accordance with the circumstances of each case. [P 893 C 1]

A. Krishnaswami Iyer, A. Srinivasa Iyengar and *V. Ramaswami Aiyar*— for Appellants.

T. M. Krishnaswami Iyer for *T. R. Ramchandra Iyer*—for Respondents.

Facts (as stated in Varadachariar, J'.s judgment in the Order of Reference)— This is an appeal by defendant 1 against a decree directing delivery of possession to the plaintiffs of a village called Kiranur in the Sivaganga zamindari and payment of mesne profits. The plaintiffs claimed title either as lessees or as purchasers from one Singa Dorai to whose father, it is alleged, this village was given by a former zamindar absolutely on a perpetual lease, by way of maintenance, as the result of a family arrangement, shortly before the whole zamin was leased to certain European lessees in May 1887. Defendant 1 claimed to be in possession of a usufructuary mortgage from the zamindar's daughter Vengu Nachiar who, in turn, claimed to have acquired the rights of one Sivachidambara under a term lease granted by the European lessees, to enure up to the middle of 1918. By another transaction which the plaintiffs allege was entered into by the zamindar on behalf of the said Vengu Nachiar, a leasehold interest created by the plaintiff's predecessor-in-title and enuring only up to the middle of 1909 had been acquired by the zamindar; and the present suit was instituted in December 1919, on the footing that the European lessees had no power to grant the lease relied on by defendant 1 and that defendant 1 by virtue of his claim under Vengu Nachiar was entitled to remain in possession only up to the middle of 1909, under the other lease. Defendant 1 contested the truth and validity of the permanent lease arrangement set up by the plaintiff, insisted on the validity of the lease granted by the European lessees and also raised pleas of adverse possession and *jus tertii*. The plaintiffs in turn contended that defendant 1 was estopped from disputing the right set up by plaintiff in himself and his predecessors-in-title.

Prior to 1887, the Sivaganga zamindari was held by Rani Katama Nachiar and she had made numerous alienations by way of permanent leases and term leases. In a dispute as to whether her own children or her sister's son was to succeed to the zamindari, the latter, named Doraisinga Thevar, was held entitled to succeed. As many of the zamin villages were in the possession of alienees, the new zamindar had to take steps to recover possession thereof, and he found it convenient to create new leases, presumably on favourable terms, and leave it to his lessees to institute suits against Rani's alienees. One such lease by the new zamindar was Ex. A relating to the suit village. It was for a period of fifteen Faslis from 1st July 1880 and provided for payment of Rs. 800 per annum to the zamindar. This leasehold interest was assigned to the zamindar's wife by Exs. A-1 and A-2 in 1882; and in 1883 the zamindar's wife made a grant of this interest to one of her junior sons by name Vadugayya Thevar. By Ex. A-3 dated 13th February 1886, the remaining term of this lease was assigned by Vadugayya to one Krishnan Chetti of Sivaganga. It was for a cash consideration of Rs. 700 and the assignee was directed to pay to the zamindar the rent of Rs. 800 per annum reserved under the original lease. It was also provided that on the expiry of the lease, i. e. at the commencement of Fasli 1305, the assignee should give up possession of the village to the zamindar. Krishnan Chetti accordingly continued in possession down to 30th June 1895. The zamindar who granted the lease under Ex. A had five sons, the

eldest of whom would succeed to the zamindari in due course. Being anxious to make proper provision for the maintenance of the other sons, the zamindar executed a will Ex. N on 21st July 1882.

It would appear from Ex. N that at that time the sons were being given every month whatever was required for their maintenance and the will provided that this practice should continue unless any of the sons was unwilling so to receive. In that contingency the will directed that a village called Tiruvalur should be given to Vadugayya Thevan for his maintenance and other villages were similarly indicated for the other sons. The zamindar's idea was that each of the sons should be in a position to get about Rs. 100 a month from the villages to be granted to them, but as the villages might yield not exactly that amount but something more as net income, it was suggested that out of the net income, Rs. 1200 per annum should be deducted as for maintenance and the balance settled as poruppu payable by the grantee to the zamindar. The will provided for a larger provision being made when the zamindary came to a good condition. Though the will contemplated Tiruvalur being given to Vadugayya Thevar only after the testator's death, he seems to have preferred to make the grant in his own lifetime and accordingly executed Ex. 19 (b) on 11th August 1882. It is described as a perpetual lease at Rupees 900 per fasli. The grantee is directed to recover possession at his own cost from Katama Nachiar's alienees and to hold the village from son to grandson and so on with powers of alienation by gift, sale etc. The amount of Rs. 900 is made up of Rs. 693-2-6 for rent and Rs. 296-13-6 for probable road-cess. In January 1883, the same zamindar made further provision for Vadugayya Thevar by Ex. 19 (c) which is described as a permanent lease of Thavasikudi at a rental of Rs. 74 made up of Rs. 50 being guthagai (or rent) and Rs. 24 road-cess. The other terms are similar to those in Ex. 19 (b) and it may be mentioned that both Exs. 19 (b) and 19 (c) purport to have been given on account of the grantor's affection for the grantee.

The zamindar Doraisinga Thevar died in July 1883, and was succeeded by his eldest son Periaswami alias Udayana Thevar. The efforts which were made to raise a loan of a large sum of money on favourable terms so as to conveniently discharge the numerous debts owing from the estate resulted in the arrangement commonly spoken of as the European lease whereby a European syndicate advanced a loan of about 17 lakhs to the zamindar on condition that it should be liquidated by their enjoying the zamindari for a term of 22 years. This was subsequently extended by 10 years, and in consideration of a further advance. As the law relating to the powers of the holder of an impartible estate was even then not considered free from doubt, the European lessees desired that the zamindar's younger brothers should assure them that the lease arrangement would be accepted by the brothers as binding upon themselves. This circumstance is relied on by the plaintiff to show the reason and the occasion for the grant of the suit village to Vadugayya Thevan at this time. As already stated, the previous zamindar had expressed a desire that Vadugayya should be given Rs. 1,200 per annum in addition to Tiruvalur. Judging from the road-cess of Rs. 24 provided for in Ex. 19 (c), Thavasikudi would not at that time have sufficed to secure anything like Rs. 1,200 to Vadugayya Thevan. Now that the eldest brother was giving away the whole zamindari to the European lessees for a long term, it was only natural that Vadugayya should have claimed a further provision for himself; and the requisition of the European lessees that all the brothers should join in assuring the validity and binding character of the lease would have given him a convenient opportunity for insisting upon his claim being satisfied. The scheme of Ex. B-2, the European lease, was that the lessees should enjoy the whole zamindari, but by Cl. (25) it was provided that :

> The leases given to the uterine brothers, etc., of the zamindar mentioned in Sch. C are not to be interfered with by the (European) lessees beyond collecting the poruppus or rent already fixed on their respective leases.

Schedule C is headed "List of Pannai Lands, etc., allotted Villagewar and Endalwar, for the maintenance of the relatives" of the zamindar; and in that schedule against Vadugayya's name the suit village Kiranur is mentioned in addition to Tiruvalur and Thavasikudi. Their Lordships find after discussing the evidence that the suit village of Kiranur was granted to Vadugayya Thevar on the terms alleged in para. 6 of the plaint which is as follows :

According to the aforesaid family arrangement the aforesaid village of Kiranur etc. were granted absolutely on perpetual lease to the aforesaid Vadugayya Thevar. Under the said family arrangement the said Vadugayya Thevar, his heirs and assigns should enjoy the aforesaid Kiranur village . . . . . and were bound to pay to the said zamindar the annual poruppu of Rs. 800 fixed for the said village as well as the road-cess alone.

Vadugayya's widow died somewhere about 1889 and the zamindar applied to get himself appointed as guardian of the person and property of three minor sons of Vadugayya. For some reason this attempt was resisted by the maternal relations of the minors and a maternal uncle (P. W. 10) and a stranger were ultimately appointed guardians. This possibly caused some chagrin to the zamindar. Therefore when the term under Ex. Z came to an end in June 1895, the zamindar tried to enter upon possession of this village. Even if the permanent grant of the village to Vadugayya were not true, it will be the European lessees that would have been entitled to deal with it, as Cl. (25) of their lease limited their rights in the suit village only so long as the lease to Vadugayya's branch continued. The zamindar could not therefore openly assert his rights and hence he began to persuade some of the ryots in the village to side with him and execute a muchilika (Ex. 2) purporting to act on behalf of all the ryots. The correspondence that passed between him and the village officers at this time shows that he sought their aid in reducing the village into possession. Krishnan Chetti, who, for a small consideration, had obtained under Ex. D (lease-deed in his favour by Vadugayya's widow on behalf of her minor sons) the right to continue in possession for 14 years from July 1895, was shrewd enough to know the weak point in the zamindar's case, and he managed to get from the European lessees a lease (Ex. 1) in the name of his natural brother Sivachidambara Chettiar to checkmate the zamindar in his attempt to take possession of the village. As Krishnan Chetti had thus armed himself with Ex. 1, the zamindar who dared not assert any claim as against the European lessees had to come to terms with Krishnan Chetti.

Hence Krishnan Chetti on the one side and the zamindar acting in the interests of and for the benefit of his daughter Vengu Nachiar on the other side brought about four documents of which only two, Ex. 1.A and Ex. D.3, are necessary to be noticed for the present purpose. Ex. 1.A is an assignment of Ex. 1 by Sivachidambara to Vengu Nachiar and Ex. D.3 is a transfer by Krishnan Chetti to Krishna Raju, a servant of the zamindar, of the lease Ex. D executed in favour of Krishnan Chetti by Nachiar Ammal, widow of Vadugayya Thevar. Krishnan Chetti received Rs. 7,500 as consideration for all these documents and left the field free for the zamindar. These transactions appear to have been intended from the beginning for the benefit of his daughter Vengu Nachiar.

But it is not possible to say if ever she got directly into possession or management. The zamindari accounts filed in the case suggest that the actual management of the village was looked after by the zamindar's men. In a written statement filed by Vengu Nachiar in January 1914 (Ex. P) she stated that the zamindar gave this village to her permanently in September 1898, but the acquisition under Ex. D.3 as well as under Ex. 1 (a) was only of a short-term interest and this is all that she purported to mortgage under Ex. 3 (1901) to defendant 1 and his elder brother. For certain reasons care was taken in Ex. 3 to refer only to the right obtained by her Ex. 1 (a) and not to the right under Ex. D.3. It is not disputed that defendant 1 has been in possession since the date of Ex. 3. After the institution of this suit he obtained from the Court of Wards, acting on behalf of the present zamindar, a fresh lease of the suit village under Ex. 4 for a term of 13 years; but it is unnecessary to make any further reference to this transaction as it cannot affect the determination of the suit. The questions raised on these facts appear from the judgment of Varadachariar, J.

Order of Reference

(Stone and Varadachariar, JJ.)

Stone, J.—This appeal raises a question of some considerable difficulty and general importance and a number of questions, largely of fact, which are only of importance to the present case. My learned brother and I are of the opinion that the first question should be referred to a Full Bench and we therefore formulate the question to be considered and state the facts and the points that appear to arise as leading up to it. The policy underlying the Transfer of Property Act appears to be not to require a transfer of property to

be in any particular form except in those cases in which the Act expressly requires the transfer to be in writing: *see* S. 9. One kind of transfer so required to be in writing is, subject to certain exceptions, a lease of immoveable properties. The term "lease" is a term having a very definite meaning in English law and a meaning by no means the same as "lease" as used in the Transfer of Property Act. In considering whether a transaction requires, as being a "lease", to be in a particular form, i. e. in writing, one has therefore not to have in mind whether it is a "lease" in the English law sense but whether it is a "lease" as defined by S. 105, T. P. Act. That section is worded as follows:

> *105.* A lease of immoveable property is transfer of *a right to enjoy* such property, made for a certain time, express or implied, *or in perpetuity*, in consideration *of a price paid or promised*, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.
>
> The transferor is called the lessor, the transferee is called the lessee, *the price is called the premium, and the money*, share, service *or other thing to be so rendered is* called the "*rent*".

I have italicised the words that raise some of the difficulties. With the above may be contrasted the definition of a "sale" contained in S. 54: "'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

It will be noticed that elsewhere in the Transfer of Property Act, when speaking of transfers by way of "sale" of "immoveable property", the terms "buyer" and "seller" are used. These terms in English jurisprudence are usually restricted to the transaction of sale of goods, the terms vendor and purchaser being applied to sales of land. In other particulars it may be that the terminology of the Transfer of Property Act is different from that adopted in English law. In this present case one is concerned with the following facts: The property in question belonged at all material times to an impartible zamindari. The zamindar made an oral grant of a village, part of the said zamindari, to a junior member.

Under the Hindu law relating to impartible estates, junior members of an impartible zamindari have very restricted rights. One such right is the right to maintenance. At one time (indeed at the time of the oral arrangement here in question) it was thought that the Zamindar's powers of alienation were restricted. Decisions have since considerably modified the law as it was thought to be in the eighties of last century. Those decisions were considered recently by Ramesam, J. and one of us in 71 M L J 1.[1] The term of the above mentioned oral grant was unlimited. It was a grant made in lieu of maintenance present or future. It was a grant which imposed an obligation upon the grantee, viz. to pay annually a sum of Rs. 800. It was a grant that conferred a benefit upon the grantee, viz. the right to enjoy a certain village, that is, the income thereof. That income, after the Rs. 800 had been paid, amounted in later years to Rs. 1,200 per annum.

The above are our conclusions of fact as to the terms of this oral arrangement. They are conclusions derived from inferences and such inferences are largely based upon the probabilities of the case rather than upon evidence that can be wholly accepted of the words used in any conversations which transmitted from mouth to ear the terms of this arrangement. It is impossible to say whether this arrangement was come to at one time or whether the zamindar was first pressed for maintenance and then agreed in consideration of that claim being given up to make a grant, on favourable terms, of the village and whether thereafter and in performance of that contract the suggested transfer was put forward by the zamindar and accepted by the junior member, or whether the whole thing was settled at one time, the zamindar agreeing to grant and the junior member agreeing to receive the right to enjoy the income from the village; the junior member in consideration thereof, giving up his claim to maintenance, present or future, and agreeing to pay Rs. 800 a year. This uncertainty as to fact is mentioned, because it may be thought to be material in considering whether a transfer falls within the Transfer of Property Act, to consider the transfer itself, not, it may be, the wider arrangement of which the transfer is one part. On the other hand, it may be thought that in considering whether an arrangement falls within any of the defined terms, e. g. the term "lease", one must look at the arrangement as a whole.

1. Ulagalam Perumal Sethurayar v. Subbalakshmi Nachiar, A I R 1936 Mad 721=168 I C 753=71 M L J 1.

We therefore find that it is not proved that the grant was separately arranged, nor is it proved that the grant was not separately arranged. We infer that the grant was made following upon, or, alternatively, as an integral part of a family arrangement of the nature above indicated.

In 24 Mad 377,[2] the material facts, on the present point, were as follows : A zamindar executed a usufructuary mortgage by way of lease for 19 years to one *R. C.* The debt increased. *R. C.* died leaving his heir one *L. C.* who made a new arrangement with the zamindar, the zamindar's brother and brother's son (the heir) and another son. The zamindar was to receive a sum down (borrowed from *L. C.* and added to the debt), transfer the zamindari to the heir, and receive maintenance from him at Rs. 250 per annum. The mortgagee, in lieu of interest, took 18 villages on usufructuary mortgage paying peishcush and road-cess to Government and maintenance at Rs. 270 per mensem to the zamindar. Thus the transaction appears to have been a family arrangement plus a settlement with a stranger mortgagee involving a usufructuary mortgage of part of the zamin to the mortgagee and the transfer of the whole of the zamin to an heir in return for maintenance to be paid partly by the mortgagee and partly by the heir. It was assumed (page 384) that such a transfer must be by registered deed. The transfer in question (at page 384) would appear to be the transfer of the zamin to the heir.

In 43 Mad 244[3] one question was whether *A*, a woman, had disposed of the suit properties during her lifetime. She and *R*, another woman, were registered owners of two moities and they jointly presented a petition to the Collector in which they recited that they had given away two villages as stridhanam to *D* and asking for the villages to be transferred in the name of *D*. The petition concluded : "The said (*D*) shall hold and enjoy them with power to alienate, etc." The Collector granted the petition and registered the transfer accordingly. The Privy Council observed at page 249 :

2. Immadipattam Thirugnana v. Periya Dorasamy, (1901) 24 Mad 377=28 I A 46=7 Sar 811 (P C).
3. Varada Pillai v. Jeevarathanammal, A I R 1919 P C 44=53 I C 901 = 46 I A 285 = 43 Mad 244 (P C).

It was not contended before the Board that the above transactions effected a valid gift of the property to *D* ; for such a gift must, under S. 123, T. P. Act, be made by registered deed.

In 45 Mad 612[4] it was held by a Full Bench of this High Court that a transfer of property by a husband to his wife to be enjoyed by her during her lifetime in discharge of future maintenance is not a gift or sale and may be made without writing. This decision appears largely to turn upon the meaning given to the word 'price' : *see* per Schwabe, C. J. at p. 617. A reference to the Oxford Dictionary will show that 'price' has as its primary meaning 'money, or the like paid for something'. 'Payment' can be made partly in goods : 152 E R 954.[5] That decision seems to show that if the transfer, though part of a family arrangement, had been of the ownership of property in return for a money payment, instead of in return for the relinquishment of a maintenance claim, it would have been a sale requiring to be in writing. In the present case a further difficulty arises owing to the fact that in S. 105 'price' and 'money' are both used. Kumaraswami Sastri, J. however in that case raised the wider question, also now raised in this case, viz. whether if the transaction is treated as a settlement of family affairs, it need be in writing. He stresses the fact that partition under Hindu law can be made without any document. Coutts-Trotter, J. observes that "a trained English lawyer would never use the word 'price', unless it be to connote something other than the frequently familiar phrase, 'valuable consideration'." The trouble we feel with this kind of reason is that the Transfer of Property Act is constantly using expressions that an English lawyer would not use in England, e. g., buyer and seller of land. The reason may be to prevent English decisions which turn upon the use of words of art being applied in India where similar words have different meanings. Clearly, 'lease' in the Transfer of Property Act means something different from 'lease' as used in the English law of landlord and tenant. In 54 Mad 163,[6] the Chief Justice and Curgenven, J. at

4. Madam Pillai v. Badrakali Ammal, A I R 1922 Mad 311=68 I C 687=45 Mad 612=42 M L J 410 (F B).
5. Saxty v. Wilkin, (1843) 152 E R 954=11 M & W 622=1 D & L 281=12 L J Ex 381=7 Jur 704.
6. Zamindar of Polavaram v. Maharajah of Pittapuram, A I R 1931 Mad 140=135 I C 17=54 Mad 163=60 M L J 56.

pages 170, 171, 179 and 180 followed the above decision and adopted the meaning given to the word 'price', Beasley, C. J. also relying on this point upon 9 Mad 141[7] and upon 25 Bom 696.[8] In 49 M L J 150,[9] Odgers, J. cited with approval Napier, J.'s decision in Second Appeal No. 225 of 1920 where he considers the decision in 17 C W N 62[10] :

> I know of no authority for the proposition that the formal requirements of the Transfer of Property Act can be avoided by calling a transaction by a particular name under the Hindu law.

Odgers, J. had however there to consider a transfer quite different to anything here, the transfer being to a stranger, though part and parcel of a wider transaction involving partition between members of the family. The other cases cited such as 36 Cal 1003[11] and 36 M L J 532,[12] which deal with the difference between a conveyance of ownership and the grant of the right to enjoy in perpetuity and the existence of the incidents of leasehold terms in the latter case including that of forfeiture in the case of a perpetual lease, do not carry the matter further.

There thus appears to be an almost complete absence of authority on the question. We put on one side the fact that the plaint speaks of a perpetual lease. One has to use some expression when speaking of an arrangement and the question is not whether this transaction amounts to a lease in some sense, but whether it amounts to a lease in the sense of the Transfer of Property Act. We notice that in the case of the other grants by this zamindar to junior members which are evidenced in writing, the sum reserved is called poruppu and the terms of transfer suggest the grant of an absolute estate rather than the giving of a lease, i. e. confer the power of sale. These other grants only appear as leases in that an annual payment is reserved. We have no reason to doubt that the oral arrangement was similar in nature. In these circumstances we refer for the opinion of the Full Bench the following question :

"Whether the transfer of the right to enjoy immoveable property in perpetuity made by the holder of an impartible zamindari to a junior member on terms, or in pursuance of an arrangement, that the junior member will give up all claims for present or future maintenance and will pay annually to the zamindar a sum of money, amounts to a lease within the meaning of the Transfer of Property Act so as to be without effect unless in writing registered, or whether such a transaction should be regarded as a family arrangement and, if so, whether it is effective though oral".

As to the remaining questions, I have had the advantage of reading the judgment of my learned brother with which I agree and to which I have nothing to add.

Varadachariar, J.—. . . . . On the facts above stated, it has been contended on behalf of the appellants that the title, if any, of the plaintiff and his assignor has been extinguished by adverse possession, as Vengu Nachiar and defendant 1 have all along ignored the alleged right of Krishnan Chetti and the plaintiff's assignor. On the other hand, it has been contended on behalf of the respondent that even if the alleged permanent grant for maintenance should be held to be untrue in fact or inoperative in law, the plaintiff's assignor must be held to have acquired a title by adverse possession and that defendant 1 is, in any event, estopped from denying the title of the plaintiff's assignor without surrendering possession. We are unable to accede to any of these contentions.

Dealing first with the appellant's contention, it must at the outset be observed that there is a considerable body of authority to the effect that possession by a stranger should not be held to be adverse to a lessor as long as there is a term outstanding, because the lessor would not prima facie be entitled to sue for possession before the expiry of the term : *see* the discussion in pages 1633 to 1636 of Mitra's Limitation, Edn. 6. The observations in (1912) M W N 669[13] must be understood in the light of the fact that the lease in that case was one from year to year and not for a definite term : *see* page 681.

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7. Queen-Empress v. Appavu, (1886) 9 Mad 141=1 Weir 645.
8. Samaratmal v. Govind, (1901) 25 Bom 696=3 Bom L R 384.
9. Made Gouda v. Chenne Gouda, A I R 1925 Mad 1174=90 I C 331=49 M L J 150.
10. Girhi Rani Misrani v. Chandra Lal Kanth, (1913) 17 C W N 62=17 I C 885.
11. Abhiram Goswami v. Shyama Charan Nandi, (1909) 36 Cal 1003=36 I A 148=4 I C 449=14 C W N 1=10 C L J 284 (P C).
12. Venkatachariar v. Rangaswami Ayyangar, A I R 1919 Mad 266=51 I C 709=36 M L J 532.
13. Ambalavana Chetti v. Singaravelu Udayar, (1912) M W N 669=15 I C 146.

Assuming however that a lessor could sue a stranger for possession and therefore the stranger's possession could become adverse to the lessor, in cases in which the tenant has been dispossessed by the stranger under a claim hostile both to the tenant and to the lessor, the facts of the present case will not suffice to attract operation of that rule. Whatever the motives or intentions of the zamindar might have been, he preferred to acquire the rights of Krishnan Chetti even under Ex. D and was in that sense in possession as an assignee of the term. The fact that Vengu Nachiar was a party only to Ex. 1 (a) and not to Ex. D.3, and purported in Ex. 4 to claim only under Ex. 1 (a) and made no reference to Ex. D.3 cannot in law affect the true position. As already stated, it is clear from the documentary evidence and the probabilities of the case that the rights under Ex. D as well as the rights under Ex. 1 were acquired by the zamindar for the benefit of Vengu Nachiar, and if any suit for possession had been instituted by Krishnan Chetti or the plaintiff's assignor against Vengu Nachiar or her assignees, it could certainly have been met by setting up the rights under Ex. D.3. The observations in 38 Mad 903[14] and 52 I C 770[15] could be invoked only if there had been a trespass against or unlawful interference with the tenants' possession and not where the tenants' rights are acquired by a third person.

In support of the plea of estoppel, the respondent contends that Krishnan Chetti, who had taken Ex. D, would be estopped from denying his lessor's title and that Vengu Nachiar being the real assignee under Ex. D.3, she and defendant 1 claiming under her could be in no better position. In dealing with this question it must be remembered that the plea of estoppel is material only in the view that the alleged maintenance grant is not true and operative, for otherwise the plaintiff can succeed on the title itself. If the grant is not true or operative in law, the title must in July 1895 be deemed to have vested either in the Zamindar or in the European lessees. If Krishnan Chetti obtained possession under Ex. D and let the zamindar or Vengu Nachiar into possession under Ex. D-3, there will be considerable force in the plea of estoppel. The decisions of the Privy Council in 37 All 557,[16] 60 Cal 980[17] and 68 M L J 552[18] deal with such a case. The respondent relies upon the decision of the majority in 40 Mad 561,[19] and contends that the rule of estoppel as between landlord and tenant is not limited to cases where the tenant is let into possession under a particular lease but may also apply to cases where a person executes a lease or otherwise attorns to a lessor. But the qualifications recognized by the learned Judges in that case clearly show that the rule cannot avail the respondent in the present case. Under Ex. A-3 Krishnan Chetti became the assignee of the rights under Ex. A and that was a lease by the zamindar himself. Ex. A-3 therefore directed him to surrender possession to the zamindar at the beginning of July 1895. The initial estoppel if anything was thus in favour of the zamindar, and it might well be contended that Krishnan Chetti's duty was to surrender possession to the zamindar or those validly claiming under him. Ex. D though executed in 1889 was to come into effect only from 1st July 1895, and if the permanent grant there asserted on behalf of Vadugayya's sons were true and valid, Krishnan Chetti could have continued in possession under it even after the expiry of the term under Ex. A. But on the assumption that the lessors under Ex. D had no title, the position would be that Krishnan Chetti had merely entered into a contract of lease under the mistaken impression that Vadugayya's sons had a title. When the time came for the lease to take effect, he became aware that his lessors had no title and accordingly took Ex. 1 from the European lessees. There is one error in the judgment of the learned Subordinate Judge in this connexion. He observes that Krishnan Chetti attorned to the sons of Vadugayya. As stated already,

14. Periya Aiya Ambalam v. Shunmugasundaram, A I R 1914 Mad 334=22 I C 615=38 Mad 903=26 M L J 140 (F B).
15. Yamunabai Narayan v. Lagmanna Basanna, A I R 1919 Bom 45=52 I C 770=21 Bom L R 820.
16. Bilas Kunwar v. Desraj Ranjit Singh, A I R 1915 P C 96=30 I C 299=42 I A 202=37 All 557 (P C).
17. Currimbhoy & Co., Ltd., v. L. A. Creet, A I R 1933 P C 29=141 I C 209=60 I A 297=60 Cal 980 (P C).
18. Chandrika Prasad v. B. B. & C. I. Railway Co., A I R 1935 P C 59=154 I C 945=68 M L J 552 (P C).
19. Venkata Chetti v. Aiyanna Goundan, A I R 1917 Mad 789=36 I C 817=40 Mad 561=31 M L J 712 (F B).

no rent was payable under Ex. D to the sons of Vadugayya and beyond the taking of Ex. D and its subsequent assignment by Ex. D-3, the record shows no other act which can be construed as amounting to an attornment by Krishnan Chetti to Vadugayya's sons. The lease which Krishnan Chetti took under Ex. 1 from the European lessees naturally provided that on the expiry of its term he must give up possession to the zamindar. In these circumstances there seems to be no scope for the application of the rule of estoppel as between Krishnan Chetti and Vadugayya's sons. He may well plead that he took Ex. D under a mistake as to lessor's title; at the worst, he may plead a constructive eviction by title paramount and it is immaterial that he did not actually surrender the possession which he obtained under Ex. A-3 and not under Ex. D: *see* 49 M L J 742.[20]

But even assuming for the sake of argument that there may be estoppel as between Krishnan Chetti and Vadugayya's sons, it does not necessarily follow that the same estoppel will bind Vengu Nachiar and those claiming under her. As stated already, care had been taken to make Vengu Nachiar a party only to Ex. 1-A under which the right obtained under the European lessees was assigned. The fact that as a possible weapon of defence the zamindar acting in the interests of Vengu Nachair took care to buy up any claim that Krishnan Chetti might have under Ex. D, cannot be held to bring Vengu Nachiar into privity with Vadugayya's sons so as to create an estoppel between them. In Ex. D.3 the parties took care to say that Vadugayya was "said to be a lessee" of Kiranur. It may be that between July 1895 and March 1896, there was something like a scramble for possession between the zamindar and Krishnan Chetty and the story now put forward on behalf of the defence that the zamindar was in possession hostilely to Krishnan Chetti even before the date of Ex. D.3 and Ex. 1-A may not be wholly true. The lands were in the occupation of tenants and each was trying to collect such rent as he could. In this sense it may even be held that possession passed only in March 1896 from Krishnan Chetti to the zamindar or to Vengu Nachiar. But it is not correct to assume that Krishnan Chetti's possession between July 1895 and March 1896 was only in the character of lessee from Vadugayya's sons, because he had also obtained Ex. 1 from the European lessees though in his brother's name. There is even less justification for assuming that Vengu Nachiar obtained possession in March 1896 in a right traceable to the title of Vadugayya's sons as lessors notwithstanding the fact that she took care to obtain an assignment only of the rights under Ex. 1 and never claimed to rely on any title acquired under Ex. D-3. Pressed to its logical result, the respondents' argument would bind Vengu Nachiar and defendant 1 by a twofold estoppel, one in favour of the plaintiff's assignor and the other in favour of the zamindar and the European lessees; the question of title will thus in effect be set at large.

The plea of title by adverse possession put forward on behalf of the respondent also rests on the assumption that Vengu Nachiar and defendant 1 must be deemed to have held possession from 1896 on behalf of Vadugayya's sons. For the reasons given in dealing with the question of estoppel, we are unable to accept this assumption and this claim of title in the plaintiff by adverse possession is accordingly untenable. (His Lordship after dealing with the appellant's plea of *jus tertii* and overruling it on facts continued.) It remains to deal with one more question of law raised on behalf of the appellants. It has been contended that even if the arrangement alleged in the plaint be true in fact, it is inoperative in law as it has not been embodied in a registered deed, as required by S. 105, T. P. Act. The Court below has held and it has been maintained before us on behalf of the respondent that the arrangement, though subject to the payment of a 'poruppu', is not a lease within the meaning of S. 105, because the maintenance of Vadugayya was the consideration therefor and the transaction is in substance a grant subject to burden. In addition to 45 Mad 612[4] (relied on before the lower Court), respondents' learned counsel has drawn our attention to the decision in 54 Mad 163,[6] by way of analogy. The learned Advocate-General replies that even taking these decisions to be correct, they do not really touch the present question because the definition of a 'lease' is not restricted to cases where a 'price' is

20. Alaga Pillai v. Ramaswami Thevan, A I R 1926 Mad 187=91 I C 1024=49 M L J 742.

paid; he argues that the idea of making a provision for maintenance can at best only constitute the 'motive' for the arrangement and if the parties chose to adopt a form of arrangement which falls within the definition of a 'lease' in the Transfer of Property Act, the forms prescribed by law must be followed. He relies on the fact that the plaint itself speaks of the interest in the nature of a perpetual lease; and the admitted reservation of 'poruppu' is, according to him, indistinguishable from a reservation of 'rent,' though it may be a favourable rent.

As we propose to refer this question to a Full Bench for an authoritative decision on the point which is bare of authority, it is not necessary to do more than to indicate some of the considerations that may bear on the decision of the question. It may not be correct to speak of 'maintenance' only as a 'motive' in this case. The grantor was the holder of an impartible estate and the grantee was his brother for whose maintenance the zamindar was bound to make provision both as a matter of law and under the terms of his father's will. 'Maintenance' would therefore be part of the 'consideration' for the transfer and the question will therefore arise, on the analogy of the decisions in 45 Mad 612 [4] and 54 Mad 163,[6] whether a transaction for which the 'consideration' is something in addition to the categories specified in S. 105, will fall under that section. Further, that section speaks of a transfer "in consideration of" money paid or promised, etc.; could it have been intended to apply to a transaction whose avowed purpose is the provision of 'maintenance' and a 'poruppu' is fixed apparently because the village set apart for the purpose yields more than the proposed maintenance amount? The provisions of Ex. N are significant in this connection as showing that this is just the kind of arrangement that the father contemplated being made for the maintenance of the junior sons. Undue stress ought not to be laid on the description of the tenure in the plaint and in some of the documents as a perpetual lease; the suit transaction was admittedly oral, and could at the inception have borne no particular description. The description "perpetual lease" might have been used for want of any other compendious expression by which a tenure of the kind intended could be referred to. On the other hand, para. 6 of the plaint speaks of the village having been granted absolutely on perpetual lease; and when one turns to documents like Exs. 19-B and 19-C, it will be noticed that the arrangement is stated to have been made on account of the great affection that the grantor bore to the grantee and the language of conveyance employed in these documents, viz. that the grantee, his heirs and assignees should enjoy the village from son to grandson and so on, with powers of gift, sale, exchange, etc., with *Ashta Bhoga Dasa Swamya*, etc., treasures, minerals and so on, is much more apposite to an absolute grant (except for the reservation of a poruppu) than to the creation of the lease in the ordinary sense. As between the zamindar and his son or brothers, it is not ordinarily to be assumed that the relationship of landlord and tenant was intended to be constituted.

The reference to 'poruppu' in these transactions remains to be dealt with. It may not always be accurate to translate it as 'rent' in the sense in which that term is known to the law of landlord and tenant. It is one of the anomalies of Indian law that in the attempt to translate vernacular terms into corresponding English equivalents, the connotations of the words in the English law are unconsciously imported. For instance, the inappropriateness of defining the relationship between a zamindar and his ryot in terms of the law of landlord and tenant has often been pointed out and yet the payment made by the raiyat to the zamindar still continues to be spoken of as "rent". In 38 Mad 1128[21] at p. 1130, Sir John Wallis, referring to inams held subject to payment of jodi, kattubadi or poruppu, speaks of the payment as a 'small rent' and describes the tenures as being of the character of a permanent lease. It may be right enough to hold that such tenure-holders are not owners or proprietors within the meaning of Madras Act, 1 of 1876; but with all respect, it will not be correct to assimilate the position of the grantor and the grantee in such cases to that of 'landlord' and 'tenant'. In the Indian law 'under-tenure' is not the same as 'tenancy'.

The learned Advocate-General relied on the decision of the Judicial Committee in

21. Maharajah of Vizianagaram v. Collector of Vizagapatam, A I R 1915 Mad 535=25 I C 780=38 Mad 1128=27 M L J 279.

42 Mad 589[22] as an instance where their Lordships have applied the principle of law of 'forfeiture' to similar tenures thereby indicating that they regarded the relationship as one of landlord and tenant. It may be observed that in that case the rent reserved was in their Lordships' opinion the 'principal matter' (*see* p. 601) and after all they say (at p. 600) that they went at length into this aspect of the law of forfeiture, though it had not been raised in India, only because it was argued with much insistence at the Bar. As they found against the alleged denial of title, it ought not to be assumed that they would have applied the law of landlord and tenant to the case. The other portion of their Lordships' judgment where reference is made to 13 M I A 438,[23] relates to what are known as grants burdened with a service. Even in such cases the grantor is allowed a right of resumption in cases of contumacious refusal of service, but such 'resumption' is not identical with the 'forfeiture' known to the law of landlord and tenant.

'Poruppu' is defined in Wilson's Glossary as a low or quit-rent levied from lands originally granted in inam or rent free. Its connotation is thus not identical with that of 'rent' in the law of landlord and tenant. (See also Nelson's Madura Manual, Part. IV, pp. 39, 121, 139, 140 and 191). The cases in 9 Mad 307[24] and 19 Mad 100[25] show that it was not uncommon for zamindars in this presidency to insist on a payment of kattubadi by grantees of inams from a prior zamindar. The tenure in such cases will be an inam and not a tenancy. Whether as a matter of sentiment, or as a result of the supposed prohibition against alienation in the Permanent Settlement Regulation, grants whether by way of reward for past services or by way of maintenance were sometimes made in the southern zamindaries not by an absolute alienation but by the creation of an under-tenure. In such cases provision was sometimes made for the payment of a poruppu to cover the peishcush on the village granted. (*See* 8 M I A 327[26] at pp. 330, 331). See also Ex. W-1 in the present case where the poruppu was fixed at the nijudhi or assessment for the alienated village; *see also* 19 Mad 292[27] at p. 297, where the terms of Ex. D in that case are set out and the way that document was construed by the Privy Council in 22 Mad 270[28] at pp. 283-285. Relying on the statement in para. 6 under the title 'family arrangements', in Halsbury's Laws of England, Vol. 15, the learned Advocate-General contended that by calling a transaction a 'family arrangement' the requirements of the law as to necessary formalities cannot be dispensed with. But unlike the statute of frauds, the Transfer of Property Act adopts it as a general principle in S. 9 that a transfer may be made without writing in every case in which a writing is not expressly required by law. Hence, the question in this country has always been whether the transaction under consideration falls within one or other of the particular categories specified in the various chapters of that Act. I concur with my learned brother in referring this question of law, in the terms stated in his judgment, for the opinion of a Full Bench.

OPINION.

Varadachariar, J.—My answer to the question referred is that the transaction does not constitute a lease within the meaning of S. 105, T. P. Act, and is therefore effective though oral. The reasons in support of this conclusion have been set forth in the concluding portion of the judgment delivered by me when referring the question to a Full Bench and I have very little to add. The learned Advocate-General laid some stress on the fact that the decision in 54 Mad 163,[6] referred to by me in that judgment, has since been reversed by the Judicial Committee in 59 Mad 910=71 M L J 347.[29] This does not affect the basis of my judgment, because, as I understand their Lordships' decision, they do not express disapproval of the principle

22. Maharajah of Jeypore v. Rukmini Pattamahadevi Garu, A I R 1919 P C 1=50 I C 631=46 I A 109=42 Mad 589 (P C).
23. Forbes v. Meer Mahomed Tuquee, (1870) 13 M I A 438=14 W R 28=5 Beng L R 529=2 Suther 358=2 Sar 588 (P C).
24. Vizianagaram Maharajah v. Suryanarayana, (1886) 9 Mad 307=13 I A 32 (P C).
25. Vizianagaram Maharajah v. Sitaramaraju, (1896) 19 Mad 100.
26. Venkateswara Naicker v. Alagoo Moothoo Servagaran, (1859-1861) 8 M I A 327=4 W R 73 (P C).
27. Fischer v. Secretary of State, (1896) 19 Mad 292.
28. Robert Fischer v. Secretary of State, (1899) 22 Mad 270=26 I A 16 (P C).
29. Zamindar of Polavaram v. Maharajah of Pittapuram, A I R 1936 P C 204=163 I C 4=63 I A 304=59 Mad 910=71 M L J 347 (P C).

of law applied by the High Court in 54 Mad 163[3] as derivable from the judgment of the Full Bench in 45 Mad 612.[4] The Judicial Committee hold that on the facts of the case before them it was not reasonable to hold that there was any other consideration in addition to the price fixed for the sale. The High Court held that the promise by the vendee not to question the validity of the execution sale under which the vendor had purchased other properties as well constituted an additional item of consideration. But the Judicial Committee point out that as the period of 30 days allowed by law for questioning the execution sale had already expired, "this promise was valueless". Their further observation that at best the promise only resembled other covenants which any sale may contain, has no bearing upon the present case. It is sufficient to say that in winding up the discussion of this question, their Lordships emphasize the fact that both parties intended the transaction in question to be a sale and "in substance it was nothing but a sale". Applying this test, I am unable to hold that the transaction now before us was intended by the parties to be a lease or was in substance a lease.

Pandrang Row, J.—I agree.

Burn, J.—I find considerable difficulty in answering the question in the form in which it has been propounded. It does not seem to me to be possible to state the answer to the question in general terms. It seems to me quite conceivable that the transfer of the right to enjoy immoveable property in perpetuity made by the holder of an impartible zamindari to a junior member on terms, or in pursuance of an arrangement, that the junior member will give up all claims for present or future maintenance and will pay annually to the zamindar a sum of money, might amount to a lease within the meaning of the Transfer of Property Act so as to be without effect unless in writing registered. I see much force in the contention of the learned Advocate-General that if a transaction is in fact a lease as defined in Section 105, T. P. Act, the requirements of the law regarding registration cannot be evaded merely by calling it a family arrangement. I think the answer would have to vary in accordance with the circumstances of each case. It seems to me not impossible to imagine a case of a junior member of a family of the holder of an impartible zamindari who might be himself interested in agriculture. If the holder of the zamindari transferred to him a portion of the zamindari in consideration of a premium with or without an annual rent reserved, one condition being that the junior member should withdraw his claim for maintenance, such a transaction might very well be a lease.

The question however was argued before us with reference to the facts of the particular case and considering it from that point of view, I have no difficulty in holding that the transaction in question was not a lease within the meaning of S. 105, T. P. Act. I do not think the learned Advocate-General was right in contending that the provision of maintenance was merely the motive for the transaction. It appears to me the transaction itself was in its essence a provision for maintenance for the junior member. It is found as a fact that the amount of the poruppu or quit rent was due to the mere accident that the annual value of the village granted happened to be Rs. 800 more than the amount thought suitable for the maintenance of the junior member. In other words the payment of the poruppu was not the consideration for the grant to the junior member of the right to enjoy the village. On the facts found, it seems to me quite clear that the zamindar was concerned solely with the provision of maintenance and was not making a lease. If the annual income from the village had been estimated at precisely Rs. 1200, there would have been no question of poruppu and it would have been impossible to suggest that the transaction was a lease. The transaction appears to me to be in its essence of the nature of a grant of the inam land. The facts deducible from the documents which were executed in the case of the other members of the family indicate that the zamindar considered himself to be making an out and out grant rather than a lease.

C.R.K./B.D. *Reference answered.*

A. I. R. 1937 Madras 894

LEACH, C. J.

C. S. Mahadeva Iyer — Petitioner.

v.

Municipal Council, Masulipatam — Respondent.

Civil Revn. Petn. No. 1169 of 1935. Decided on 6th August 1937, from decree of Dist. Munsif, Masulipatam, in S. C. S. No. 850 of 1934.

Madras District Municipalities Act (5 of 1920 as amended in 1930), S. 93 and Sch. 4, R. 17—District Judge having headquarters within certain Municipality going on leave preparatory to retirement after living in it for 34 days—Period of summer vacation prefixed to his leave—District Judge performing administrative acts during period of vacation—District Judge held could not be taxed under S. 93.

A District Judge, who was appointed as such on 1st April 1931, had his headquarters within a certain Municipality. He went on leave preparatory to his retirement from 6th July 1931 with permission to prefix the period of vacation commencing from 4th May 1931. The District Judge left the place on 4th May 1931 never to return, though he was holding his office during the period of vacation. During this period of vacation he had performed certain administrative acts. The Municipality of the area charged him with profession tax under S. 93, Madras District Municipalities Act :

Held : that though the District Judge was holding an office during the period of vacation, still it could not be said that he had an office any longer within the Municipality within the meaning of R. 17, Sch. 4 of the Act. The administrative acts performed by him required no office so far as he was concerned. He could not therefore be taxed under S. 93 : *17 Mad 453*; *A I R 1915 Mad 582* and *22 Mad 145*, *Rel. on.* [P 895 C 2]

R. Swaminatha Iyer — for Petitioner.

V. Govindarajachari — for Respondent.

Order.—This petition raises the question whether the petitioner who in 1931 was the District Judge of Kistna with headquarters at Masulipatam is liable to the Municipal Council of Masulipatam in the sum of Rs. 93-10-0 by way of profession tax. The petitioner was appointed the District Judge of Kistna on 1st April 1931. The Court closed for the vacation on 4th May 1931, and the petitioner left Masulipatam never to return, although he remained the District Judge of Kistna until 31st July 1931, when he retired. The Court re-opened after the vacation on 6th July 1931. On 22nd April 1931, that is before the Court closed for the vacation, the Government of Madras granted to the petitioner leave on average pay from 6th July to 30th July with permission to prefix the period of the vacation. By the same order the Government appointed an Additional Sessions Judge with headquarters at Ellore in order that criminal cases could be dealt with in the meantime. The petitioner was actually in Masulipatam from 1st April 1931 to 4th May 1931 and therefore was not there for a period of 60 days. S. 93, Madras District Municipalities Act, 1920 as amended by the Act of 1930 states that if the Council by a resolution determines that a profession tax shall be levied (and this resolution has been passed), every person who in any half year (a) exercises a profession, art, or calling or transacts business or holds any appointment, public or private (i) within the Municipality for not less than 60 days in the aggregate, or (ii) without the Municipality but who resides in the Municipality for not less than 60 days in the aggregate, or (b) resides in the Municipality for not less than 60 days in the aggregate and is in receipt of any pension or income from investments, shall pay a half yearly tax assessed in accordance with the rules in Sch. 4 of the Act.

The question to be decided is whether the petitioner held his appointment within the meaning of the section for the period requisite to make him chargeable. The District Munsif has held that the petitioner does come within the section and relies for this decision on R. 17 of the Rules to be found in Sch. 4 to the Act. R. 17 says that a person shall be deemed to have exercised a profession, art or calling or held an appointment within a Municipality if he has an office or place of business within such Municipality. The learned District Munsif was of the opinion that the petitioner had an office within the Municipal area notwithstanding that he was on leave. Before discussing the correctness of this decision, I would refer to three decisions, two of which refer to the Madras District Municipalities Act of 1884 and the other to the City of Madras Municipal Act of the same year. S. 53 of the former Act provided that :

If the Municipal Council notify under S. 50 that a tax on arts, professions, trades and callings, and on offices or appointments shall be levied, every person who, within the Municipality exercises, after the date specified in the said notification, any one or more of the arts, professions, trades, or callings, or holds any one or more of the offices or appointments, specified in Sch. A, shall be subject to the provisions of S. 59, pay in respect thereof the sum specified in the said sche-

dule as payable by persons of the class in which such person is placed.

The City of Madras Municipal Act, 1884 was to the same effect. In 17 Mad 453[1] it was held that an officer, whose headquarters are within a Municipality, does not ipso facto exercise his profession or hold such office or appointment within the Municipality so as to render himself liable for the payment of profession tax. Accordingly, an officer who was not personally present at his headquarters in the course of duty for a period of sixty days in the half year was not liable for the tax. The reason for the decision was that it was an essential condition of liability that the profession should be exercised within municipal limits. In 38 Mad 879,[2] it was found that a District Judge whose usual place of business was within the Municipality of Cuddalore had resided for sixty days within another Municipality during the annual recess and during that period had done some administrative but no judicial work, and it was held that he was not liable to payment of profession tax to the Cuddalore Municipality. It was said that he must be deemed to have held his office of District Judge within the Kodaikanal Municipality, where he spent his vacation and not at Cuddalore. The case in 22 Mad 145[3] was under the City of Madras Municipal Act. The Inspector General of Police, whose official place of business was in Madras went on tour, and during his absence the Assistant Inspector General of Police in Madras signed letters for him. It was decided that in these circumstances he was not liable to the profession tax under the City Act, as he was not holding the office in Madras within the meaning of the statute.

Section 93, Madras District Municipalities Act of 1920, as amended by the Act of 1930, has been differently arranged, but the re-arrangement in my opinion does not alter the section and the authorities to which I have just referred would have application if the matter rested there. Rule 17 of the Statutory Rules does, however, make a difference. Under that rule a person is to be deemed to hold an office within a Municipality if he has an office within the Municipality and it matters not whether he goes outside or remains inside the municipal limits. Therefore what I have to decide in this case is whether the petitioner must be deemed to have had an office in Masulipatam from 4th May 1931 to the end of July of that year. It is quite clear that he was holding the office of the District Judge during this period, but it does not necessarily follow that he had still got an office. The Court room was still there and so was the office room attached to it, but can that room be regarded as a place of business or an office of the petitioner? I consider that it cannot. The petitioner left Masulipatam on 4th May 1931 never to return again. He knew that he was retiring at the end of July and before he left he had arranged for leave to be granted to him for the period between the end of the vacation and the date on which he was leaving the service. Under Rule 72 of the Fundamental Rules, he could not return to Masulipatam to act as District Judge even if he wanted to, before the expiration of the period of the leave, without the express sanction of the Government. His work had finished and he was allowed to spend the remaining days of his service elsewhere. I am asked to hold that he had an office because he passed an order appointing a record keeper and other junior officials after he had left Masulipatam. These were administrative acts which he was bound to perform and which required no office so far as he was concerned. The Madras District Municipalities Act in this respect is a taxing statute, and must be construed strictly. Before the petitioner can be made liable to the tax imposed upon him, it must be clearly shown that he comes within the four corners of the section. I am of opinion that on a true construction of the section he is not within its purview. For these reasons the petitioner succeeds and his petition must be allowed with costs throughout.

C.R.K./K.B. *Petition allowed.*

1. Chairman, Ongole Municipality v. Mounsey, (1894) 17 Mad 453.
2. Henry Moberly v. Municipal Council of Cuddalore, A I R 1915 Mad 582=23 I C 398=38 Mad 879.
3. Hammick v. President, Madras Municipal Commission, (1899) 22 Mad 145.

A. I. R. 1937 Madras 895

LEACH, C. J. AND VARADACHARIAR, J.

Lala Gokuldas and *another* —

Appellants.

v.

John Kantaraj — Respondent.

Appeal No. 63 of 1936, Decided on 29th July 1937, from judgment and decree of Gentle, J., D/- 25th August 1936.

Christian Marriage Act (1872), Ss. 4 and 77 —Parties to marriage competent to contract —Bridegroom making false declarations as to age and place of residence before Marriage Registrar—Marriage solemnized by authorized Registrar in accordance with Act— Fact of making false declarations cannot make marriage void under S. 4.

The parties to a marriage were Indian Christians and were in a position to contract a lawful marriage. The bridegroom took the oath required by S. 42, Christian Marriage Act, and made two false declarations (i) that the bride was of age and (ii) that the parties lived within the district of the Marriage Registrar. As a result of the false declarations, the bridegroom obtained a certificate which entitled them to marry, there being no statement in it showing any lawful impediment to such marriage. The marriage was solemnized by a Marriage Registrar who was authorized by law in this behalf, in accordance with the provisions of the Act:

Held: that the marriage being otherwise valid, the mere fact that the bridegroom induced the Registrar to solemnize the marriage by making false declarations could not render the marriage illegal and void under S. 4, in view of the provisions of S. 77 of the Act. [P 897 C 2]

T. R. Venkatarama Sastriar and *T. Krishnaraja Naicker* — for Appellants.

T. A. Srinivasan — for Respondent.

Leach, C. J. — The appellants, who are father and daughter, were the plaintiffs in the Court below. They sued for a declaration that the marriage of appellant 2 to the respondent solemnized before the Registrar of Marriages at St. Thomas Mount on 17th July 1934 is a nullity. The parties are all Indian Christians. At the time of the marriage, appellant 2 was 18½ years of age, and was a student at the Women's Christian College, Madras. Both she and the respondent who had attained his majority at the time were resident in Madras. The respondent gave notice of the marriage to the Registrar at St. Thomas Mount and falsely declared before him that appellant 2 was of age. There being no impediment to the marriage, it was duly solemnized on the date mentioned. The learned Judge declared for the validity of the marriage. The appellants challenge this decision on the ground that it conflicts with the express provisions of the Indian Christian Marriage Act of 1872. It is therefore necessary to examine the relevant sections of that statute.

Section 4 provides that every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of S. 5; and any such marriage solemnized otherwise than in accordance with such provision shall be void. S. 5 states that marriages may be solemnized inter alia by a Marriage Registrar appointed under the Act. The marriage in question having been solemnized before a Marriage Registrar, it is necessary to turn to Part 5 of the Act which commences with S. 38. This section states that when a marriage is intended to be solemnized, by or in the presence of a Marriage Registrar, one of the parties to such marriage shall give notice in writing in the prescribed form to a Marriage Registrar of the District within which the parties have dwelt; or if the parties dwell in different districts, they shall give notice to the Registrar of each district, and shall state therein the name and surname and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, the time during which each has dwelt therein, and the place at which the marriage is to be solemnized. The notice given by the respondent in this case stated that both the parties resided at St. Thomas Mount and was, therefore, deliberately false. On receipt of notice, the Registrar shall under S. 39 publish it, and under S. 40 enter it in the Marriage Notice Book. S. 41 provides that if the party, by whom the notice was given, requests the Marriage Registrar to issue the certificate mentioned in the section and if one of the parties intending marriage has made oath as required, the Marriage Registrar shall under his own hand issue a certificate of such notice having been given and of such oath having been made. There are several provisos to this section, but it is only necessary to refer to the last of them which says that, if one of the parties is a minor, the certificate shall not be issued until fourteen days after the entry of the notice have expired. Turning to S. 42, we find that the certificate shall not be issued by a Marriage Registrar until one of the parties intending marriage appears personally before him, and makes oath:

(a) That he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance to the marriage, and (b) that both the parties have, or (where they have dwelt in the districts of different Marriage Registrars) that the party making such oath has, had their, his or her usual place of abode within the district of such Marriage Registrar, and, where either or each of the parties is a minor,—(c) that the consent or consents to such marriage required by law has or have been obtained thereto, or that there is no

person resident in India authorized to give such consent, as the case may be.

Section 19 of the Act requires in the case of a minor's marriage the consent of the father, if living, or if the father be dead, the guardian of the person of such minor and in case there is no such guardian, then the mother of the minor. This is made applicable to marriages under Part V of the Act by S. 44. The respondent took the oath required by S. 42 and made two false declarations in the course of his statement (i) that the second appellant was of age and (ii) that the parties lived within the district. By S. 51, after the issue of the certificate of the Marriage Registrar, the marriage may, if there be no lawful impediment to the marriage of the parties described in the certificate, be solemnized between them, according to such form and ceremony as they think fit to adopt. Now, in this case, as the result of the false declaration which the respondent made, he obtained a certificate which entitled him and the second appellant to be married, there being in it no statement showing any lawful impediment to the marriage. The last section we need refer to is S. 77 which states that whenever any marriage is solemnized in accordance with the provisions of Ss. 4 and 5, it shall not be void merely on account of any irregularity in respect inter alia of the following matters :

(1) Any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law ; (2) the notice of the marriage.

It is not disputed that the marriage was solemnized by the Registrar on 17th July 1934. But it is said that the solemnization was invalid because of the false declaration which the respondent made. This argument however ignores the provisions of Ss. 4 and 5 and would read into Part V provisions which are not there. The Registrar who solemnized this marriage was authorized by law to solemnize it, and having been solemnized by an official authorized in this respect, it cannot be declared to be void under S. 4. As I have pointed out, there was no lawful impediment shown in the certificate of notice issued by the Registrar and therefore there was nothing to prevent the Registrar solemnizing the marriage. The respondent of course induced the Marriage Registrar to solemnize this marriage as the result of a false declaration and he has rendered himself liable to severe punishment under S. 66 of the Act, but that is a quite different thing from saying that under the provisions of the Act this marriage is not lawful. There is no provision in the Act which renders this marriage illegal by reason of the false declaration of the respondent. The law is the same in England and the Indian Christian Marriage Act of 1872 follows English legislation of a similar nature. The parties were in a position to contract a lawful marriage and such a marriage was solemnized by the Registrar in accordance with the provisions of the Act. For these reasons we think that the decision of the learned trial Judge was correct and the appeal will accordingly be dismissed with costs.

C.R.K./K.B. *Appeal dismissed.*

A. I. R. 1937 Madras 897

VENKATASUBBA RAO AND CORNISH, JJ.

United Motor Finance Co.—Appellants.

v.

Romer Dan & Company —

Respondents.

O. S. Appeal No. 29 of 1936, Decided on 5th May 1937, from judgment and decree of Wadsworth, J., D/- 20th March 1936.

Fraud—Essentials — Motor hire-purchase contract — Hirer to make cash payment of 1/3rd price and dealer, before sending proposal form, to satisfy himself as to integrity of hirer being terms of business between dealer and company financing purchase — In proposal form hirer falsely stating that he sent cheque in payment of 1/3rd price but actually sending promissory note to dealer — Dealer in spite of his knowledge about this sending proposal form to company — Representation held amounted to deceit and dealer held liable in damages — Measure of damages stated.

To establish the actionable tort of fraud or deceit, the plaintiff must prove that defendant has made to the plaintiff a wilfully false representation of a fact with the intent that the plaintiff should act on that representation, and that the plaintiff having been induced to act upon it has suffered loss. The burden of proof that a false statement was knowingly made by a defendant lies on the plaintiff. If a defendant has formed no belief whether the statement was true or false, and made it recklessly without learning whether it was true or false, an action will lie against him ; but not so if he carelessly made the statement without appreciating the importance and significance of the words used, unless indifference to their truth is proved: *Derry* v. *Peek*, (1889) *14 A C 337* ; *Glasier* v. *Rolls*, (1889) *42 Ch D 436* ; *Angus* v. *Clifford*, (1891) *2 Ch 449*, *Ref.* [P 901 C 2]

The terms of a motor hire purchase contract upon which the company which was to finance the purchase was to do business with the dealer were that the hirer was to make a payment, by cash or cheque, of not less than 1/3rd of the price of car, plus the insurance, plus stamp charge for the agreement, and that the dealer had, before referring a proposal to the company, to satisfy himself by proper enquiry that the hirer was a person who would carry out the conditions of the hire-purchase. In the proposal forms the hirer falsely stated that he had sent a cheque for the deposit amount but actually gave a promissory note to the dealer. In forwarding to the company these proposal forms the dealer knew that the statements of the hirer that a cheque was sent were untrue:

Held: that the dealer, though honestly believed that he was justified in taking for the sums payable to him promissory notes instead of insisting on payment in cash, was negligent in the representation he made to the company as he did not have, and could not have had, any bona fide belief that the said representation was true; that the misrepresentation made by the dealer amounted to a deceit and was made with a view to induce the company to act upon it and that the dealer was liable to the company for the loss suffered by it by such misrepresentation. The measure of damages was what the company had lost by entering into the transaction: *A I R 1937 P C 21, Ref.* [P 902 C 1, 2]

N. Rajagopalan — for Appellants.

C. E. Padmanabhan—for Respondents.

Venkatasubba Rao, J. — This is an appeal from the judgment of Wadsworth, J. dismissing the action brought by the plaintiffs. The nature of their business was to finance motor hire-purchase transactions introduced to them by motor dealers. They complain in the suit that on certain false representations made by the defendants as such dealers, they were induced to enter into the three contracts described in the plaint. Each of them consists of two parts: first, the plaintiffs buying from the defendants a motor vehicle, secondly, they letting it on hire to the customer introduced by the defendants. Various kinds of fraud are set out in the plaint, but the defendants' learned counsel Mr. V. V. Srinivasa Ayyangar says (and Wadsworth, J's. judgment lends support to this statement) that the learned Judge was invited to address his mind to one ground of fraud only, namely that relating to what is known as the initial one-third deposit. I have no doubt that the plaintiffs' counsel referred at the trial to the other grounds of complaint as well, but the only matter seriously discussed appears to have been the one to which I have adverted. I proceed upon this footing, but wish to add that in view of the conclusion at which I have arrived, this makes little difference. It is necessary in order to appreciate the contentions raised to grasp one central fact connected with these transactions. As the contracts are worded, the one-third initial deposit was to be received by the plaintiffs; but that was never observed, and in practice the customer paid, or was expected to pay, the amount to the dealers, who retained it towards the price payable by the plaintiffs. I may here quote the following sentence from the proposal form, which will make my meaning clear. The customer addressing the plaintiffs says, "I herewith send you cheque for the following amount", meaning thereby that the initial payment is made to the plaintiffs. It is the departure from this strict letter of the contract that is the genesis of the trouble that has arisen. In the bills submitted by the dealers to the plaintiffs they demanded the remaining two-thirds of the price only and that amount alone was paid. In fact the dealers say—though that attitude is not strictly legal—that the one-third initial payment was their own look-out. The short question which this appeal raises is whether the dealers were justified in taking promissory notes for this one-third deposit instead of receiving cash. We understand that this is one of several suits of a similar kind filed by the plaintiffs, but the action being one for deceit, the facts or findings in them can hardly be helpful. The question to decide is whether on the contracts as they stand, if all that is proved is that the promissory notes were taken and nothing more, a case of fraud can be said to have been made out.

I may mention that Mrs. Palmer, on behalf of the plaintiffs, rested her case in the trial Court upon an alleged interview with Mr. Ramalinga, the proprietor of the defendants' firm. The effect of her evidence is that he was made to understand definitely that the receipt of the one-third deposit in cash was an essential term of the business. Now, on Wadsworth J.'s finding, with which we intimated to the Bar we were not disposed to disagree, that interview completely disappears and the case thus depends not upon any explicit representation but upon what is merely implicit in the documents. I entirely agree with my learned brother, whose judgment I have had the advantage of reading, that strictly speaking the defen-

dants must be deemed to have represented that what they received was a cheque for the one-third payment. I also agree that from the letter of 16th May 1929 (Ex. 1), it would be reasonable to infer, in view of the words " one-third down ", that what was probably intended was payment in cash; but upon the evidence I cannot resist the conclusion that the defendants in taking the promissory notes honestly believed that they were adhering to the spirit of the bargain. As Lord Herschell observes in his classic judgment in (1889) 14 A C 337[1]:

> Making a false representation through want of care falls far short of and is a very different thing from fraud and the same may be said of a false representation honestly believed though on insufficient grounds: (1889) 14 A C 337[1] at p. 375.

This qualifies and in a most material manner, as pointed out by Lindley, L. J., his earlier statement that fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth: (1891) 2 Ch 449.[2] Indeed, the two statements should be read in close proximity, if it is desired to comprehend the full effect of Lord Herschell's decision. The effect in (1889) 14 A C 337[1] has been to establish incontrovertibly that there is a vital difference between negligent and fraudulent misrepresentation, and as Lord Herschell forcibly observes, mischief is likely to result from blurring the distinction between carelessness and fraud (p. 376). I cannot do better than quote Bowen, L. J. who says:

> I am satisfied that what (1889) 14 A C 337[1] did was to decide that there was no legal duty cast upon persons in such cases to take reasonable care in forming their belief, that is to say, that negligence in forming their belief need not give rise in such cases to a cause of action: (1891) 2 Ch 449[2] at p. 470.

The question in each case is, does the proof offered establish fraud or carelessness? If it is fraud, it is actionable; but if it is not fraud, but merely carelessness, it is not. Speaking of the prospectus in the case before his Lordship, Lindley, L. J. makes these observations, which I think are very pertinent to the case in hand:

> The conclusion at which I have arrived from their evidence is this, that they (the Directors) really did not put the statement complained of into the prospectus with the idea that it was likely to mislead; it was a blundering statement and their attention was never specifically called to it. It was not that they shut their eyes and did not care whether it was true or false; but they did not see the effect of what they were saying, or the construction which would be put upon it when these words 'for the Directors' were passed by them: (1891) 2 Ch 449[2] at p. 467.

"Some recklessness to truth, that is to say, some indifference to truth" may amount to dishonesty [(1891) 2 Ch 449[2] at p. 472], but in my opinion the evidence here falls far short of establishing this, for, it must be remembered that especially in an action of this sort, the plaintiffs cannot rely upon the defects in the defendants' evidence:

> The burden of proof is on the plaintiff, he charges the defendant with fraud and he must prove it, the burden does not lie on the defendant of proving that he made the statement honestly: Per Cotton, L. J. in (1889) 42 Ch D 436[3] at p. 458.

Turning to the facts, I think the answers given by Mirza Hasham Razai (the defendants' manager) in his cross-examination represent the essence of the transaction. That is to say, for the successful working of a hire-purchase transaction, there must be a bona fide sale and an honest hirer. And what is the test of honesty? His capacity to make the initial deposit and make further payments in due course. It seems to me that as the defendants were permitted to credit a third of the price, and the plaintiffs were to be responsible for the remaining two-thirds, only the former honestly believed, though perhaps negligently, that they were justified in taking for the sums payable to themselves, promissory notes instead of insisting on payment in cash or by cheque. For, I wish to repeat, the specific case of explicit oral arrangement having gone, the question is merely one of inference. Now, with these observations let me examine the three transactions.

As regards the first, I must own, to some surprise, that it was seriously made the subject of any controversy at all. There were several matters which obscured the position: first, the defendants' firm belonged to an absentee proprietor, and secondly, the suit was brought long after the dates of the transactions and the closing of the firm itself. The accounts of that firm were produced and although they were neither satisfactory nor clear, there is no gainsaying the fact that they were honestly kept. It was left to us in the

1. Derry v. Peek, (1889) 14 A C 337 = 58 L J Ch 864=61 L T 265=38 W R 33=1 Meg 292=54 J P 148.
2. Angus v. Clifford, (1891) 2 Ch 449=60 L J Ch 443=65 L T 274=39 W R 498.
3. Glasier v. Rolls, (1889) 42 Ch D 436=58 L J Ch 820=33 W R 113.

appeal to discover that in respect of this transaction, the plaintiffs' charge in regard to the one-third deposit is unfounded. A hundi was taken from the customer, which was immediately discounted and this was tantamount to a cash receipt. I must hold that the plaintiffs' case to this extent fails.

In regard to the second transaction, the matter can be disposed of on one short ground. The defendants' books disclose that they allowed a substantial rebate to the customer. This amounts to a clear fraud under the decisions (no blame of course attaches to the partners who were absentee proprietors), for the contract was upon the basis that the price entered in the proposal form was to be the net price. Let me take an example. Supposing the price of the car to be Rs. 600, the amount which the plaintiffs were to pay would be Rs. 400. If the dealers allowed a discount of Rs. 150, the true price would then be Rs. 450 and the two-thirds which the plaintiffs would have to pay would be Rs. 300. But if on the basis of the price being Rs. 600 a sum of Rs. 400 was collected from the plaintiffs, there can be no doubt that the representation would be fraudulent, which would make the dealers liable for deceit. It is upon this ground that I agree with my learned brother's conclusion that the plaintiffs must succeed in this transaction.

In respect of the third also, I agree that the defendants are liable but upon the following ground. There can be no doubt that a promissory note was taken from Velu Mudaliar, the customer. But the question is, did the defendants' manager believe he had a reasonable prospect of realizing the money due on the note? The answer must upon the evidence be decidedly in the negative. On the back of the proposal paper there are certain entries under the heading "Reference Form" to be signed by the dealers and the following questions and answers are here relevant :

Column 5 : *Q.* Has the dealer satisfied himself as to the applicant's responsibility and integrity ?

A. Yes.

Against Column 6 "Give reasons" was made the endorsement "Personal knowledge". I must also mention that there is a column relating to "Guarantor" and the name of one Dhanapal Chetty was inserted. The evidence in the case shows that this Velu Mudaliar was a motor driver, who is alleged to have later blossomed into a bus owner and an improbable story is told that he suddenly and somewhat mysteriously came into some property. The representation that he was personally known to Mirza Hasham Razai, who on behalf of the defendants' firm affixed his signature to the Reference Form, has been shown to be substantially untrue. It is noteworthy that this witness admits that he made no inquiries regarding Dhanapal Chetty, although it must be mentioned that in the Reference Form no particulars are called for in respect of the Guarantor. Nor is this all; Razai was constrained to admit that there was no demand upon Velu Mudaliar for the payment of the amount due on the note, nor were any steps taken to enforce it. Indeed, the promissory note which admittedly was taken was not even forthcoming. From these facts the inference seems to be clear that it was not seriously believed that the promissory note was going to be realized, in other words the taking of the note amounts practically to a waiver of a third of the price. On this ground I hold that the defendants are liable in respect of the third transaction.

As regards the measure of damages the principle to be adopted is that laid down in the recent decision of the Judicial Committee in (1937) 1 M L J 432.[4] The case is referred to the Official Referee for the ascertainment of the damages in respect of the second and the third contracts. The appeal is accordingly allowed to the extent indicated above. There will be no order as to costs on the Original Side; but in the appeal the appellants will get their full costs.

Cornish, J.—I have come to the same conclusion as my learned brother. I think that the suit was wrongly dismissed upon the first issue. Proof of the terms on which the plaintiffs and defendants were transacting business did not depend upon the alleged interview asserted by Mrs. Palmer, denied by Mr. Ramalingam, and found by the learned Judge not to have taken place. There is ample proof of the terms to be found in the documents as well as in the evidence of the actual transactions which are the subject of this suit. I take as typical the relevant documents cf

4. United Motor Finance Co. v. Addison Co., Ltd., A I R 1937 P C 21=166 I C 790=(1937) 1 M L J 432 (P C).

the first of the questioned transactions. (His Lordship after stating in detail the facts and discussing the evidence of the witnesses proceeded.) I think it clear upon this evidence that the terms upon which the plaintiff company was to do business with the defendants were that the hirer was to make a payment, by cash or cheque, of not less than one-third of the price of car, plus the insurance, plus stamp charge for the agreement, and that the dealer had, before referring a proposal to plaintiffs, to satisfy himself by proper inquiry that the hirer was a person who would carry out the conditions of the hire-purchase. It is clear that in the three instances in question the defendants did not adhere to these terms. It becomes necessary therefore to decide the question, which the learned trial Judge left undecided, whether upon the evidence the plaintiffs have established their case of fraud against the defendants. The allegations in the plaint are that defendants falsely reported in the three specified instances that the hirer had paid by cheque or cash the amount of the initial deposit, insurance premium and stamp, and that the hirers were persons who might be safely trusted with the vehicles to pay the instalments regularly and otherwise to fulfil the conditions of the hire purchase agreements; and that the price of the vehicle reported by the defendants was the actual net price.

The statement in each of the three proposal forms that the hirer had sent a cheque for the deposit amount was untrue. The man Ratnam had given a hundi to the defendants; the other two, who each took an Erskine motor-bus priced at Rs. 4,400, are said to have given a promissory note. The actual writing of the untrue statement was by the hirers; but there may be a representation by conduct, and in forwarding to the plaintiffs these proposal forms, which the defendants knew to contain this material untruth, the defendants were making a false representation. There is no doubt that the defendants knew that the statements of the hirers that a cheque was sent were untrue. The hirers were introduced by the defendants, the reference form at the back of the proposal form was filled up by them, and the particulars of the "first payment" stated in the schedule to the reference form could not have been filled in by defendants without seeing how much had been put down as the amount of the deposit paid by cheque in the proposed form. But to establish the actionable tort of fraud or deceit, the plaintiffs have to prove that defendants have made to the plaintiff a wilfully false representation of a fact with the intent that the plaintiffs should act on that representation, and that the plaintiffs having been induced to act upon it have suffered loss. Lord Herschell has said in (1889) 14 A C 337[1] that "to prevent a false statement from being fraudulent, there must always be an honest belief in its truth", and he added "one who knowingly alleges that which is false has obviously no such honest belief". The burden of proof that a false statement was knowingly made by a defendant lies on the plaintiff. If a defendant has formed no belief whether the statement was true or false, and made it recklessly without learning whether it was true or false, an action will lie against him; but not so if he carelessly made the statement without appreciating the importance and significance of the words used, unless indifference to their truth is proved: *see* (1889) 42 Ch D 436[3] and (1891) 2 Ch 449.[2]

The evidence bearing on the plaintiffs' allegations of fraud must be considered in the light of these doctrines. I take Ratnam's transaction, the first in order of date. In their particulars the defendants have stated that the arrangement between them and Ratnam was that Ratnam should give hundis for Rs. 700 to be negotiated by defendants, and that this arrangement was known to the plaintiffs' agent. The plaintiffs' agent, as he is called, a man named Ponting, was examined on commission on behalf of the defendants, and not a question was put to him for the purpose of substantiating this allegation. The proper inference, I think, is that it is untrue that plaintiffs had any knowledge of the arrangement made by defendants with Ratnam. The defendants' account with Ratnam shows that on the 23rd Ratnam is credited with Rs. 51 "by cash for 3 per cent. commission for finance" which was not, of course, a cash payment made by him but the amount of commission credited to the plaintiff company, and a cash payment of Rs. 6-12-0, and that on the 24th, the defendants negotiated a hundi for Rs. 700 debiting Ratnam with a sum of Rs. 10-11-0 for the discounting. It also appears that this hundi was subsequently dishonoured. The representation that Ratnam had given a cheque for Rs. 706 to

cover deposit, insurance premium and stamp charge was not accurate. He had paid only Rs. 6-12-0 in cash and had given a hundi for Rs. 700 to secure the balance. But though not strictly true, I think that a case of fraud has not been made out on this transaction. The defendants got cash for the amount of the hundi, which represented a payment. I do not think that because defendants got somebody else's money on the hundi, they must be regarded as having practised a deceit.

I turn now to the other transactions of Velu and Mohanarajulu, which in my opinion stand on a different footing. In their particulars the defendants state in each case that with the knowledge of the plaintiffs' agent the arrangement was that the plaintiffs should pay Rs. 2,597-4-0 in the one case and Rs. 2,594-4-0 in the other towards the agreed price of the motor-bus, viz. Rs. 4,400, and that defendants were to recover the balance from the hirers. Velu and Mohanarajulu have given evidence. They both describe an interview with the plaintiffs' man Ponting in which they explained to him their impecuniosity and inability to pay for the bus which each of them wanted. Their evidence is most vague on this point, but the inference which is expected to be drawn from it apparently is that Ponting acquiesced in the arrangements which the defendants made with them and which have resulted in each of them obtaining a bus for nothing. But not a single question was put to Ponting by defendants' counsel, or to Razu, who was present at the interviews according to Velu and Mohanarajulu, to confirm their story of the interview or of plaintiffs' knowledge of the arrangement. I do not believe that any such interview with Ponting took place or that the arrangement made between defendants and Velu and Mohanarajulu was with the knowledge of the plaintiffs. Razu has said that promissory notes were taken from these two men for Rs. 1,143 and Rs. 1,812 respectively. These notes have not been produced. It is not pretended that they have been paid or that any attempt was made by the defendants to recover the money due on these notes. The representation made in the proposal forms by these two men that they had given cheques for the respective deposit amounts was false to the knowledge of the defendants. The defendants have attempted to justify what they did on the ground of an arrangement made with the knowledge and implied consent of the plaintiffs' agent Ponting. They have entirely failed to establish that ground, and I think that the presumption is that defendants did not have, and could not have had, any bona fide belief that the false representation was true. In my opinion these misrepresentations amounted to deceit. There is no doubt that they were made to the plaintiffs to induce the plaintiffs to act upon them and that as a consequence the plaintiffs have suffered damage.

In my judgment, therefore, the plaintiffs' appeal should be allowed and their suit should be decreed as regards the transactions with Velu and Mohanarajulu. The damages to which they are entitled is the measure of what they have lost by entering into the transactions: *see* (1937) 1 M L J 432[4] at p. 440. In the result, I agree with the order proposed by my brother.

C.R.K./D.S. *Appeal partly allowed.*

*** A. I. R. 1937 Madras 902**

WADSWORTH AND STODART, JJ.

Revenue Divisional Officer, Vizagapatam — Appellant.

v.

Sri Rajah Vyricherla Narayana Gajapathiraju Bahadur Garu — Respondent.

Appeal No. 10 of 1934, Decided on 4th May 1937, against award of Court of Sub-Judge, Vizagapatam, D/- 11th September 1933.

(a) Land Acquisition Act (1894), Ss. 18 and 53—Application under S. 18—Court can frame issue not directly arising from objections to award provided it is not inconsistent with them — Statement of objection under any head mentioned in S. 18 (1) is sufficient compliance with S. 18 (2)—Court can calculate amount of compensation in different manner from that in statement of objections.

When a reference is made to Court under S. 18, Land Acquisition Act, the Court can consider in framing the issues not only the pleadings, i. e. the statement of claim, the award and the objections thereto, but also the allegations of the pleaders where they are not inconsistent with the pleadings in view of S. 53 of the Act. The Court has therefore jurisdiction to frame an issue which does not directly arise from the objections taken, provided that it is not totally inconsistent with them. Though S. 18 (2) requires that the application for a reference to Court shall state the grounds on which the objection is taken, there is a sufficient compliance with the provisions of this sub-section if the application states on which of the four heads of objection detailed in sub-s. (1) the applicant proposes to rely. When an objection

to the amount of compensation has been taken, the Court has jurisdiction to work out the amount of compensation in a manner different from that which has been adopted in the statement of objections : *A I R 1930 P C 64, Expl.*; *A I R 1930 Mad 576* and *95 I C 577, Discussed.*

[P 907 C 1, 2 ; P 908 C 1]

***(b) Land Acquisition Act (1894), Ss. 23, 24 — Compensation — Market value on date of notification is best criterion under S. 23 — Compensation for special adaptability of acquired land—Value must be based on prudent business calculations — Special requirements of acquiring authority cannot be considered—Compensation for special adaptability shall be awarded when it has value for other purchasers.**

In a case of compulsory acquisition the owner is entitled to receive compensation based on the value of the land to himself, not based on its value to acquiring authority. In assessing the value, regard must be had not only to the use which the owner has made of the land up to the date of the notification under S. 4 but also to all its potentialities and the restrictions on its user as on that date. Ordinarily, the market value as on the date of the notification is the best criterion of value. 'Market value' means the price which a willing owner as on that date would get by a process of bargaining with a willing seller. Apart from the market value, the owner is also entitled to compensation for any damage done to his unacquired lands by the loss of the lands acquired. The 'special adaptability' of the land, that is the natural suitability of the land for some special use other than the use to which it is put by the owner, is an element to be taken into consideration in assessing the value; and the compensation to be awarded for such special adaptability is its value based on prudent business calculations having reference to the position on the date of the notification under S. 4. In a case of compulsory acquisition, the special requirements of the acquiring authority cannot be taken into consideration in fixing the value of the special adaptability but may be used as an illustration of the way in which the special adaptability might be of value to others, and when it has been shown that the special adaptability has such a general value, compensation must be awarded for it.

[P 910 C 1, 2 ; P 912 C 1]

Certain land was acquired for harbour purposes. It was proposed to start an anti-malarial propoganda in order to make the tract of land fit for human habitation and to provide drinking water to the malarial area, from the owner's spring. The special adaptability of the acquired land as a source of drinking water had no prospect of becoming an element of value apart from the anti-malarial scheme. It was shown that there was at the time of the notification under S. 4 no other purchaser besides the harbour :

Held : that as the special adaptability of the land as a source of drinking water supply arose entirely from the anti-malarial scheme carried out by the harbour authority, it could not be taken into consideration in assessing the value of the land in view of S. 24 (5), Land Acquisition Act : *In re Lucas and Chesterfield Gas and Water Board, (1908) 1 K B 571, on appeal (1909) 1 K B 16, Rel. on ; Cedar Rapids Manufacturing & Power Co. v. Locaste, (1914) A C 569, Applied ; Case law discussed.*

[P 912 C 2]

Page (of Calcutta Bar) — for Appellant.

Advocate General, K. Umamaheswaran & P. Venkataramayya—for Respdt.

Wadsworth, J.—This appeal is from the order on a Reference by the Land Acquisition Officer under S. 18, Land Acquisition Act. The acquisition covered land of the total extent of 108.90 acres situated to the south of the Vizagapatam harbour and required for harbour purposes. The appellant is the acquiring authority. There is a memorandum of cross-objections by the first claimant, the proprietor of the Anakapalli Estate, otherwise known as the Zamindar of Chemudu. We are no longer concerned with the rival claimants to the land, whose claims were overruled by the Subordinate Judge. The Land Acquisition Officer awarded in all a sum of Rs. 17,745-1-3 as compensation, including Rs. 5,000 for damage to the unacquired property of the respondent by reason of the diversion of a spring situated in the acquired land which helps to irrigate the respondent's Lova Garden, the cultivated land of which has not been acquired. The respondent claimed compensation, amounting in all to Rs. 3,96,730, the important features of this claim being a sum of Rs. 1,30,680 claimed for value of the land acquired at Rs. 1,200 an acre and Rupees 2,50,000 claimed for 'damage sustained by severance'. The Subordinate Judge allowed in all Rs. 1,03,004-14-9, the bulk of which is made up of the estimated value of the spring in the acquired land, in addition to the amount already awarded by the Land Acquisition Officer.

The following questions arise for decision in this appeal and cross-objections : (1) Did the respondent in fact claim either in his original statement of claim or in his objection to the award by the Land Acquisition Officer, compensation for the value of the 'special adaptability' of the land acquired for supplying drinking water otherwise than to the unacquired lands of the respondent ? (2) If no such claim was made before the Land Acquisition Officer, had the Subordinate Judge jurisdiction to award compensation for the 'special adaptability' ? (3) If there was jurisdiction, has the 'special adaptability' of the land for supplying drinking water any value apart from the scheme for the purpose of which the acquisition was made ? (4) Can the requirements of the harbour authorities for water be taken into consideration in

estimating the value of the land acquired? (5) Was the Subordinate Judge wrong in holding that the water supply on the land acquired had no potential value as a possible supply of drinking water for a building scheme in connexion with the unacquired land of the respondent? (6) What is the correct way of calculating the compensation and what is the proper figure?

In order to understand the contentions of the parties, it is necessary to describe the chief topographical features of the neighbourhood of the area acquired. The Vizagapatam harbour, the construction of which was begun in 1920, was formed by excavations in swampy land adjoining the existing creeks and by dredging a deep water channel so as to give access to the artificial basin thus created. The town of Vizagapatam is situated to the north of this entrance channel and to the east of the land originally taken up for harbour purposes. There is no road across this channel, the only communication with the south side of the harbour land being by ferry. Running west to east, along the south of the harbour land is the Anakapalle Road which terminates inside the harbour land about half a mile from the entrance to the Lova Garden owned by the respondent. Except for an almost abandoned path there is no access to the respondent's garden from this road. The harbour land to the south of the entrance channel intervenes between the road and the Lova Garden. The area acquired consists of a large heart-shaped block of barren hilly land separated from the south shore of the harbour by a line of hills and containing the catchment area of the spring which has given rise to this litigation. In the north-east corner of this large block the harbour authorities have also acquired a narrow tongue of land running in a north-easterly direction to accommodate a small reservoir and channel and pipe line; and another narrow piece from the northern extremity of this tongue running towards the north-west, through which a tunnel has been cut so as to carry both drainage water and pipe line through the hilly barrier separating the respondent's land from the reclaimed land of the harbour to the north. The spring in the acquired land naturally drains to the north-east into a valley known as the Lova Garden which is cultivated. Owing to its natural beauty, this valley was held in great affection by the Rani of Wadwan, who was the owner at the time when the notification was issued in 1928. She died in 1928 after the acquisition and her successor-in-title is the Zamindar of Chemudu who is the respondent. At the time of acquisition, there had been practically no development of the harbour land to the south of the channel. This area is very malarious. It had no water supply, the harbour getting its water from the town of Vizagapatam so far as the main area is concerned. With a view to the development of the south side of this harbour, the land on both sides of the Anakapalle road had been acquired and villages situated therein which were very malarial had been shifted further to the west. The harbour authorities intended by undertaking anti-malarial works and by creating a southern water supply to make this land on the south banks of the channel suitable for commercial purposes, such as oil installations and for the construction of a labour colony for the coolies employed on the harbour.

The malaria problem was very serious. Not only did it render the southern area unfit for development, but there was considerable danger to the workers in the Harbour Office situated on the northern bank of the channel and it was feared that the crews of the dredgers and other vessels in the harbour might be infected. In 1926 (*vide* Ex. 24) an anti-malaria survey was undertaken. This showed that the villages all along the south side of the channel were full of malaria and that the Lova Garden belonging to the respondent was one of the principal breeding places of the mosquitoes which endangered the health not only of the adjacent villagers but also of the harbour staff. The anti-malarial officer suggested that operations to get rid of the mosquitoes in the Lova Garden could most economically be carried out in conjunction with the utilization of the water from the valley to provide a pipe water supply to the south side of the harbour. This suggestion was welcomed by the harbour authorities, more especially as the existing agreement for the supply of water from the municipality, while it provided a sufficient supply during the early stages of the scheme, would not suffice for the ultimate needs of the harbour. Moreover, the spring at the head of the Lova Garden was 150 feet above the sea level so that a gravitation flow was practicable.

The alternative water supply then in contemplation was either the development of the wells in the evacuated villages on the south side or a much more ambitious scheme entailing the utilization of the water of the Meghadrigedda stream on the west of the harbour, a scheme which entailed difficulties because it required the co-operation of the Harbour, the Railway, the Municipality and the Government of Madras. It was estimated that the Lova Garden spring would give 50,000 gallons of excellent water daily. The original scheme was to take this water in pipes through the garden, and out by the mouth of the valley which emerges into the entrance channel. This was eventually abandoned in favour of the plan for tunnelling through the hilly area to the north of the spring and leading the water in an almost direct line to the point at which it was required, this tunnel being utilized not only to carry the pipe line, but also to carry away flood water so as to prevent the stagnation of water in the valley and thus eliminate one of the breeding places for mosquitoes. The scheme for utilisation of this water and the carrying out of anti-malarial operations in the valley was not really an independent scheme. It was linked up with a bigger scheme for getting rid of breeding places of mosquitoes all round the southern side of the harbour so as to make the whole of this area fit for development. The modification of the scheme by the proposal for a tunnel rendered it unnecessary to acquire the Lova Garden proper which the owner was most anxious to retain. All that had to be done in that garden was the construction of suitable drainage works. Full particulars of this scheme were communicated to the Rani who then owned the property.

In 1927 (*vide* Ex. D) the Diwan reported to the Rani on this scheme pointing out that it was not purely an anti-malarial measure but had a commercial bearing, that the constant supply of water was of great value and that compensation would have to be paid for it. This report was not apparently communicated to the harbour authorities at the time. Work on the tunnel so far as it was on harbour land was started in November 1927. On 13th February 1928, we have the Notification under S. 4 (1), Land Acquisition Act, for the acquisition of the land with which we are now concerned, and other adjacent lands for the execution of anti-malarial works. It is to be noted that this preliminary notification as well as the draft declaration issued later referred only to anti-malarial works; but there is no doubt that the greater portion of the area acquired from the respondent was acquired primarily not merely for anti-malarial works, but as the catchment area of the water supply required in connexion with the development of the south side of the harbour and that this larger objective was communicated to the respondent some time before the acquisition began. The respondent's objection to the acquisition (*vide* Ex. F) states that there was no objection to anti-malarial operations provided that the water source of the valley was not affected, but that if the water supply from the springs in the upper portions of the valley was to be cut off, the cultivation and amenities of the lower valley would be adversely affected and should be taken into consideration in fixing compensation. In April 1928 the Notification Ex. HH-1 was issued to enable the acquiring authority to take immediate possession of small portions of land required. Again (*vide* Ex. 19) the respondent objected to the diversion of the water so as to cut-off the water supply of the lower portions of the valley. There was no reference to any value which the water might possibly have except for the irrigation of the valley.

In the autumn of 1928 the respondent engaged Diwan Bahadur A. V. Ramalinga Ayyar, formerly Chief Engineer to the Government of Madras, as an expert to examine the property which was to be acquired and value it. His report is Ex. 3, dated 21st December 1928. He expressed the opinion that the water at the head of the valley could be utilized for the development of a building estate on the unacquired lands of the respondent situated round the valley and that such building sites would be in demand for persons connected with the harbour; and on this assumption, taking into consideration the value of the whole of the area, which in his opinion could be developed for building, and concluding that the diversion of the spring would put an end to this development, he suggested that a claim be made for Rupees 8,00,000 as compensation. This valuation was communicated to the harbour authority in Ex. KKKK dated 5th January 1929; and the Diwan states therein, quoting the agreement between the Harbour

and the Municipality for the supply of water, that the respondent would be justified in claiming at least Rs. 4,00,000 by way of compensation and threatening to take the matter up to the Privy Council if necessary. On the same day (*vide* Ex. 20) the respondent filed before the Land Acquisition Officer a statement of claim which sets forth the importance of the water supply for the cultivation of the garden, the natural amenities of the valley and its attractions as a pleasure resort, the possibility of the development of the garden as a building estate and the consequent use to which the water of the spring could be put both for irrigation and for the supply of drinking water and the valuation put upon the property by Mr. Ramalinga Ayyar. The actual details of the claim were :

	Rupees
Land-value at Rs. 1,200 per acre ...	1,29,480
Value of the masonry structures and roads. ...	15,000
Value of trees. ...	1,050
Damage sustained by severance. ...	2,50,000
Value of portions already taken possession. ...	1,200
Total Rs....	3,96,730

It is to be noted that though there is a big claim for "damage sustained by severance" which presumably must be the damage to the unacquired land by reason of the acquisition, there is no express claim based on the value of the water to any one else other than the respondent. The award of the Land Acquisition Officer, which was not apparently based on any further representations made on behalf of the respondent or any materials to show that this water had a value other than its irrigation value, proceeds on the basis that the adverse effect on the irrigation facilities of the Lova Garden would not reduce the income from the valley by more than half and estimates the loss owing to the diversion of the major portion of the spring water at Rs. 5,000. The lands are valued on the basis of similar acquisitions in the neighbourhood and for the masonry structures, all of which are in a completely ruined condition as a result of a cyclone, the Land Acquisition Officer awards Rupees 3,950, the figure estimated by the Executive Engineer. On receipt of this award, the respondent objected and claimed a reference under S. 18. The only words referring to the grounds of objection are the following :

> The compensation awarded is very low and inadequate for the portion acquired and for the damages sustained by severance to the other portions of the valley garden.

Clearly this objection is not based on any value which the spring might have for sale to the public generally. After the reference to the Court the respondent filed in Court what is called a statement of claim under O. 8, R. 1, Civil P. C. This document besides dilating on the beauties and fertility of the valley and the adverse effect of acquisition upon these amenities, states also :

> There is a growing demand for sites for building purposes and for bungalows in Vizagapatam and the Lova Gardens including the sites in question has by reason of its adaptability for building sites a potential value as such if drinking water is available. The sites in question are also fit for a water reservoir in order to store and supply water both for drinking and irrigation purposes and they can also be utilized for quarrying purposes. If the present sites be acquired with the spring water thereon, the zamindar will not only lose the above advantages but the plantations and gardens in the lower valley would be rendered useless and unattractive and sustain irreparable loss. The palatial buildings built in the lower valley for pleasure resort would be useless and lose their value if the garden adjoining them does not thrive by the deprivation of the only permanent water source.

In the schedule, the claimant repeats the details given in the statement of claim filed before the Land Acquisition Officer, the main item being again "damage sustained by severance : Rs. 2,50,000." By doing what appears to be violence to the wording of the passage extracted above, and by ignoring the particulars in the schedule attached thereto, the learned Subordinate Judge has arrived at the conclusion that this statement of claim embodies a claim for compensation for the market value of the water supply apart from its development in connexion with the building estate and apart from its value for irrigation purposes to the land remaining in the ownership of the respondent. There are no materials other than the correspondence which shows that the Dewan knew that the Harbour wanted this water for drinking purposes and had every intention of making the authorities pay for this drinking water, to justify the conclusion that there was a specific claim made before the Land Acquisition Officer or in the first statement filed before the Subordinate Judge to the market value of the special adaptability of the acquired land for supplying drinking water to any one other than the prospective occupants of the res-

pondent's own land. It seems to us quite clear that this basis of valuation was not put forward by the respondent until the actual trial of the reference before the learned Subordinate Judge. It follows that, on the first question, our finding is that the respondent has not in fact claimed either in his original statement of claim or in his objections to the award of the Land Acquisition Officer compensation for the value of the "special adaptability" of the land acquired for supplying drinking water otherwise than to his own unacquired lands.

The next question is whether the Subordinate Judge had jurisdiction to award compensation for that value in the absence of what may be called a pleading. There is very little in the Act itself to afford a basis for the appellant's argument that there is no jurisdiction. S. 18, which deals with reference to Court, contemplates four kinds of objections, namely (1) to the measurement of the land, (2) to the amount awarded as compensation, (3) to the person to whom the payment of compensation is to be made, and (4) to the apportionment of the compensation. Sub-s. 2 requires the claimant to state the grounds of his objection. Whether the claim based on the acquisition of the spring is a claim for the value of the land acquired as specially adapted to supply drinking water to the outside public or whether it is merely a claim for damages for detriment to the unacquired land of the claimant by the loss of a potential drinking water source to the occupants of the unacquired land, the claim falls under the second head in S. 18 (1), namely 'Compensation'. Under S. 20 the Court is directed to 'proceed to determine the objection'. The only sections which appear to restrict the jurisdiction of the Court in this matter are Ss. 21 and 25, with which we are not now concerned. S. 53 of the Act makes the provisions of the Civil Procedure Code applicable to all proceedings before the Court under the Land Acquisition Act where the Code is not inconsistent with the Act. That being so, it may well be contended that O. 14, R. 3 of the Code will apply and will enable the Court to consider in framing the issues not only the pleadings (that is the statement of claim, the award and the objections thereto) but also the allegations of the pleaders where they are not inconsistent with the pleadings. If so, it would follow that the Court would have jurisdiction to frame an issue which does not directly arise from the objections taken provided that it is not totally inconsistent with them.

Moreover, if O. 6, R. 17, Civil P. C., applies to proceedings before the Court under the Land Acquisition Act, surely the Court could have given the respondent leave at the time of framing the issues to amend his statement of objections by including in it a claim for the value of the natural suitability for water supply of the land acquired subject of course to such terms as might be proper. In fact the learned Subordinate Judge did not receive any application to amend the statement of objections; but, if the power to amend exists, then the question is one of procedure rather than of jurisdiction. In the absence of a clear authority to the contrary, we should be constrained to hold that no question of jurisdiction arises.

Mr. Page, appearing on behalf of the Acquiring Authority, has cited numerous cases on this part of his argument, but, as we agree generally with the learned Subordinate Judge on the jurisdiction question, we do not think it necessary to deal at length with the case-law which has been fully set forth in the lower Court's judgment. It is sufficient to state that there is good authority for the view that, though S. 18 (2) requires that the application for a reference to Court shall state the grounds on which the objection is taken, there is a sufficient compliance with the provisions of this sub-section if the application states on which of the four heads of objection detailed in sub-s. (1) the applicant proposes to rely. It has been held by the Judicial Committee in 57 I A 100[1] that the jurisdiction of the Court with reference to S. 18 (1) is confined to considering and pronouncing upon the objection which has been raised in the written application of reference, that is to say, the objection considered must fall under the same category in S. 18 (1) as the objection pleaded. As their Lordships said, once it is ascertained that the only objection taken is to the amount of compensation, that alone is the 'matter' referred, and the Court has no power to determine or consider anything beyond it. This however does not amount to a decision

1. Pramathanath Mullik v. Secretary of State, A I R 1930 P C 64=121 I C 536=57 I A 100 =57 Cal 1148 (P C).

that, when an objection to the amount of compensation has been taken, the Court has no jurisdiction to work out the amount of compensation in a manner different from that which has been adopted in the statement of objections. The case which goes nearest to the position for which Mr. Page contends is the ruling of a single Judge of this Court in 59 M L J 30.[2] In that case the learned Judge holds, quoting only a ruling of the Punjab Chief Court, that the raising of new grounds of compensation not taken in the statement of objections could only be allowed before the Court by virtue of some section of the Land Acquisition Act and that there is no section which gives power to the Court to entertain such fresh grounds. The learned Judge does not consider the effect of S. 53 of the Act which introduces the provisions of the Civil Procedure Code in the trial of references under the Act. He states :

> In all ordinary circumstances, a claimant can and should present his case fully before the Collector, and should be held bound throughout the proceedings by what may be termed his pleadings ;

and with reference to S. 18 (2) he observes:

> The proceedings before the Court are of the nature of objections to the Collector's award, and not a judicial enquiry independently undertaken into such questions as the claimant may raise. On this view it would not be open to a claimant to make out a fresh case, whether by way of supplementary claims to compensation or otherwise.

If this be taken as a rule of procedure, subject to all just exceptions as are provided in the Civil Procedure Code, there is no reason to quarrel with this statement of the law ; but if the decision of Curgenven, J. is to be taken to mean that the Court has no jurisdiction in a proper case to allow the claimant to vary the basis of his objection or to frame an issue relating to the same head of objection but not arising precisely out of the pleadings, then, in our opinion and with all respect, he goes too far. There is another ruling of this High Court, 23 M L W 731,[3] which deals with a case on which compensation was claimed for land on the basis of its use as a cocoanut tope, and in the reference to the District Judge a claim was made for compensation on the footing of its possible use as a building site. It was held that the claim on the basis of the building site value was inconsistent with the claim for its value as a cocoanut tope and that the claimant should not be allowed to base her case in Court on a valuation of the land which was inconsistent with the basis on which it was valued in proceedings before the Land Acquisition Officer. Here again the decision does not purport to go any further than to hold that as a matter of procedure a claimant should ordinarily be confined to the basis of value which has been put forward before the Land Acquisition Officer. There is no decision that the Court has no jurisdiction in a proper case to consider the effect of valuation on a different basis. Our conclusion on the second question, therefore, is that the Subordinate Judge had jurisdiction to award compensation on the basis of the value of this land for water supply apart from its value to the respondent's own lands, though no express objection was taken on this basis and no specific claim for compensation to this effect was urged before the Land Acquisition Officer.

The next question is primarily one of fact, namely, whether the natural adaptability of the land acquired as a source of drinking water for areas outside the land of the respondent had any value at the time of the notification apart from the scheme for which the land acquisition was made. In answering this question, we must leave out of consideration for the moment, both the possibility of the owners themselves using the water supply as part of some building scheme on their unacquired land and also the realized possibility of the water being required by the harbour for the scheme which led to the acquisition. The answer to the question depends very largely on the topography of the area north of the land acquired. The main harbour area is separated by the entrance channel from the reclaimed land lying to the north of the land acquired. There is no question of any supply being required by people living to the south or east or west of the land acquired. In the south there is a barrier of hills; to the east there is the land of the respondent, the Dolphin's Nose which has been acquired by the harbour authorities and the sea; to the west there is a barrier of hills; to the north there is a ridge of high ground through which the tunnel now runs and beyond it the undeveloped harbour land from which the inhabitants of a few malarious hamlets had been

2. Secy. of State v. Subramania Iyer, A I R 1930 Mad 576=127 I C 298=59 M L J 30.
3. Lakshminarasamma v. Assistant Commissioner of Labour, (1926) 95 I C 577=23 M L W 731.

removed to a distance. The only populous area in the neighbourhood is that of the town of Vizagapatam which is situated on the other side of the harbour, and it is established that the conveyance of the water from the respondent's land to the town of Vizagapatam is not practicable. There is no evidence that anyone prior to this scheme ever conceived of the possibility of running a pipe line down to the creek and selling the water to shipping, and any such scheme would not only require the concurrence of the harbour authorities, but in all probability would be so highly speculative that it could not be considered to be of any practical value.

It has been suggested that there might have been a sale of this water to the oil companies and others who in future might become tenants of the harbour on the land to the south of the channel. But at the time when this scheme was promulgated the whole of that area was undeveloped. It was full of malaria and it was incapable of any profitable use apart from the success of the anti-malarial campaign of which this acquisition is a part. It is not conceivable that the respondent himself would ever have been able to develop a water supply scheme, carrying out the necessary anti-malarial works and thereby encouraging business concerns to occupy the harbour land and buy water from him; nor is it likely that any such scheme would have worked at a profit. For the costs of ridding the area of malaria and making it fit for habitation would use up any profit that there might be from the sale of water. The evidence in the case quite clearly shows that the owner of the water source had no idea whatever that it had any commercial value as a source of supply of drinking water before the harbour authorities began investigations. The matter seems to be concluded by the evidence of the respondent's own expert Mr. Ramalinga Iyer, which is as follows :

I do not think that there is anything else to induce the claimant to sale the Lova Gardens beyond the water scheme and the building scheme. When I put forth the scheme, I thought that the harbour authorities would purchase the water. I did not think of any other buyers. The claimant did not suggest any other buyers. The Harbour is the only person who has any legal right of access to the reservoir because it owns all the surrounding properties. I thought that the harbour cannot but buy this water for the development of the harbour scheme. According to me, there is no competition; but one buyer is bound to come and buy. That buyer is a public authority and the claimant is in a position to make hay for his own goods. I agree that but for this harbour scheme there is no market for this water.

The conclusion therefore on the question of fact must be that the 'special adaptability' of this land for the supply of drinking water has no value apart from the scheme for which the acquisition is made and apart from the use to which it might conceivably be put for the development of the building scheme by the respondent himself.

The next question is whether the requirements of the harbour itself for water can be taken into consideration in estimating its value. This is purely a question of law and we are indebted to Mr. Page and the learned Advocate General for a very complete discussion of the English and Indian authorities on the subject. The general principles upon which Courts must estimate the value of the lands compulsorily acquired are set forth in Ss. 23 and 24, Land Acquisition Act, and in a series of English decisions which have been followed by the Privy Council and the Courts in India. It is well settled that English decisions under the Land Clauses Act of 1845 lay down principles which are equally applicable to proceedings under the Indian Act. The cases which have been quoted before us are all considered by the learned Subordinate Judge who seems however to have been misled by a consideration of the effect on the English law of the Land Clauses Act of 1919. Apparently the express provision of that Act that the special adaptability of the land acquired for a particular purpose cannot be taken into account when there is no market apart from the special needs of the particular purchaser, seems to have led the learned Subordinate Judge to the inference that the law in England, as it stood prior to the Act of 1919, was entirely changed by that Act. This appears to be an error. It is unnecessary for the purpose of this case to go into the question of the effect on the English law of the Act of 1919. All the leading cases upon which we propose to base our decision are anterior to that Act, and the proper course seems to be to consider the effect of those decisions and to ignore the subsequent changes in the statute law in England, which have no application to India.

Under S. 23 (1) of our Act, the Court, in determining the amount of compensation

to be awarded for land, is required to take into consideration, first, the market value of the land as on the date of the notification under S. 4 (1), secondly, the damage sustained by the loss of standing crops or trees, thirdly, the damage by severance, and fourthly, the damage by reason of the acquisition injuriously affecting other property of the owners. We are not now concerned with the other matters for consideration specified in the section. S. 24 provides that the Court shall not take into consideration the degree of urgency that led to the acquisition, the disinclination of the owner to sell, any damage which would not give a right of suit, any damage to the land acquired after the date of the declaration by the use to which it will be put, the increase in the value of the land acquired likely to accrue from the use to which it will be put when acquired, the increase to the value of the other land of the owner likely to accrue from the use to which the land acquired will be put and any expenditure on the land acquired after the date of the notification under S. 4, sub.s. (1). We are concerned here mainly with the fifth of these considerations, namely, the increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired. Applying this clause to the present case, it is argued that the Court cannot take into consideration the increase to the value of the land acquired by reason of the use of the water on the land for providing a drinking water source to the harbour.

It is settled law that in a case of compulsory acquisition the owner is entitled to receive compensation based on the value of the land to himself not based on its value to the acquiring authority. In assessing the value, regard must be had not only to the use which the owner has made of the land up to date of the notification under S. 4, but also to all its potentialities and the restrictions on its user as on that date. Ordinarily the market value as on the date of the notification is the best criterion of value. "Market value" means the price which a willing owner as on that date would get by a process of bargaining with a willing seller. Apart from the market value, the owner is also entitled to compensation for any damage done to his unacquired lands by the loss of the lands acquired. It is settled that in considering the market value the market may be an imaginary market; there need not be evidence of the existence of specified purchasers. It is laid down in the Act that in assessing the value, the Court must exclude any increments of value which would accrue to the land by reason of the use to which it is to be put after acquisition and any value which will after the date of the notification under S. 4 accrue to the land by reason of the further development of the scheme for the purpose of which it is to be acquired. What is called the "special adaptability" of the land, that is to say the natural suitability of the land for some special use other than the use to which it is put by the owner, is an element to be taken into consideration in assessing the value; and the compensation to be awarded for such special adaptability is its value based on prudent business calculations having reference to the position on the date of the notification under S. 4.

So far there is no doubt as to the law. Apart from the above propositions, the appellant contends that where on the date of the notification there exists no person who can reasonably be presumed to be a probable buyer of the property for the special purpose to which it is naturally adapted, then the special adaptability cannot be taken into consideration at all in assessing the compensation, for to take it into consideration in such circumstances would be to make the acquiring authority pay for its own improvements, would nullify the effect of the statutory power of compulsory purchase, would involve the valuation of the land on the basis of its value of the acquirer and not on the basis of its value to the owner and would involve the consideration of the urgency which has led to the acquisition. On the other hand, the learned Advocate-General for the respondent contends that the intrinsic value of the special adaptability must be considered and not merely its market value; that this intrinsic value exists even when there is in prospect no possible purchaser other than the acquiring authority. It is argued that the value of the land to the owner includes necessarily the price which he might reasonably have expected to get on the date of the notification for the special adaptability of the property to the needs of the acquiring authority. The respondent contends that the owner, quite apart from the compulsory acquisition, would be likely to get a reasonable price for his facilities by a process of bargaining between himself as a willing seller and

the acquiring authority as a willing buyer even in the absence of possible rival purchasers. It is argued that compulsory acquisition does not involve the expropriation of the owner without giving him the price which he might reasonably have expected to get in view of the development of the locality as it stood on the date of the notification, that is to say, the owner would naturally be aware of the development of the harbour and the likelihood of the use of the land to the south of the harbour for oil tanks and other commercial purposes and that the mere existence of this probability would give an intrinsic value to the supply of water which was likely to be required for those probable developments quite apart from the actual scheme of the acquisition. It is also contended that the only practicable way of assessing the price which a willing seller can expect to get in such circumstances is by taking as a basis of calculation the price which the buyer was actually paying for similar facilities elsewhere, and that is the basis which the learned Subordinate Judge has adopted.

It is unnecessary to dwell on the numerous cases cited which lay down propositions about which there is no dispute, but we must carefully consider those leading cases which help us to decide which of the two conflicting views outlined above is correct. In 56 M L J 750,[4] the Privy Council had to deal with the valuation of certain land acquired under the Land Acquisition Act, which land was absolutely worthless except as a potential site for salt works. It was held that the owner on compulsory acquisition was entitled to the present market value of that potentiality and that where in fact it was found that the exploitation of this land as a salt factory was not likely to be profitable, the land should be valued as waste land. The case in (1915) 2 Ch 252[5] has been quoted for the respondent merely because of the observation that the market price is not a conclusive test of real value. There is nothing in the actual ruling which has any bearing on the facts before us. An important case on the acquisition of water rights is that of (1903) 1 K B 574 the appellate judgment being reported in (1904) 1 K B 417.[6] That was a case in which land was acquired which had a special adaptability for use as a reservoir and it was wanted for that purpose by a public authority. There was no evidence that the land could not be used as a reservoir for other places but there was in fact no other buyer in view at the moment. It was held that it was right to take into consideration the fact that the land in question had peculiar natural advantages for supplying water to the District, apart from any value created or enhanced by the scheme for appropriating the water to the particular local authority, and it was not necessary to prove that the land could be similarly used by other specified local authorities. The effect of that decision is most clearly seen from the brief judgment of the Master of the Rolls. He says :

> To exclude the element of adaptability it would be necessary, as it seems to me, to show that there is no reasonable possibility of the site coming into the market. The value of the possibility if it exists is a question entirely for the arbitrator.

That is to say, the burden of proof lies upon the acquiring authority to show that no one else has any use for the special adaptability other than the acquirer; it is not enough merely to show that at the moment no offer has been received from anybody else. The case of *In re Countess Mary Osalinskey and the City of Manchester*, which is reported at p. 659 of the Appendix to Browne and Allen's Law of Compensation, is often quoted on this subject. It arose out of the acquisition of land adjacent to Thirlmere in the Lake District for the construction of a reservior to supply the Manchester Corporation. At page 662 dealing with the argument that the arbitrator erred in taking into consideration the value of the land to the Manchester Corporation for use as a reservior, Grove, J. observes :

> You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put land to, when they take it under Parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case as going to enhance the value of the land, are not visionary, but are schemes with certain probability in them.

4. Vallabhdas Naranji v. The Collector, A I R 1929 PC 112=115 IC 730=56 MLJ 750 (PC).
5. South Eastern Railway v. London County Council, (1915) 2 Ch 252 = 84 L J Ch 756=113 L T 392=79 J P 545=13 L G R 1302 = 59 S J 508.
6. *In re* Gough and Aspatria Silloth and District Joint Water Board, (1903) 1 K B 574; on appeal (1904) 1 K B 417 = 73 L J K B 228=90 L T 43=52 W R 552=68 J P 229 = 20 T L R 179.

Later on at p. 665 the learned Judge observes:

> There is not a single fact stated from the shorthand writer's notes to show me that the arbitrator did that which he ought not to have done, namely, based his valuation upon the particular circumstances and particular price which the Manchester Corporation might be interested to pay for this compulsory sale.

The judgment of Stephen, J. points out that the geographical position of Thirlmere with a large quantity of water at such a level as to make it available to nearly any large town in England makes it absurd to say that there is no special value attaching to its natural features. This case may therefore be taken as an authority for the position that the special requirements of the acquiring authority cannot be taken into consideration in fixing the value of the special adaptability but may be used as an illustration of the way in which the special adaptability might be of value to others, and when it has been shown that the special adaptability has such a general value, compensation must be awarded for it.

The most instructive of all the English cases on this subject is that of *In re Lucas and Chesterfield Gas and Water Board*, the original judgment in which is in (1908) 1 K B 571 and the appellate judgment in (1909) 1 K B 16.[7] That was a case in which the Chesterfield Gas and Water Board owned two reservoirs, one above the other. Through the land between the two reservoirs, ran a pipe line belonging to the Board. Apart from the pipe line, the intervening land was the property of Mr. Lucas, and it was admittedly specially suitable for use as a reservoir. The argument on behalf of the Board was that this land had no value on account of its special adaptability as a reservoir because no other purchaser could use it for that purpose without acquiring statutory powers and without interfering with the Board's pipe line. It was held that the special value must be taken into consideration in awarding compensation, on the basis that the Court would assume that any possible purchaser would have been able to get statutory powers for the development of a scheme and that a public body would not use the existence of its pipe line merely as a lever to force the owner to part with the rest of his land for less than its worth. The judgment of Fletcher Moulton, L. J. has been repeatedly quoted with approval both by their Lordships of the Privy Council and by the Courts in India. The learned Judge at page 31 states as a proposition of law that:

> Where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase, it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of a scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes.

He observes also at p. 32:

> As I read the award of the umpire, he has specifically found as a fact that there exists such a special suitability in the lands in question, and that there also exists such a possible competition in the District in respect of the supply of water as would entitle him to estimate the compensation in the way I have described.

And then at p. 34:

> But if the land still remains in the position that there is no competition for it by reason of its special position and adaptability, and that when the compensation has to be assessed, there is no one (apart from the one purchaser who has obtained compulsory powers of purchase) to whom the land has a higher value than its value for ordinary purposes, I can see nothing to exclude the operation of the principle that you are to look at the value to the seller and not at the value to the purchaser.

There can be little doubt that this exposition of law when applied to the facts of the present case as we have found them would justify the conclusion that no value can be awarded to the special adaptability of this land for supplying drinking water to the harbour alone, if it can be shown that the land cannot have any value as a source of drinking water to anyone else. The judgment of Fletcher Moulton, L. J. has been approved by the Privy Council in (1914) A C 569,[8] which was a case of the acquisition of lands required for developing a hydro-electric project on a river in which the owner of the land had certain water rights. Their Lordships held that the proper basis for compensation was the amount for which the respondent's lands and rights could have been sold had the

7. (1908) 1 K B 571; on appeal (1909) 1 K B 16 =77 L J K B 1009=99 L T 767=72 J P 437 =6 L G R 1106=24 T L R 858.

8. Cedar Rapids Manufacturing & Power Co. v. Locaste, (1914) A C 569=83 L J P C 162= 110 L T 873=30 T L R 293.

appellants with their acquired powers not been in existence, but with the possibility that that company or some other company or person might obtain those powers. The most that could be said for the respondent on the strength of this case is that the respondent would be entitled to the value of the water supply on his land as it existed before the scheme for the development of the southern lands of the harbour was promulgated, but in view of the possibility that some such scheme might come into existence. Their Lordships say :

> The value of the land is the price which it would fetch, enhanced above the bare value of the ground, which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled, had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

Applying this ruling to the facts of the present case, it seems most unlikely that the land acquired would in fact have received any increment of value by reason of its adaptability for supplying drinking water, which adaptability only existed for the malarial tract of land to the south of the harbour, had it been offered for sale before there was any proposal to clear those lands of malaria and render them fit for habitation and development. In 26 Bom 1,[9] it was held that the plaintiffs were entitled to the market value including any actual speculative advance which was shown to have arisen at the date of the notice, but excluding any future speculative advance from the same cause. It was pointed out that the Court should not award more because the object of the scheme is likely to increase the value of the land, nor give less because the same object was likely to increase the value of the owner's unacquired land, but that the Court should exclude for both parties speculations on the effects which the scheme might produce on prices, except to the extent to which it is shown that such speculations had actually entered into the market price on the date of the notification. There is in the present case not only no evidence that speculations had affected the market value of this land as a source of drinking water supply on the date of the notification, but the evidence makes it clear that the respondent had no idea that this drinking water was of any value until investigations were made by Mr. Ramalinga Ayyar months after the notification was issued.

In (1917) A C 187[10] the Privy Council confirmed the decision of the Court which set aside the arbitratior's award on the ground that the arbitrators had estimated the potential value of the property due to the acquiring authority's reservoir and capitalised the estimated profit arising therefrom. It may be pointed out that the arbitrator's procedure was very similar to that which has been followed by the learned Subordinate Judge. Their Lordships summarise the leading cases referred to above and approve of the principle that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired. In (1914) 3 K B 629,[11] Rowlatt, J. points out that, where there is no competition or where the price has been raised by biddings to a point at which competition ceases, there is no room for the application of the doctrine of special adaptability. At p. 637 the learned Judge states :

> If and so long as there are several competitors including the actual taker who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land is an element of value in no respect differing from that afforded by the possibility of offers for it for other purposes. As such it is admissible as truly market value to the owner and not merely value to the taker. But when the price is reached at which all other competition must be taken to fall, to what can any further value be attributed ? . . . There can be only one answer—in respect of the value to him for his scheme.

Other cases have been quoted which do no more than give effect to the same principles. There is however one case which it is desirable to refer to as a warning that the report is based on a misquotation. The report of the case in A I R 1936 Rang 226,[12] misquotes a passage from the case in (1917) A C 187[10] probably owing to a copyist error, and makes it read that the

9. The Secy. of State for Foreign Affairs v. Charlesworth Pilling & Co., (1902) 26 Bom 1=28 I A 121=8 Sar 1 (P C).

10. Fraser v. City of Fraserville, (1917) A C 187=86 L J P C 91=116 L T 258=33 T L R 179.
11. Sidney v. N. E. Railway Co., (1914) 3 K B 629=83 L J K B 1640=111 L T 677.
12. Katheresan Chetti v. Special Collector, Twarte, A I R 1936 Rang 226=163 I C 172.

value for purpose of compensation is the value to the seller with all its advantages due to the carrying out of the schemes for which it is acquired. The words "excluding those advantages" which should be read after "all its advantages" have been omitted thus making the decision quoted exactly the contrary of its true import. This error has been carried into the headnote.

Let us apply the law as laid down in these rulings to the facts of the present case. It has been shown that there was at the time of the notification no other purchaser besides a harbour who was reasonably possible as a purchaser for the drinking water supply on the respondent's land. That being so, this special adaptability has no value apart from the value created by the scheme for the purpose for which it is acquired. Even if we are to take into account the speculative rise of price which might have taken place by reason of the owner conceiving the possibility of the development of some such scheme as has been put forward, it is on the evidence apparent that no one foresaw this scheme until the actual investigation began and there is no evidence whatever of any speculative rise of price until after the scheme had resulted in the notification. Though the special adaptability existed, it had no prospect of becoming an element of value apart from the scheme; its value therefore was the result of the scheme and to award compensation for it is to do that which cannot be done with reference to S. 24 (5) of the Act, i. e. to take into account the increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired. It follows that the learned Subordinate Judge erred in awarding compensation for the special adaptability of this land to supply drinking water to persons outside the respondents' estate.

In view of this conclusion, it is unnecessary to go into the correctness of the Subordinate Judge's method of valuation. It must however be pointed out that his valuation rests on various assumptions for which there is no adequate basis if regard is had to the position before the issue of the notification. It assumes a realized possibility of the scheme maturing; it fails to consider the possibility of the scheme not being taken up or of the harbour deciding on one or other of the two alternative schemes of water supply which were under consideration; it assumes that the harbour would be willing to pay in perpetuity a rate for water which it had agreed to pay only for five years; it seems to overlook the fact that even this agreement with the Municipality reduced the price by one half for the succeeding five years. In fact the learned Subordinate Judge has really awarded compensation based on the value to the harbour of a completed scheme, and not on the possibility of some such scheme being completed.

The memorandum of cross-objections, so far as it deals with the details of the learned Subordinate Judge's method of calculation need not be considered. As to the rejection of the alternative basis of claim, namely, the possible development of a building estate on the respondent's land to utilize the water on the land which has been acquired, we would only say that we agree with the learned Subordinate Judge that such a building scheme was not a practical proposition and need not be taken into consideration in estimating compensation. It is unnecessary to repeat the grounds upon which the learned Subordinate Judges's decision is based. As to the actual value of the lands acquired, we consider that the learned Subordinate Judge is in error in treating as conclusive an estimate prepared for the harbour authorities at the early stages of the investigation and in deducing therefrom that the proper value of the land at the head of the valley was considerably more than the price which the respondent himself claimed.

In actual fact, none of the land acquired was yielding any income at all to the respondent at the time of the acquisition. The learned Subordinate Judge finds as a fact that the diversion of the water has not adversely affected the cultivation of the valley. The land acquisition officer has awarded a substantial sum for the loss of a part of the irrigation supply. We consider that the award of the Land Acquisition Officer is ample compensation for the value of the land with its potentialties and for any damages that may have been done by the diversion of the water from it away from the unacquired land. There is no reason to consider that the Land Acquisition Officer's estimate of the value of the buildings on the land acquired is too low. In the result therefore, we allow the appeal with costs here and in the Court below, and restore

the award of the Land Acquisition Officer in toto. The memorandum of cross-objections is dismissed with costs.

Stodart, J.—I concur with my learned brother. The diversion of the water of the respondent's spring had two purposes: 1. To intercept the water and thus render the lower part of the Lova Gardens free from malaria. 2. To provide drinking water to the area south of the harbour. As a source of drinking water, the spring could only be utilized in that area, but, apart from the scheme, which was being undertaken at the time of this acquisition, that area was uninhabitable, or at least not habitable by people in such numbers as would require a moderately copious supply of drinking water. It is not contended that any other public authority or private undertaker except the harbour authorities would even have come forward to develop this area and make it habitable. Thus the value of the respondent's spring as a source of drinking water—ruling out respondent's scheme for developing a building estate in his valley—arose entirely from the antimalarial scheme carried out by the harbour authorities and depended on the success of that scheme. To my mind, S. 24, sub-s. 5 of Land Acquisition Act, is completely applicable to the facts of this case. If under that section the Court is debarred from taking into consideration "any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired", what was the use to which at the date of this acquisition it was proposed to put this spring? Partly to drain the lower end of the valley. Partly by developing and improving the south side of harbour, to supply with drinking water the persons who might possibly be located there.

By Court.—Certified for two counsel.

C.R.K./K.B. *Appeal allowed.*

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* A. I. R. 1937 Madras 915

VARADACHARIAR AND PANDRANG ROW, JJ.

Dandamudi Ramarayudu — Appellant.

v.

Dandamudi Sitalakshmamma and *another* — Respondents.

Appeal No. 223 of 1934, Decided on 6th May 1937, against decree of Sub-Judge, Tenali, in O. S. No. 69 of 1930.

(a) Hindu Law—Maintenance—No demand for long time—Right to arrears is not lost—Delay should, however, be taken into account in considering amount to be awarded.

The absence of a demand for a long period will not deprive a widow of her right to arrears of maintenance though that circumstance may have to be taken into consideration in determining the extent of the liability to be imposed for arrears due for a long period. [P 916 C 1]

(b) Hindu Law — Maintenance — Widow—Charge—Charge should generally be restricted to husband's share.

In awarding maintenance to a widow against her husband's co-parcener, prima facie the charge must be on the husband's share in the joint family property and only in exceptional circumstances a Court may declare a charge on a larger extent of the joint family property. [P 918 C 1]

*** (c) Insolvency — Appeal—Competency—Suit by Hindu widow for maintenance against husband's father *A*—*A* declared insolvent during pendency of suit—Official Receiver added as party defendant—Personal decree against *A* declaring charge over property held by *A*—*A* held entitled to appeal—O. 22, Rr. 8 and 10, Civil P. C., held not applicable.**

During the pendency of a suit by a widow against her husband's father *A* for past as well as future maintenance, *A* was adjudicated insolvent on the application of a creditor. The Official Receiver was added as a party defendant 2. The widow alleged that the insolvency proceedings were collusive. The lower Court passed a decree in her favour declaring her maintenance as a charge on property held by *A*. *A* appealed against that decree impleading the Official Receiver also as respondent. In appeal, the widow contended that after the vesting of the estate in the Official Receiver, *A* had no locus standi to appeal against the decree:

Held: that the decree, as it stood, was a personal decree against *A* though there was also the declaration of a charge and therefore the objection under S. 59, Provincial Insolvency Act, was not well founded. [P 917 C 1]

Held further: that the case was not one within the terms of O. 22, R. 8, Civil P. C., because *A* did not become an insolvent during the pendency of the appeal, and the scope of the suit was not one which an assignee or receiver might maintain for the benefit of the creditors though the appeal, if successful, may incidentally benefit them. O. 22, R. 10, Civil P. C., was only permissive and did not impose any disability on a person already on record, and therefore appeal by *A* was competent: *A I R 1915 Bom 298, Disting.*; *A I R 1921 Mad 402* and *A I R 1933 Mad 851 (F B), Approved* and *Foll.* [P 917 C 1, 2]

M. S. Ramachandra Rao — for Appellant.

A. Lakshmayya — for Respondents.

Varadachariar, J.—This appeal arises out of a suit for maintenance. The plaintiff is the widowed daughter-in-law of defendant 1. Her husband, who was the only son of defendant 1, died in 1920, a few

months after his marriage, leaving the plaintiff a minor then aged 11 or 12. Though the written statement alleges that even after her husband's death the plaintiff used to be living with defendant 1, only occasionally visiting her parent's house, no serious attempt has been made to prove it and the case has proceeded on the footing that, but for other objections, the plaintiff would be entitled to separate maintenance including arrears. As regards the claim for arrears, some objection on the score of limitation was raised but there is no substance in it and it was rightly not pressed before us. Nor is there much force in the objection that there was no demand. It is well settled law that even the absence of a demand will not deprive a widow of her right to arrears, though that circumstance may have to be taken into account in determining the extent of the liability to be imposed upon the defendant for arrears due for a long period. The evidence adduced on the plaintiff's side attempted to establish demand on a number of occasions. Even if the whole of that evidence be not accepted, there can be little doubt in the circumstances that there must have been some demands before the formal notice was given prior to the institution of the suit.

The real question for determination is as to the rate of maintenance, past and future. There is also a question as to the extent of properties to be charged for the maintenance that may be decreed in plaintiff's favour. The lower Court held that 500 bags of paddy may fairly be taken to be the net income derived by defendant 1 from the family lands. It left the outstandings out of account on the ground that debts approximately to the same extent were due by the family. An objection was raised before us on behalf of the plaintiff to the lower Court's conclusion under this head and our attention was drawn to portions of the evidence indicating that defendant 1 had attempted improperly to secrete some of the outstandings for his own benefit by assigning them in the names of other persons. Whatever force there may be in this objection, we find that the lower Court had before it the account books of defendant 1 for a period of nearly ten years. In a case of this kind, it is possible to estimate the income of the family only in a rough way and we do not find sufficient ground to differ from the lower Court's general estimate of the income, with reference to which the maintenance payable to the plaintiff should be fixed. For the same reason we overrule the appellant's objection to that finding. Seeing that there were no other members in the family, except defendant 1, to be provided for, the lower Court fixed 150 bags of paddy per annum as a reasonable provision for the plaintiff's maintenance, inclusive of claims for residence and other sundry items. The defendant complains that this is too high, while the plaintiff complains that this is too low. Here again, we do not feel we will be justified in interfering with the award given by the lower Court unless we are satisfied that its discretion has been improperly exercised. Even assuming that the allowance is a bit too liberal, we do not feel called upon to interfere with it in the circumstances of the case.

The objection raised by the appellant against that portion of the decree which relates to arrears of maintenance seems to us more substantial, as also the objection to the form of the decree declaring the charge. But before dealing with them it is necessary to deal with a preliminary objection raised on behalf of the respondent to the maintainability of this appeal. During the pendency of the suit in the Court below defendant 1 was adjudicated insolvent on the application of a creditor. The plaintiff alleged that the insolvency proceedings were collusive; but, for the purposes of the present preliminary objection we have to proceed on the footing that an adjudication order has been made and remains in force. On the adjudication, the Official Receiver was added as defendant 2. A question seems to have been raised before the lower Court as to whether, after the addition of the Official Receiver as a party, it was open to defendant 1 to continue the defence. After hearing arguments, the lower Court ruled on 14th September 1933 that it was open to defendant 1 to continue the defence of the suit. It does not appear that the Official Receiver, though he continued to be a party on the record, took any further part in the conduct of the defence. When the decree was passed by the lower Court, it was accordingly defendant 1 who filed this appeal impleading the Official Receiver as a party respondent. On these facts, Mr. Lakshmayya (for the plaintiff-respondent) contends that after the vesting of the estate in the Official Receiver the insolvent has no locus standi to appeal

against the decree. We are unable to accede to this contention.

We do not see anything which justifies our denial of the right of appeal to a person who is *eo nominee* a party to the decree. The decree as it stands is a personal decree against defendant 1 though there is also the declaration of a charge. Whether on the objection raised before the lower Court it should have struck out the name of defendant 1 or not is another matter; we doubt whether the lower Court would have been justified in striking his name out. It cannot be said that the claim in the suit is one which only related to the property of the insolvent. As pointed out in 50 Mad 161[1] the expression "relating to the property" should not be treated as synonymous with "affecting the property". It is true that it is only by reason of the possession of co-parcenary property that defendant 1 became liable to the plaintiff. But when the plaintiff complains that defendant 1 has been in possession of the whole of the family property from 1920 to the date of the institution of the suit, and has withheld maintenance payable to her during all that time, defendant 1's liability, so far at any rate as the arrears of maintenance are concerned, is undoubtedly a personal liability. The mere fact that the plaintiff will also be entitled to ask that it should be charged on the property, will not show that the liability is not personal but only shows that the plaintiff's remedy is twofold and cumulative. Even as regards the future liability of defendant 1, it is no doubt limited by the possession of the property and the extent of the property, but as long as he is in possession of joint family property his liability will continue to be personal to the limit of the property. It is therefore not right to say that the claim of the plaintiff in the suit is one which solely related to the property of the insolvent. The objection founded on S. 59, Provincial Insolvency Act, does not therefore seem to us well founded.

Nor is there greater force in the objection founded on O. 22, R. 8, Civil P. C. The case is certainly not literally within the terms of O. 22, R. 8. It is true that the word 'plaintiff' in that Rule must in relation to appeals be read as including an appellant; but the case here is not that of a person who became insolvent pending an appeal and there is also the question whether the proceeding is one which an "assignee or receiver might maintain for the benefit of his creditors". The appeal, if successful, will no doubt incidentally benefit the creditors but, as we have already explained, that is not the whole scope of the suit. The objection under O. 22, R. 10, Civil P. C., has no force because R. 10 is only a permissive Rule and does not impose a disability upon a person already on the record. So far as general principles applicable to the status of an insolvent are concerned, we do not think there is such a preponderance of authority as supports the respondent's contention. 39 Bom 568[2] may be distinguishable on the ground that the suit (so far as it claimed a forfeiture of the lease held by the defendant) 'related to the property' of the insolvent; but assuming that to some extent it favours the respondent's contention, we may point out that the learned Judge recognises that he is not following the view taken in earlier cases both in Bombay and in Calcutta. In this Court the reasoning of the decision in 13 M L W 616,[3] which was approved of by the Full Bench in 65 M L J 719,[4] is clearly against the theory of total incapacity of the insolvent to continue proceedings in a case like the present. We accordingly overrule the preliminary objection.

Dealing with the merits of the claim to arrears, it seems to us that the learned Judge was not in the circumstances justified in awarding past maintenance to the plaintiff at the rate which he has adopted. It is well recognized that the Court will be justified in drawing a distinction according to the circumstances of each case between the rate at which past maintenance is to be awarded, and the rate at which future maintenance is fixed. The circumstances of this case illustrate the necessity for such a distinction. The learned Judge finds that between 1920 and 1929 paddy was selling at something like Rs. 8 to 10 per bag. In a decree which he passed in 1934, at a time when paddy was selling at

1. Subbarayar & Bros. v. Muniswami Iyer & Sons, A I R 1926 Mad 1133=98 I C 516=50 Mad 161=51 M L J 613.

2. Tribhovandas Narotamdas v. Abdullally Hakimji, A I R 1915 Bom 298=28 I C 506=39 Bom 568=17 Bom L R 209.

3. Tatireddi v. Ramachandra Rao, A I R 1921 Mad 402=62 I C 854=13 M L W 616.

4. Subbaraya Goundan v. Veerappa Chettiar Bank, A I R 1933 Mad 851=146 I C 521=57 Mad 89=65 M L J 719 (F B).

Rs. 2 or 3 per bag, he calls upon the defendant to pay the value of something like 1200 bags of paddy at an average price of Rs. 8 per bag, which means that the defendant must sell about four times the quantity of paddy which the Judge had in mind when making the award. It may in certain circumstances be advantageous to both parties to award maintenance in kind, but in the present case it would obviously work injustice to the defendant. It is not as if the defendant has been putting by the sale price of 150 bags of paddy year after year between 1920 and 1929. It must also be remembered that in 1920 when her husband died, the plaintiff was a girl of 11 or 12. Whatever might be her needs in later years in life, we find it impossible to agree with the view of the learned Judge that in the years when the plaintiff was barely in her teens and was living with her parents, she reasonably required Rs. 100 per mensem for her maintenance. Having regard to all these circumstances, we think it proper to reduce the award in respect of arrears of maintenance up to date of suit to Rs. 600 per annum. From the date of the institution of the suit the plaintiff will be entitled to maintenance at 150 bags of paddy per annum valued in the manner given in the judgment of the lower Court.

As regards the charge, we think it an unreasonable hardship on defendant 1 to declare the maintenance a charge upon the whole extent of his immoveable property. In 27 Mad 45[5] it was recognised that prima facie the charge must be on the husband's share in the joint family property. Assuming that in exceptional circumstances a Court may declare a charge on a larger extent of the joint family property, we do not think the circumstances of this case either call for or justify a charge upon anything more than her husband's share. If the plaintiff's husband were alive today, defendant 1 would undoubtedly be entitled to get divided from him by a mere declaration of his intention with the result that one half of the family property would be absolutely at the disposal of defendant 1. It seems to us too much to hold that the plaintiff's position has been so far improved by her husband's death as to justify our making it impossible for defendant 1 to alienate any portion of his property free of the plaintiff's claim for maintenance. We have been informed that defendant 1 has made alienations of his property during the pendency of the suit and any modification that we may make in the lower Court's decree may diminish the plaintiff's chance of realizing the fruits of the decree in her favour. We can only say that the charge that we propose to declare will take effect from the date of the institution of the suit and no alienation made by defendant 1 during the pendency of the suit will prejudice the rights of the plaintiff as declared by our decree. We would accordingly set aside so much of the lower Court's decree as declares the plaintiff's maintenance a charge on the whole of the immoveable properties mentioned in Schs. A and A-1 to the plaint and send the case back to the lower Court to ascertain on a fair division what will represent a half share of these properties as on the date of suit and to declare a charge in plaintiff's favour on the half share so ascertained. The decree will make it clear that the charge to this extent is available to the plaintiff not only in respect of the future maintenance, but also in respect of arrears of maintenance accrued due prior to the institution of the suit.

The appeal is allowed to the extent above indicated and the decree of the lower Court is accordingly modified. The costs awarded to the plaintiff in the lower Court will be proportionately reduced. As the appeal has succeeded in part and failed in part and the memorandum of objections wholly fails, we make no order as to costs either in the appeal or in the memorandum of objections.

C.R.K./B.D. *Decree modified.*

5. Jayanti Subbiah v. Alamelu Mangamma, (1904) 27 Mad 45.

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* A. I. R. 1937 Madras 918

VENKATARAMANA RAO, J.

N. Adinarayana Chetty and *another* — Petitioners.

v.

A. Chengiah Chetty and *others* — Respondents.

Civil Revn. Petn. No. 1185 of 1935, Decided on 5th February 1937, from order of Sub-Judge, Chittoor, D/- 1st April 1935.

(a) Execution—Decree binding—Executing Court can refuse to execute decree directing sale prohibited on ground of public policy — Objection can be determined even by taking evidence.

There is an exception to the application of the general rule as to jurisdiction of the executing Court to go behind the decree. Where alienation of certain property is prohibited on grounds of public policy, either under the general law or by statute, the executing Court can refuse to execute a decree which directs such a sale : *26 Mad 31* ; *28 Mad 84* and *A I R 1927 Mad 911, Foll.* [P 920 C 2]

Distinction should not be drawn between the cases where prohibition appears on the face of the decree and cases where evidence will have to be taken to ascertain it. It is the duty of the Court to entertain the objection and determine the same if necessary by taking evidence : *A I R 1937 Mad 134, Disting.*; *A I R 1925 Cal 907* and *A I R 1932 Cal 380, Dissent.*; *A I R 1919 Mad 429* and *A I R 1935 Mad 647, Foll.* [P 921 C 1]

(b) Execution—Decree binding — Doctrine that executing Court cannot go behind decree is not applicable where objection is taken at stage of passing of final decree in mortgage suit.

The doctrine that an executing Court cannot go behind the decree would not be applicable to a case where objection is taken at the stage of passing the final decree in mortgage suit. Until the final decree is passed in a mortgage suit, there is no executable decree and the suit must be deemed to be still pending. An application for a final decree is not an application in execution and it cannot be said that the objection that the Court cannot pass a decree for sale is one relating to execution, discharge or satisfaction of the decree : *A I R 1920 Mad 1019 (F B), Discussed.* [P 921 C 2]

*** (c) Civil P. C. (1908), O. 34, R. 5—Court can refuse to pass final decree for sale if it is prohibited by law — Legal representative of deceased mortgagor can resist passing of final decree on ground that mortgaged property is Acharyapurusha service inam.**

Order 34, R. 5, Civil P.C., no doubt says that if payment is not made as directed by the preliminary decree, the Court shall pass a final decree for sale, but that does not mean that the Court is bound to pass a final decree for sale. It is only in cases where there is no prohibition imposed by substantive law that the Court can direct a sale. It is open to a party, who has been impleaded as the legal representative of the deceased mortgagor defendant, to resist the passing of a final decree on the ground that the mortgaged property being an Acharyapurusha service inam is inalienable and the sale of such property would be illegal on the grounds of public policy. [P 919 C 2, P 922 C 1]

(d) Estoppel—Doctrine of, cannot be relied upon to defeat prohibition of law on ground of public policy.

Estoppel cannot be relied upon to defeat the prohibition of law on the ground of public policy, and therefore the original mortgagor as well as his legal representative can take the objection to final decree for sale being passed on such grounds : *A I R 1935 Mad 252, Foll.* [P 922 C 1]

A. C. Sampath Ayyangar — for Petitioners.

T. K. Srinivasa Thathachariar — for Respondents.

Order. — The question raised in this civil revision petition is whether it is open to a party who has been impleaded as the legal representative of the deceased mortgagor defendant to resist the passing of a final decree on the ground that the mortgaged property being an Acharyapurusha service inam is inalienable and the sale of such property would be illegal on grounds of public policy. The lower Court took the view that it can and raised an issue for determination as to whether the property mortgaged is Acharyapurusha service inam and adjourned the matter for the taking of necessary evidence. Mr. Sampath Aiyangar for the mortgagee petitioner contends that the lower Court had no jurisdiction to go into the said question. He urged two points in support of his contention : (i) The lower Court is bound to pass a final decree in accordance with O. 34, R. 5, Civil P. C., if it is found that payment as directed was not made ; and (ii) assuming it can go behind the preliminary decree, it has no jurisdiction to take evidence to find out the nature of the property.

Reliance is placed on the recent decision of Burn and Lakshmana Rao, JJ. in 1936 M W N 1352,[1] which reversed the decision of Pandrang Row, J. in 41 M L W 485.[2] The argument of Mr. Sampath Ayyangar can be outlined thus : An executing Court has no jurisdiction to go behind the decree and must execute it as it stands ; assuming it can, in cases where public policy is involved, it must ex facie appear from the decree or there must be an admission by the parties that the property is inalienable. This principle is applicable with greater force to mortgage decrees as the Court has no option but to pass a final decree in accordance with the directions of the preliminary decree which settles finally the rights of parties. It is no doubt a well established principle of law that a Court executing the decree cannot go behind it, but the Courts are not agreed as to the exact limits of this rule. The above rule was given effect to in a Full Bench decision of this Court reported in 43 Mad 675,[3] even in cases of

1. Annamalai Chettiar v. Srirangachariar, A I R 1937 Mad 134 = 168 I C 103 = I L R (1937) Mad 329=71 M L J 867=1936 M W N 1352.
2. Srirangachariar v. Annamalai Chettiar, A I R 1935 Mad 647=156 I C 331=41 M L W 485.
3. Zamindar of Ettiyapuram v. Chidambaram Chetty, A I R 1920 Mad 1019=58 I C 871=43 Mad 675=39 M L J 203 (F B).

want of territorial jurisdiction. Wallis, C. J. explained the basis of the decision at pages 686 and 687 thus :

> The ordinary way of questioning a decree passed without jurisdiction is an appeal or in revision, and if this is forbidden, a Court of first instance cannot in execution do that which the Appellate or Revisional Court is precluded from doing . . . An objection to the jurisdiction is a ground for setting aside the decree and is not one of those questions relating to the 'execution, discharge or satisfaction of the decree' which are required by S. 47 to be dealt with in execution.

The Full Bench decision purports to follow the ruling of the Calcutta High Court in 44 Cal 627,[4] but the Calcutta High Court has since relaxed the rule. In 53 Cal 166[5] the question arose in execution with reference to some of the mortgaged properties being outside the territorial jurisdiction of the Court which passed the decree. There was a reference to the Full Bench in the following terms :

> Where a decree having been passed by a Court having no jurisdiction to pass it is void and a nullity, is the executing Court competent to question its validity and refuse to execute it ?

The answer to the reference was in these terms :

> Where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction.

This view has been since followed in the Calcutta High Court. In 58 Cal 1018[6] a decree was passed on an award made under the Indian Arbitration Act and it was sought to be executed. Objection was taken that no such decree could be passed and therefore it was a nullity. It was held that the executing Court was competent to treat the decree as a nullity. This was confirmed by the Privy Council in 60 Cal 670,[7] where their Lordships of the Judicial Committee make the following observations at page 674 :

> The Act (the Indian Arbitration Act) does not contain any provision for making a decree on an award such as is contained in Sch. 2, Para. 21, Civil P. C. Such a decree, if made, is one without jurisdiction and therefore a nullity. Their Lordships agree with the view taken by the Courts in India that the decree of 14th February 1919 was passed without jurisdiction, and was therefore incapable of execution as such.

This is a definite pronouncement by the Privy Council that if the decree is a nullity it is competent to the executing Court to entertain the objection relating thereto and refuse to execute it. In view of this pronouncement, some of the decisions of our High Court which have taken a contrary view in regard to the objections based on the score of nullity will require re-consideration and with due respect I dissent from the observations of Venkatasubba Rao, J., as to the scope of the Privy Council decision in 60 Cal 670,[7] in 59 Mad 642[8] at pp. 653 and 654. There is another exception which the Courts have recognized to the application of the general rule as to jurisdiction of the executing Court to go behind the decree. It has been held where alienation of certain property is prohibited on grounds of public policy, either under the general law or by statute, the executing Court can refuse to execute a decree which directs such a sale. For a case under the general law, reference may be made to 26 Mad 31.[9] In that case there was a decree by consent on a mortgage of certain property. The property mortgaged was the office known as "golla mirasi" and the emoluments attached to the said office. Objection was taken in execution as to the incompetency of the Court to sell the said property. The objection was upheld. The learned Judges observed :

> There is no contention but that the sale of such an office as that now in question is opposed to public policy and ought not to be recognized or enforced by the Courts.

For a case of prohibition under the statute, reference may be made to 28 Mad 84.[10] In that case there was an ex parte decree directing the sale of certain village carpenter's service inam as a public service inam inalienable under S. 5 of Act 3 of 1895. It was held that the order for sale therein cannot be carried out. Their Lordships Subramania Ayyar and Sankaran Nair, JJ. observed that :

4. Kalipada Sirkar v. Hari Mohan Dalal, A I R 1917 Cal 844=35 I C 856=44 Cal 627=24 C L J 375=21 C W N 1104.
5. Gorachand Haldar v. Prafulla Kumar Roy, A I R 1925 Cal 907=89 I C 685=53 Cal 166 =29 C W N 948=42 C L J 1 (F B).
6. Rabindranath v. Jnanendra Mohan, A I R 1932 Cal 9=136 I C 466=58 Cal 1018=35 C W N 537.
7. Jnanendra Mohan v. Rabindranath, A I R 1933 P C 61=142 I C 324=60 I A 71=60 Cal 670 (P C).
8. Krishnamurthi v. Imperial Bank of India, A I R 1936 Mad 618=164 I C 472=59 Mad 642=71 M L J 209.
9. Lakshmanaswami Naidu v. Rangamma, (1903) 26 Mad 31.
10. Rajah of Vizianagaram v. Dantivada Chelliah, (1905) 28 Mad 84=14 M L J 468.

The decree in so far as the direction for sale goes was altogether ultra vires and incompetent to confer the right intended and Courts are bound on the matter coming to their notice to abstain from enforcing the direction.

The same principle was applied in 50 Mad 897.[11] Thus the extreme contention of Mr. Sampath Ayyangar that an executing Court cannot go behind the decree is untenable. In none of the above cases, it will be seen, was any distinction drawn between the cases where prohibition appeared on the face of the decree and cases where evidence will have to be taken to ascertain it. In 53 Cal 166,[5] no doubt Walmsley, J. who delivered the leading judgment used the word 'apparently' and the learned Judges in 54 C L J 593[12] at p. 594, explained it as meaning 'on the face of', but it is not possible to understand why such a distinction should be drawn. As Page, C. J. remarks in 9 Rang 480[13] at p. 500 :

If the fact is that the decretal Court had no jurisdiction to pass the decree, I ask with all due respect to the learned Judges who decided 53 Cal 166,[5] what difference does it make in principle or as a matter of common sense whether the executing Court ascertains that fact by perusing the decree or after hearing evidence or holding an enquiry ? In my opinion, none whatever. If there was a want of jurisdiction in the decretal Court, the fact exists and remains whether the absence of jurisdiction is apparent or not.

The learned Judges in 1936 M W N 1352[1] seems to have taken the same view as the Calcutta High Court and distinguished the cases in 28 Mad 84[10] and 50 Mad 897[11] as cases in which the objection to jurisdiction was apparent on the face of the decree. In coming to the said conclusion, the attention of the learned Judges was not directed to the decision of a Bench of our High Court reported in 37 M L J 65.[14] That was a suit on a mortgage and there was razinama decree. The property mortgaged comprised an impartible estate which can only be alienated subject to the restrictions imposed by the Impartible Estates Act, Madras Act 2 of 1904. Under S. 4 of that Act, the proprietor of an estate is restricted from alienating that estate except in circumstances where alienation would be permissible by law if the estate was ancestral property and the proprietor occupied the position of a managing member. An application was made for the passing of a final decree under O. 34, R. 5, and for sale of the mortgaged property. Objection was taken that the property was an impartible estate, that there was no necessity to borrow the amount for which the mortgage was executed and therefore the property could not be sold. It will be seen that this fact could not be apparent from the face of the decree. The learned Judges held that the objection can be entertained and evidence can be taken in regard thereto. This case is a distinct authority for the position that where objection as to alienability is taken on the ground of public policy, it is the duty of the Court to entertain the objection and determine the same if necessary by taking evidence and refuse to pass a final decree or to execute the decree. It is this view which Pandrang Row, J. gave expression to in 41 M L W 485[2] where he observed thus :

I fail to see why, if the Court can decide a question on the admission of parties, it should lose that power to decide it simply because the parties do not choose to make any admissions and the Court has to take evidence for the purpose of deciding it. The Court's jurisdiction can in no way be dependent on the point whether evidence has to be recorded or not (Pages 487 and 488).

With these observations I agree and respectfully dissent from the view taken in 1936 M W N 1352.[1] If the facts of the present case were the same as in 1936 M W N 1352,[1] being a decision of the Bench, I am bound to follow it. But the facts of this case are distinguishable. In 1936 M W N 1352[1] objection was taken after the final decree for sale and at the stage of execution; but in this case the final decree has not been passed and objection was taken to the passing of the final decree. In my opinion the decision in 37 M L J 65[14] would directly apply to the case, but even on principle the doctrine that an executing Court cannot go behind the decree would not be applicable to a case where objection is taken at the stage of passing the final decree. Until the final decree is passed in a mortgage suit, there is no executable decree and the suit must be deemed to be still pending. An application for a final decree is not an application in execution and it cannot be said that the objection that the Court cannot pass a decree for sale is one relating to execution, discharge or satisfaction of the decree and thus the reasons advanced by

11. Rajah of Kalahasti v. Venkatadri Rao, A I R 1927 Mad 911=105 I C 248=50 Mad 897=53 M L J 533.
12. Amalabala Dasi v. Sarat Kumari Dasi, A I R 1932 Cal 380=137 I C 375=54 C L J 593.
13. S. A. Nathan v. S. R. Samson, A I R 1931 Rang 252=135 I C 65=9 Rang 480 (F B).
14. Ramachandra Suru v. Venkatalakshminarayana, A I R 1919 Mad 429=50 I C 577=37 M L J 65.

Wallis, C. J. in 43 Mad 675[3] would not apply. O. 34, R. 5, Civil P. C., no doubt says that if payment is not made as directed by the preliminary decree, the Court shall pass a final decree for sale, but that does not mean that the Court is bound to pass a final decree for sale. It is only in cases where there is no prohibition imposed by substantive law that the Court can direct a sale. Therefore the question whether in default of payment the Court can direct a sale can be gone into, because it is the duty of the Court to see whether the appropriate relief by way of sale could be given to the parties or not and once the prohibition on grounds of public policy is brought to the notice of the Court, it is incumbent on the Court to give effect to that prohibition and decline to pass an order for sale: 40 Cal 534[15] and 37 M L J 65.[14]

Mr. Sampath Ayyangar also contends that it is not open to the present defendant as the legal representative of the mortgagor to raise the objection. There is not much substance in this contention. Objection can be taken even by the original mortgagor and in cases where objection was entertained, it was done at the instance of defendants who were parties to the decrees, the principle being that estoppel cannot be relied upon to defeat the prohibition of law on the ground of public policy: 58 Mad 389[16] at page 392.

The lower Court is therefore competent to go into the question whether the property is inalienable. If it finds it is, it can refuse to pass a final decree; otherwise, the execution must be allowed and it is not open to it to go into any other question in execution. The decision of the lower Court to go into the question of inalienability of the property is therefore right. In the result this civil revision petition fails and is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

15. Lakshmi Bibi Kujrani v. Atal Bihari Haldar, (1913) 40 Cal 534=21 I C 117.

16. Ramakrishnamma v. Venkatasubbiah, A I R 1935 Mad 252=153 I C 817=58 Mad 389=68 M L J 46.

*** A. I. R. 1937 Madras 922**

VARADACHARIAR AND MOCKETT, JJ.

Peer Ammal and *another* — Appellants.

v.

N. S. Nalluswami Pillai and *others* — Respondents.

Appeal No. 532 of 1930, Decided on 5th May 1937, against decree of Sub-Judge, Madura, in O. S. No. 128 of 1926.

*** (a) Civil P. C. (1908), O. 9, R. 13—Setting aside ex parte decree—High Court refusing to set aside decree—Finality of orders under O. 9, R. 13 is restricted to matters coming under that Rule—Appeal from original decree—Facts relating to ex parte decree stated as ground of appeal—High Court can decide such ground—It should, however, see that the client had made no default—Whether adjournment was advisable or not should also be determined.**

Though on general principle some finality should be attached to the order passed by the Court in proceedings under O. 9, R. 13, yet such finality is restricted only to matters within the scope of O. 9, R. 13. Therefore High Court in hearing an appeal from the original ex parte decree is not precluded from considering and deciding the question whether under the circumstances of the case it would not have been better in the interests of justice for the trial Court to have adjourned the case to give the defendants an opportunity to engage another vakil, cross-examine the plaintiff's witnesses and lead evidence on their own behalf: *A I R 1925 Pat 534, Rel. on*; *A I R 1920 Mad 962, Disting.* [P 927 C 2; P 928 C 2]

No doubt the Court before interfering in such cases in its appellate jurisdiction must be satisfied that there has been no kind of default on the client's part and that the circumstances were such as to leave the client helpless to proceed further with the conduct of the case. [P 928 C 1]

In a suit on a mortgage the contesting defendants were a Mahomedan gosha lady and her minor son represented by his mother. She had engaged two vakils: one a leading member of the bar and another a junior. After some adjournments, on the day the suit came on for hearing, the contesting defendants and their witnesses were ready present in Court. The senior vakil was engaged otherwise and absent and the junior vakil was either not prepared to go on with the case or was absent. The Judge refusing to grant an adjournment recorded the evidence of the plaintiff's witnesses, they not having been cross-examined by the defendants and delivered judgment in favour of plaintiff, treating the defendants as ex parte, and stated "that the defendants did not even take steps in time". An application under O. 9, R. 13, Civil P. C., allowed by the trial Court was set aside by the High Court in revision. In the appeal against the decree, the defendants had taken the above facts as one of the grounds of appeal:

Held: that under the circumstances the High Court, while hearing the appeal, could consider such a ground of appeal. [P 928 C 2]

(b) Suits Valuation Act (1887), S. 8—Suit by co-mortgagee limiting his claim to his

share—For court-fee and jurisdiction mortgage should be considered as a whole (*Obiter*).

Obiter :—When a co-mortgagee sues on a mortgage, limiting his claim to his share in the mortgage amount, it will be more reasonable to regard the whole mortgage as a single cause of action, at any rate for purposes of jurisdiction; and in such a case under S. 8, Suits Valuation Act, the valuation for purposes of court-fee cannot be different: *A I R 1930 Mad 985, Discussed.* [P 925 C 2]

K. Bhashyam Ayyangar and *T. R. Srinivasan* — for Appellants.

K. S. Jayarama Ayyar and *K. Swaminatha Aiyar* — for Respondents.

Varadachariar, J.—This appeal arises out of a suit for the sale on foot of a mortgage deed, Ex. A, executed in 1911 by one Peer Mohammad, in favour of Alla Pichai Rowther who was the mortgagor's brother-in-law as well as his son-in-law. The mortgagee died in 1913 leaving a number of heirs some of whom are also interested in the equity of redemption by reason of their relationship to Peer Mohammad. It is clear from the plaint itself that no payment either towards any portion of the principal or towards interest was made in respect of this mortgage between 1911 and the date of the suit. In August 1926, Alla Pichai Rowther's widow, that is defendant 7, and two of her daughters assigned their interest in the mortgage bond to the plaintiff under Ex. B, and this suit was filed in September 1926. Besides the persons who are also the heirs of the mortgagor, the only other co-heir to the mortgagee's estate, so far as we have been able to gather, is one Nagur Kanni Rowther who was impleaded as defendant 9 in the case. In view of the arguments urged before us on behalf of the appellants as to the frame of the suit, it is necessary to mention that the assignors were entitled only to 19/24th share in the mortgagee's estate and that the assignee therefore became entitled only to that share of the mortgage money. It also appears that the assignors had somehow become interested in a portion of the hypotheca and it is accordingly stated in the deed of assignment that the assignee should proceed only against the rest of the hypotheca. In these circumstances the plaint sets out the fact that the plaintiff was entitled only to a 19/24th share in the mortgage amount and in para. 14 of the plaint the plaintiff works out the amount due under the mortgage deed at Rs. 7,644 and states that a 19/24th share therein is Rs. 6,051-8-0 and after remitting therefrom on his own choice Rs. 551-8-0, the plaintiff limits his claim to Rs. 5,500 which he takes as the figure for the purposes of court-fees and jurisdiction.

A written statement was filed on behalf of defendants 1, 5 and 4, the widows and the son of the mortgagor. Neither in this written statement nor at the stage when the issues were framed in the case was any objection taken to the frame of the suit. Nor does it appear that any such objection was urged at any time before judgment was given in the lower Court. The issues framed in the case related to three pleas : (1) that the plaint bond was not true and supported by consideration, (2) that the assignment relied on by the plaintiff was not true and supported by consideration, and (3) that the suit was barred by limitation. I may say at this stage that it is unnecessary for the purpose of this appeal to notice any further the pleas involved in issues 2 and 3, because there is no prima facie basis for issue 2 nor is there any substance in issue 3. In the appeal, however, objection has been taken to the frame of the suit. The learned counsel for the appellant laid some stress upon the fact that the plaint claim relied against some of the mortgaged properties, but realizing that the omission to claim relief as against the other properties—whatever other consequences it may involve—was not fatal to the maintainability of the suit; he tried to press it into service as part of his objection based on the Proviso to S. 67, T. P. Act, especially when taken along with the fact that the plaintiff is limiting his claim to 19/24th share of the mortgage amount. S. 67, T. P. Act, no doubt provides that a mortgagee or a co-mortgagee cannot claim to recover a fraction of the mortgage amount from a proportionate fraction of the mortgaged property. But in the present case the omission of some of the mortgaged properties from the suit has, in view of the provisions in the assignment deed, nothing to do with the limitation of the plaintiff's claim to a fraction of the mortgage amount. There is accordingly no force in the objection about the omission to include some of the hypotheca.

The objection that the plaint should have in some manner comprised the whole claim under the mortgage, might have had some force and might have required more serious notice if the objection had been raised in time. It cannot be said that the

objection is purely one of law arising on the pleadings, because admittedly one of the mortgagor's heirs, that is defendant 1, is also entitled to a share in the mortgage money. The other co-heir who is said to be entitled to a 10/72nd share in the mortgage amount, is defendant 9. He has not filed any written statement and what exactly his position is either in relation to defendant 1 or in relation to the plaintiff, we have no means of knowing. It is possible that these two heirs of the mortgagee did not wish to enforce their claim under the mortgage or their claim has been otherwise satisfied ; and in the latter alternative, the plaintiff will certainly be entitled to limit his claim to the portion which is due to himself. In this view I do not think that this Court will be justified in allowing this objection to the frame of the suit to be raised for the first time at this stage. But, as this question as to the frame of the suit has been argued at some length before us, I think it right to make a few observations on one or two aspects of the matter. On behalf of the appellant, Mr. Bhashyam Iyengar asked us to read the decision of the Privy Council in 47 Cal 175[1] as laying down a rule in addition to that contained in the Proviso to S. 67, T. P. Act. The suit, as originally framed in that case, undoubtedly contravened that prohibition, because the plaint in that suit claimed a sale of a half-share in the mortgaged property in respect of the plaintiff's half-share of the mortgage amount. That defect was remedied by the directions given by the High Court for the amendment of the plaint to the following effect :

> If in the opinion of the Court the plaintiff is held to be not entitled to a decree on the footing of a mortgage for the principal sum of Rs. 80,000, then a usual mortgage decree may be passed in favour of the plaintiff and defendant 3 for the amount found due up to the period of grace to be fixed by the Court upon the basis of the entire mortgage money, that is, Rs. 1,60,000 : *see* the report in 24 C W N 297.[1]

Their Lordships of the Privy Council construed the mortgage as being a single mortgage for Rs. 1,60,000 in favour of the plaintiff and defendant 3 as tenants-in-common and repelled the contention that the document evidenced two mortgages in favour of two mortgagees for Rs. 80,000 each. Even on this view, the objection under S. 67, T. P. Act, would seem to have been obviated by the amendment directed by the High Court. When the matter was before the Judicial Committee, the observations of their Lordships seem to proceed on the lines laid down by the Court of Appeal in England in (1879) 11 Ch D 121,[2] namely that not merely should all the mortgagees be before the Court whether the plaintiff or as defendants, but that the suit should not be so constituted as to make it possible for the Court eventually to give a decree in respect of the whole mortgage amount and not merely in respect of the plaintiff's share. If this was all that their Lordships intended to lay down, the amendment directed by the High Court would seem to give effect to that principle. But their Lordships observe that the amendment directed by the High Court "is not properly worded"; the judgment however gives no clear indication as to what in their Lordships' opinion was the defect.

This decision was considered by Ramesam, J. in the judgment reported in 59 M L J 928.[3] The learned Judge was discussing the question from the point of view of the court-fee which a co-mortgagee should in similar circumstances be called upon to pay when suing on the mortgage, limiting his claim to his share of the mortgage amount. The learned Judge would seem to think that the observations of the Judicial Committee would be complied with if the co-mortgagee who did not join as the plaintiff was impleaded as the defendant and the relief was not restricted to a share of the mortgaged property. In his opinion it was necessary that the plaintiff should ask for a decree for the whole amount due under the mortgage or pay court-fee thereon. If it were necessary to decide the question I should have felt some difficulty in agreeing with some of the reasons given in support of this view. The hardship involved in calling upon the plaintiff to pay court-fee on the full amount does not seem to be a proper reason to be relied upon in determining the proper frame of the suit. But for S. 8, Suits Valuation Act, it might perhaps be possible even to obviate this

1. Sunitabala Debi v. Dhara Sundari Debi, A I R 1919 P C 24=53 I C 131=46 I A 272=47 Cal 175=24 C W N 297 (P C).

2. Luke v. South Kensington Hotel Co., (1879) 11 Ch D 121 = 48 L J Ch 361=40 L T 638= 27 W R 514.

3. Bansiram Jashamal v. Gunnia Naga Iyer, A I R 1930 Mad 985=129 I C 45=59 M L J 928.

hardship by a particular construction of S. 7, Cl. (i) of Court-fees Act, holding that the words "according to the amount claimed" in that clause may refer to the amount claimed by the plaintiff for himself. An illustration may help to make my meaning clear. Take the case where a puisne mortgagee includes a prior mortgagee as a party defendant in the action and prays that the property may be sold free of mortgages and that out of the proceeds the prior mortgagee may be paid in the first instance and the balance applied in discharge of the plaintiff's claim. O. 34, Civil P. C., and the decree forms appended to the Code undoubtedly contemplate such a case. There is no reason for holding that in such a case the plaintiff should value his suit by adding even the amount payable on the prior mortgage or by court-fee thereon. If this principle could be extended, by way of analogy, to the case of a co-mortgagee, it may be possible to relieve him from the hardship of paying court-fee on the whole amount.

If, on the other hand, the question is raised as one relating to the jurisdiction of the Court instead of a question of court-fee, the difficulty of accepting some of Ramesam, J.'s observations will become apparent. Suppose, the plaintiff's share in the mortgage amount was within the limits of the Court's jurisdiction but the whole amount due under the mortgage was in excess of its jurisdiction, as might well happen in this country. Ramesam, J. certainly contemplates that the decree passed in the suit may provide for the realization of the whole of the mortgage amount by sale of the property and not merely of the plaintiff's share. What is to be regarded as the value of the suit for purposes of jurisdiction? There is an obvious distinction between the case of a co-mortgagee and that of a prior mortgagee above referred to by way of illustration; a puisne mortgagee suing as plaintiff may well bring the hypotheca to sale subject to the prior mortgage, but one co-mortgagee cannot sell the hypotheca subject to the other co-mortgagee's right. Further, if it becomes necessary to sell the whole or anything in excess of a proportionate part of the hypotheca to realize even the amount due to the plaintiff co-mortgagee, it will be neither fair nor consistent with the policy of the law to allow the plaintiff to appropriate the proceeds wholly in satisfaction of his claim. Justice can be done between all the parties concerned only by providing in the decree for the distribution of the sale proceeds amongst the co-mortgagees. It accordingly seems to me more reasonable to regard the mortgage as a single cause of action at any rate for purposes of jurisdiction and in such a case under S. 8, Suits Valuation Act, the valuation for purposes of court-fee cannot be different. Ramesam, J. suggests that as regards the defendant co-mortgagee's share, the Court may be able to collect the court-fees later on before distributing the moneys to him. With great respect, I venture to doubt if there is anything in the Court-fees Act authorizing the Court to do so. It is not within the scope of S. 11, Court-fees Act : *cf.* 55 Mad 26.[4] The learned Judge refers to the analogy of partition suits where even the defendants may claim a share on payment of court-fee. In 55 Mad 975[5] the same learned Judge, as a member of a Bench, held that a defendant in a partition suit cannot be called upon to pay court-fee in respect of his share.

Reference was made by Mr. Jayarama Iyer (the learned counsel for the respondent) in this connexion to the decision in 67 M L J 843[6] where the learned Judges drew a distinction between a claim by one of two joint promisees and a claim by one or two co-heirs of a single promisee. With great respect, I am not, as at present advised, satisfied with that distinction. It is possible, as contended by Mr. Jayarama Iyer, that the frame of the suit in the present case may be justified on the ground that the mortgage had become split up by the admitted fact that defendant 1 had become interested in the mortgage right as well as in the equity of redemption. But this question was not argued at great length before us and I do not therefore deal with it further. I may also add that even according to the decision of their Lordships in 47 Cal 175[1], the objections to the frame of the suit is by no means fatal and it might well be met by directing an amendment of the plaint. It is not by any means clear from the plaint that the plaintiff has

4. Ramaswami Iyer v. Rangaswami Iyer, A I R 1931 Mad 683=134 I C 1137 = 55 Mad 26= 61 M L J 933.
5. Venkatasubbamma v. Ramanadhayya, A I R 1932 Mad 722=139 I C 457=55 Mad 975=63 M L J 845.
6. Gopalu Pillai v. Kothandarama Ayyer, A I R 1934 Mad 529=153 I C 916=57 Mad 1082= 67 M L J 843.

framed the suit only for a share of the mortgage money. It is clear from the remission of Rs. 551 even out of the 19/24th share that he thought that he could not realize more than Rs. 5,500 out of the available hypotheca. This is another reason which has induced me to overrule the appellant's contention as one raised at a late stage. If, as was apparent, the only object of the appellants in raising this objection was to get an opportunity of having the case tried again before the lower Court, it is very doubtful whether I should have acceded to that request but for the fact that for other reasons I have decided to give the appellants such an opportunity.

This takes me on to the question which has been argued on the merits and which I am free to confess has given me great difficulty in making up my mind. Issue 1, as I have already stated, related to the question whether the suit bond was only nominal or was supported by consideration. In an attempt to persuade us not to show any indulgence to the appellants at this stage, Mr. Jayarama Iyer laid stress on the fact that this is a familiar plea in Indian Courts and contended that we will be encouraging a frivolous plea by allowing it to be seriously pressed so many years after the transaction. I may be embarrassing the Court in deciding the case on the merits, by referring at great length to the circumstances suggesting that the plea may not after all be frivolous. I therefore content myself with saying that the circumstances of the case do not justify the contention that the plea must necessarily be frivolous. As to the argument based upon the lapse of time, I would only point out that this is not by any means an argument against the defendants; on the other hand, they themselves rely on the circumstance that notwithstanding the fact that no payment had been made towards interest or principal, no action was taken to enforce the mortgage between 1911 and 1926. The fact that on account of the state of work in this Court, this appeal has been pending from 1930 till 1936, should not be allowed to prejudice the appellants' claim to indulgence if otherwise they are entitled to any indulgence at our hands.

Mr. Jayarama Iyer next contended that by reason of the order already passed in proceedings under O. 9, R. 13, Civil P. C., the appellants were no longer entitled to raise any point in appeal justifying their request for an opportunity to adduce evidence or for a fresh trial. The facts bearing on this contention are as follows. After some adjournments, the suit came on for hearing on 8th August 1928. Leaving alone certain discrepancies between the various affidavits filed in the case, the events of that date may substantially be taken to have been the following. The contesting defendants had engaged Mr. M. S. Sesha Iyengar (one of the leading members of the Madura Bar) and a junior as their counsel. When the case was first called between 11 and 12 noon on 8th August, it was represented to the Court by the junior vakil that Mr. Sesha Iyengar had gone to the District Magistrate's Court to attend to some work there because he had been led to think that the Sessions case which had been posted for trial before the learned Subordinate Judge would take some time. It is not denied that there was a Sessions case posted for trial that day, but it would appear that for some reason it did not take as long as was originally expected. The junior counsel requested that the case may be taken up sometime later in the day and stated that Mr. Sesha Iyengar would be sent for. At 12-30 P. M. the case was again called. It was represented to the Court that a man had been sent to fetch Mr. Sesha Iyengar and that he would be going over almost immediately. The learned Judge was good enough to wait till one o'clock, but as he had no other work to do that day he was unable to wait longer and he began the trial of the case. It is not denied that defendant 1 was present in Court at the time, and she was acting for herself and as guardian ad litem of her minor son, defendant 4. For reasons which I certainly do not wish to be understood as at all approving of or even as prepared to condone, the junior vakil in the case was not prepared to take upon himself the duty either of cross-examining the plaintiff's witnesses or of leading evidence on behalf of his clients. The result was that the learned Judge recorded the examination-in-chief of the witnesses tendered on the plaintiff's side and immediately delivered judgment in favour of the plaintiff.

It is necessary to refer to one observation in para. 5 of his judgment because it is obviously a mistake. After observing that the defendants have not let in any evidence to show that the deed was nominally executed, he goes on to say: "They did not even take steps in time." This is

certainly an unfortunate mistake. The affidavits sworn to, not merely by defendant 1 but also by the three witnesses who had attended the Court on her behalf on 8th August, and filed in Court on 9th August, show that these three witnesses had been summoned to give evidence at the defendant's side and that they were present in Court on the 8th till 3 P. M. when they were informed that the case had been disposed of ex parte, that the defendants' vakil could not appear and that they need not wait any longer. We are not in a position to say whether the learned Judge was informed or whether he realized that the defendants' witnesses were present in Court. In the view that the defendants had not taken any steps in time to substantiate their plea, the learned Judge might well have thought that the defendants were merely trying to obstruct the trial of the suit by putting forward frivolous pleas to substantiate which they took no steps. This would naturally have added to the impression produced on his mind by the absence of their vakil. If on the other hand he believed that the defendants and their witnesses were ready in Court, it would certainly not have led him to think that the defendants were not serious about their plea. After a decree had been passed in plaintiff's favour, on the 8th August, an application under O. 9, R. 13, Civil P. C., was made on the very next day to set aside the ex parte decree. Notice of that application was issued during the incumbency of the same Judge, but it came on for final orders before his successor who took a somewhat lenient view of the situation and directed the ex parte decree to be set aside on terms. But when the matter came up on revision before this Court, Jackson, J. was of opinion that while it might be possible to hold on the facts that there was non-appearance within the meaning of O. 9, R. 13, Civil P. C., it was not possible to hold that there was sufficient cause for non-appearance. He accordingly set aside the lower Court's order, with the result that the original decree stood. The present appeal has been filed as a regular appeal against the decree itself.

On the above facts it has been argued by Mr. Jayarama Iyer that the order passed by this Court on the petition under O. 9, R. 13, Civil P. C., precludes the appellants from re-agitating the same question in the appeal. Reliance was placed in support of this position on the decisions in 39 M L J 697[7] and 100 I C 553.[8] I am prepared to assume for the purpose of this case that on general principles some finality should attach to the order passed by the Court in proceedings under O. 9, R. 13, Civil P. C. But the very reasoning of the decisions relied on by the respondent limits that finality to matters within the scope of O. 9, R. 13. On the facts of this case, it is difficult to hold that the grounds on which the application under O. 9, R. 13 was sought to be supported are really grounds falling under O. 9, R. 13 at all. Jackson, J. no doubt was prepared to assume that the facts might have amounted to non-appearance, but as he was deciding against the defendants on other grounds, it can hardly be regarded as a decision on that question. It seems to me to be straining the natural inference from the facts to hold that the case was really one under O. 9, R. 13. The fact that a party wrongly put in an application under O. 9, R. 13, Civil P. C., will not bring in any rule of finality merely because the Court refused to regard the case as a fit one for setting aside the ex parte decree.

It may also be pointed out that even taking the events to amount to non-appearance, and that too for no justifiable cause, we are not now called upon to set aside the ex parte decree or re-consider these very grounds. As I have stated already, the contesting defendants were a Mahomedan lady and her minor son. The lady was certainly not guilty of any default; she had engaged vakils, had summoned witnesses and she and her witnesses were present in Court. Her senior vakil was absent and her junior vakil was either absent according to his affidavit or was not prepared to go on with the case according to the other affidavits. A request was made that the case might be taken up after the senior vakil arrived, but in view of the state of work before the Court that day, the learned Judge was not inclined to grant the request to the full extent required. In this appeal we confine ourselves to the question whether it would not have been better, in the interests of justice, having regard especially to the fact that the contesting defendants

7. Chinna Asethu v. Kesavayya, A I R 1920 Mad 962=60 I C 215=39 M L J 697.
8. Lakshmi Ammal v. Devadasi Nayudu, A I R 1927 Mad 1114=100 I C 553.

were a Mahomedan lady and her minor son, for the Court to have adjourned the case so as to give the defendants an opportunity to cross-examine the plaintiff's witnesses and to lead evidence on their own behalf.

I once again wish to make my position clear that I am not to be understood as justifying the course adopted by the junior vakil in the circumstances. I regret to say from my own experience that members of the bar too often think that they were serving their clients' interests by running away from the case when the senior is not available. Courts have frequently reiterated their unwillingness to interfere in such cases under O. 9, R. 13, Civil P. C. It seems to me that conduct of this kind is certainly not calculated to help the clients concerned. And from the point of view of the vakil concerned, one can only express the strongest disapproval of such a course. But I am unable to agree with Mr. Jayarama Iyer that in such a case the Court is powerless to interfere to help the client in the interest of justice and must leave the client to his or her remedy against the vakil. The remedy against the vakil is, to say the least, problematical, and it may also be that the fruits of any decree that the client may obtain on the ground of negligence will not by any means compensate the client for the loss of his case. I am not at all sure that it would inevitably follow from the interference of the Court in one of such cases that it will either become a precedent or will justify interference of the Court in all cases where the vakil has neglected the conduct of the client's case. The Court must always be satisfied that there has been no kind of default on the client's part and that the circumstances were such as to leave the client helpless to proceed further with the conduct of the case. The plea of prejudice to the other side has no doubt to be considered, but there are other ways in which the other side can be compensated for any possible prejudice that may be caused by the Court's interference.

I should like to indicate another point of view in this connection. Suppose, for instance, that at the time the case was taken up on 8th August the client who found that the senior vakil was absent and the junior was unable or unwilling to go on with the case, represented to the Court that she had been badly let down by her legal adviser and she must have time to engage another vakil to take charge of the case. Mr. Jayarama Iyer was not prepared to go the length of saying that a request of that kind was one which the Court should reasonably refuse. But he said that that is not the case here, because the kind of request was not made by defendant 1. I cannot altogether ignore what I know of the mentality of the clients in this country. They are not as ready to find fault with their legal advisers as they may be entitled in law to do. In this very case, if she had made that request to the Court, she would have to find means to engage another vakil, and if by the next morning the original senior vakil was available, it would have been an unnecessary strain on her purse to insist upon another vakil appearing. These reasons stand in the way of my laying it down as any rule of law that in a case of this kind the Court is bound to visit upon the client the consequences of the omission of the vakil or vakils in the case to do their duty. If I had any reason to think that the defendants had not done their duty to facilitate the conduct of the case, I should certainly have little sympathy with the request now made on their behalf. But on the facts and for the reasons already stated, I am unable to uphold Mr. Jayarama Iyer's objection that we are precluded from acceding to the request made on behalf of the appellants.

In this connexion I may refer to the judgment of the Patna High Court in A I R 1925 Pat 534,[9] where they distinguish the case reported in 39 M L J 697[7] and point out that the orders passed on an application under O. 9, R. 13, Civil P. C., do not stand in the way of the Court considering the merits of the question whether in the circumstances of the case an adjournment should have been granted or not. Mr. Jayarama Iyer finally contended that if we show any indulgence to the appellants we must at least put them on terms. This request is certainly reasonable. Two sets of terms were suggested; one a limitation of the class of witnesses to be examined and the other a provision as to the costs so far incurred by the plaintiff. We think it proper to leave the latter question to be decided at

9. Mullick v. Ganga Gope, A I R 1925 Pat 534 =91 I C 167=7 P L T 381.

a later stage, when the evidence and findings that we propose to call for will be before the Court. We will then be in a better position to exercise our discretion in this matter. As regards the witnesses to be called by the contesting defendants to give evidence, I think there is some force in Mr. Jayarama Iyer's objection that we should not encourage the possibility of witnesses now being placed before the Court for the first time who had never been thought of before. We would therefore in the first instance limit the contesting defendants to the examinations of the witnesses summoned on their side in connexion with the former hearing and to the witnesses whose names have been specified in the list filed on their behalf even though they had not been summoned. It has however been represented to us that in view of the time that has elapsed, some of the witnesses then thought of might not be available. All that we can do at this stage is to leave to the lower Court to consider whether any of the witnesses now sought to be produced on the appellants' side for the first time have really become necessary by reason of causes of the kind above indicated. I do not wish to fetter the discretions of the lower Court by any further observations. If it is satisfied that the appellants had bona fide reasons for not calling them or citing them on the previous occasion, it will be at liberty to permit the appellants to examine them now. The appellants will of course be given an opportunity of cross-examining the plaintiff's witnesses who were examined on the previous occasion as well as any other witnesses that the plaintiff might choose to examine. The plaintiff will be at liberty to examine once again the witnesses examined on the previous occasion and any other witnesses whom he may consider necessary.

In the circumstances of this case I do not think it desirable to set aside the decree and send the case as a whole back to the lower Court. The case had been pending so long that it seems better to direct the lower Court to record the evidence and admit any documentary evidence that the parties might tender in the light of the observations made above and to submit a revised finding on the first issue. The finding will be submitted before 31st October 1936 : ten days for objections.

Mockett, J.—I agree with the order proposed by my learned brother. But I desire to limit the reasons on which I agree to one. It must be remembered that we are hearing an appeal against a decree in the suit in question which was passed on 8th August 1928, a decree which had an interesting subsequent history. But it is that decree which is before us. Now my learned brother has narrated the events that happened in Court on the day that this ex parte decree was passed and it is unnecessary for me to repeat them. But it is perfectly clear that owing to the very peculiar behaviour of the pleaders engaged by the contesting defendants to this case the learned Judge's mind might have inadvertently been full, at least of doubt, if not of suspicion, with regard to the bona fide of the defendants themselves.

In para. 5 of his judgment the learned Judge says as follows : "Defendants have not let in any evidence to show that the deed was nominally executed. They did not even take steps in time". According to the B diary it is stated under 8th August 1928 "defendants have no evidence". The maintenance of this B diary may be of assistance, but the statement in it is not final. Now in this case it is clear that on the application to set aside the ex parte decree the petitioner stated quite clearly in her own affidavit and it is also stated in the affidavits of three other persons that there were three witnesses, that they were summoned, and that they did attend Court at 11 a. m. on the day in question. This fact, curiously enough, is not condradicted in the counter affidavit. It is therefore quite clear that the learned Judge was under a great misapprehension when he stated that no steps had been taken by the contesting defendants in the case. I think that a Judge who had to determine on that day whether to proceed or not with the case, must have had his judgment completely swayed by the circumstance that no evidence had been brought to the Court to prove an issue which the defendants would have to prove. It would be inevitable in my view that the result would follow which did follow; namely that he passed an ex parte decree, no doubt taking the view that this was merely a time-serving case without any substance whatever in it. Immediately however, it appears, as we now know, that there was a genuine attempt to defend this matter, I think the decree itself becomes vulnerable and so vulner-

able that it is open to us to say that we should pass an order enabling the appellants in this case to have the limited hearing which we have indicated. On these grounds I agree as I said with my learned brother's proposed order.

With regard to the behaviour of the pleaders concerned I only wish to say this: that if it were not for the difficulty relating to the supposed absence of the defendant's witnesses, I should with regret have been unable to agree that the conduct of the pleaders above was such as to enable us to pass any order in favour of the appellants. I think that our position is very similar to that of a Judge sitting in revision considering applications under O. 9, R. 13, Civil P. C. I would refer to the observations in 10 Lah 570,[10] where it is stated that the absence of a pleader is not in any way final one way or the other in considering whether a decree should or should not be set aside. It is stated there that there should be a judicious inquiry in each case into the particular facts relating to the absence of the particular pleader on the particular occasion. I think that that is a very sound test because it does not lay down any general rule in this matter. I think that this test must be applied in this case. It is not possible to say that the absence of the pleaders was excusable, and much as I regret it, I think it is inevitable that the client in these circumstances would have had to suffer. It is the result of what I suppose is a lack of judgment in choosing legal advisers. As however I am agreeing with the order proposed by my learned brother, it is unnecessary to say more on this particular topic. I have only to add that I agree with the observations which my learned brother has made relating to the frame of the suit and the opinion which he has indicated regarding the decisions in 47 Cal 175[1] and also the decision of this High Court in 67 M L J 843.[6]

C.R.K./B.D. *Order accordingly.*

10. Abdul Azeez v. Punjab National Bank Ltd., A I R 1929 Lah 96=114 I C 76=10 Lah 570 =30 P L R 628.

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* A. I. R. 1937 Madras 930

MOCKETT AND HORWILL, JJ.

Official Receiver, Madura — Appellant.

v.

N. S. Kuppuswami Chettiar and *another* — Respondents.

Appeal No. 68 and Civil Revn. Petn. No. 236 of 1937, Decided on 6th May 1937, against order of Dist. Court, Madura, D/- 7th November 1936.

(a) Provincial Insolvency Act (1920), S. 75, Prov. 1—Revision—Powers of High Court.

The powers of the High Court in revision are discretionary and although the High Court under the Prov. 1 to S. 75 of the Provincial Insolvency Act has wider powers than under S. 115, Civil P. C., those powers extend no further than those given by the corresponding provisions in the Provincial Small Cause Courts Act. And the High Court will not interfere on questions of fact unless there has been a patent miscarriage of justice. [P 932 C 1]

*** (b) Civil P. C. (1908), S. 109 (a)—'Any other Court of final appellate jurisdiction'—Meaning of—District Court sitting in appeal under S. 75, Provincial Insolvency Act, is not Court of final appellate jurisdiction—No appeal to Privy Council lies from its decision whatever may be the value of subject matter.**

There is no essential difference between a remedy by way of appeal and by way of revision, and the term 'appellate jurisdiction' is 'both grammatically and logically' wide enough to comprehend the revisional powers of the High Court. Hence the District Court sitting in appeal from a Subordinate Judge under S. 75 of the Provincial Insolvency Act is not a Court of final appellate jurisdiction as the High Court has revisional powers over it under the same section of the Act.

[P 932 C 1; P 933 C 1; P 934 C 1, 2; P 935 C 1]

Moreover, S. 75, Provincial Insolvency Act, is comprehensive and self-contained. S. 75 has been deliberately framed with the intention that the appellate finding of the District Judge, whether the subject matter is valued at more than Rupees 10,000 or less is to be subject only to the revisional powers of the High Court under Proviso 1 and subject to second appeal under Proviso 2 in matters coming within the provisions of S. 4 of the Act. No appeal therefore lies to the Privy Council from the decision of such Court whatever may be the value of the subject matter: *Case law relied on.* [P 934 C 2]

*** (c) Privy Council—Appeal heard by Board even though no appeal lay—No rule that such appeal is always maintainable.**

Where no appeal lies from a decision to the Privy Council but an appeal is filed and the Board hears it, the mere hearing of such appeal by the Judicial Committee is not necessarily to be regarded as a ruling by the Board that such an appeal is maintainable : *40 Cal 21 (P C), Rel. on.* [P 933 C 2]

*** (d) Provincial Insolvency Act (1920), S. 75—S. 75 does not govern appeals to Privy Council—District Court on disposing of insol-**

vency appeal granting permission to appeal to Privy Council—No appeal lies against such order to High Court.

The right of a party to appeal to the Privy Council is beyond the scope of the Provincial Insolvency Act and therefore S. 75 does not govern such appeals. [P 936 C 1]

Where therefore the District Judge on disposing of the insolvency appeal under S. 75, Provincial Insolvency Act, grants permission to appeal to Privy Council, no appeal lies from it to the High Court, as no appeal is provided from such an order passed under O. 45, R. 3, Civil P. C.: *A I R 1916 P C 21, Rel. on*; *A I R 1936 Mad 660, Expl.* [P 935 C 1; P 936 C 2]

(c) Civil P. C. (1908), S. 115 and O. 45—Applicability—S. 115 applies to order granting or refusing certificate under O. 45—Power of revision however will be exercised by High Court only when order is without jurisdiction.

The right of the High Court to interfere in revision is as much an incident of litigation as the right of an aggrieved person to appeal from the decree of the District Judge. [P 936 C 2]

Section 115, Civil P. C., is applicable to an order passed granting or refusing a certificate under O. 45; but this power of revision will be exercised by the High Court only when an order of this nature is passed by the subordinate Court without jurisdiction. [P 936 C 2]

B. Sitarama Rao, N. R. Govindachari and *K. T. M. Ahmed Ibrahim* — for Appellant.

T. M. Krishnaswamy Iyer and *N. Sivaramakrishna Iyer* — for Respondents.

Judgment. — The Official Receiver, Madura, filed a petition ostensibly under Ss. 4 and 53, Provincial Insolvency Act, to set aside two mortgages by the insolvents in favour of the respondents to this appeal. The value of the property in question exceeded Rs. 10,000. There were two mortgages concerned, evidenced by Exs. I and II. Ex. I was of the value of Rs. 12,000 and Ex. II of the value of Rs. 1,000. The Subordinate Judge of Dindigul set aside the alienation under Ex. II on the ground that it was a sham transaction but refused to set aside Ex. I holding that it was genuine. A Civil Miscellaneous Appeal No. 54 of 1935 was filed under S. 75, Provincial Insolvency Act, before the District Judge of Madura against the order of the Subordinate Judge in respect of Ex. I, the Rs. 12,000 mortgage. The learned Judge allowed the appeal holding that the mortgage was without consideration and not in good faith. The respondents here filed a petition before the District Judge seeking leave to appeal to the Privy Council, which was resisted by the Official Receiver on the ground that no appeal lay. It is necessary to point out that an application such as was heard by the lower Courts under S. 53 is not within the provisions of S. 4, Provincial Insolvency Act. This is relevant when considering the provisions of S. 75, Provincial Insolvency Act (*see* 54 Mad 989[1]). S. 75 is as follows :

(1) The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court, may appeal to the District Court, and the order of the District Court upon such appeal shall be final; Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit; Provided, further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under S. 4 may appeal to the High Court on any of the grounds mentioned in sub-s. (1) of S. 100, Civil P. C., 1908. (2) Any such person aggrieved by any such decision or order of a District Court as is specified in Sch. 1 come to or made otherwise than in appeal from an order made by a Subordinate Court, may appeal to the High Court.

It will be seen that in an appeal from the Subordinate Judge to the District Court the order of the District Court 'shall be final'. There are however two Provisos. The first Proviso gives a wide revisional jurisdiction to the High Court much wider in its terms than S. 115, Civil P. C., and the second Proviso gives a right of second appeal to the High Court from the District Judge. This however as has already been pointed out is not a case within S. 4 and therefore under the Act the only remedy open to the respondents was by way of revision. The position in the moffussil relating to insolvency applications is peculiar. They are not always heard at first instance by the Subordinate Judge but sometimes by the District Judge. In the case before us there being no District Judge at Dindigul, there was no option except for this case to go before the Subordinate Judge for trial. The result of this is that if the case is heard by the Subordinate Judge at first instance, an appeal lies to the District Judge, but if the case is heard by the District Judge at first instance, the appeal lies to the High Court in which latter case, provided the amount in dispute is more than Rs. 10,000 and other necessary conditions are fulfilled, an appeal would lie to the Privy

1. Alagiri Subba Naick v. Official Receiver, Tinnevelly, A I R 1931 Mad 745=132 I C 641=54 Mad 989=61 M L J 820.

Council; 12 Rang 194[2] is an authority in point as to the right of appeal to the Privy Council. As the matter before us is not within S. 4, Provincial Insolvency Act, a second appeal does not lie to the High Court and therefore a party losing in appeal before the District Judge would appear to be confined to his remedy by way of revision whatever be the amount at stake. The appellant's contention is that S. 109, Civil P. C., is the dominant provision of law on which this matter should be decided. S. 109 reads as follows:

> Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council: (a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction; (b) from any decree or final order passed by a High Court in the exercise of Original Civil Jurisdiction; and (c) from any decree or order, when the case as hereinafter provided is certified to be a fit one for appeal to His Majesty in Council.

The important words are contained in (a). What is meant by 'any other Court of final appellate jurisdiction'? The appellant argues that the District Court is not a Court of final appellate jurisdiction because revision lies to the High Court generally under S. 115, Civil P. C., and specially in this case under the first Proviso to S. 75, Provincial Insolvency Act, and had this been a case within S. 4, Provincial Insolvency Act, then a second appeal would have been competent to the High Court. Mr. Sitarama Rao for the appellant contends that once the decision of the District Judge is given in appeal, the facts can never be re-opened. He concedes—as he is bound to concede—that the powers of the High Court in revision are discretionary and although the High Court under the Proviso to S. 75, Provincial Insolvency Act, has wider powers than under S. 115, Civil P. C., it is equally conceded that those powers extend no further than those given by the corresponding provisions in the Provincial Small Cause Courts Act, 9 of 1887. It is now a well-established practice not to interfere even under the last mentioned Act on questions of fact unless there has been a patent miscarriage of justice. Therefore the only appeal to the Privy Council open to a litigant whose case is at first instance tried by a Subordinate Judge would be against the misuse of the revisional discretion of the High Court or by special leave under S. 109, Civil P. C. The argument of the respondents is that whatever may be the trend of authority with regard to the meaning of the words 'any other Court of final appellate jurisdiction' in other connections, the sense of S. 75, Provincial Insolvency Act, and S. 109, Civil P. C., is that for the purpose of applications in matters such as those before us, the District Court is a Court of final appellate jurisdiction.

In 22 Mad 68[3] a Full Bench of six Judges considered the important question whether an appeal would lie against an order made by a single Judge under S. 622, Civil P. C. This decision was of course before the amendment. It is clear that Shephard, Offg. C. J., while agreeing with the majority view, would have preferred to distinguish between the revisional and appellate jurisdiction of the High Court. Subramania Iyer, J., whose judgment may be taken to represent the view of the majority of the Bench, held that the term "appellate jurisdiction" was "both grammatically and logically" wide enough to comprehend the power exercisable under S. 622 (now S. 115), Civil P. C. Recently a Full Bench of this High Court in (1937) 1 M L J 453[4] had to consider whether in Art. 182 (2) and (5), Limitation Act, the word 'appeal' included revision. Venkatasubba Rao, J. gave the opinion of the Court and approves the view that there is no essential difference between a remedy by way of appeal and by way of revision and considers that that view is reinforced by the observations of their Lordships of the Judicial Committee in 63 M L J 329=59 I A 283[5] In considering the meaning of the word 'appeal' in Art. 182 (2), their Lordships said:

> But their Lordships have no doubt that any application by a party to an Appellate Court asking it to set aside or revise a decision of a subordinate Court is an appeal within the ordinary acceptation of that term and that it is no less an appeal because it is irregular or incompetent.

2. Maung Ba Thaw v. Ma Pin, A I R 1934 P C 81=148 I C 1=61 I A 158=12 Rang 194 (P C).

3. Chappan v. Moidin Kutti, (1899) 22 Mad 68=8 M L J 231 (F B).

4. Chidambara Nadar v. Rama Nadar, A I R 1937 Mad 385=168 I C 561=I L R (1937) Mad 616=(1937) 1 M L J 453 (F B).

5. Nagendranath De v. Sureshchandra De, A I R 1932 P C 165=137 I C 529=59 I A 283=60 Cal 1=63 M L J 329 (P C).

In conclusion, the Full Bench point out that the word 'appeal' has a narrower meaning in Arts. 150 to 157 than it seems to have in Art. 182, but accept the position that if sufficient reasons exist, a word can be construed in one part of an Act in a different sense from that it bears in another part. The appellant also referred to 13 C L J 90[6], 13 C L J 688[7] and 41 Cal 323,[8] and contended that the District Judge's order being subject to revision by the High Court on the basis of the above authorities, the District Judge was not a Court of final appellate jurisdiction. The argument may be summarized in the words of Subramania Iyer, J. in 22 Mad 68[3] at page 80 :

> Here the two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter.

Mr. Sitarama Rao accepted the position that if his view is correct there are no other Courts of final appellate jurisdiction in the Madras Presidency within the meaning of S. 109 (a), Civil P. C. and suggested that the words were put in the Code so as to include Chief Courts or any other Courts not subordinate to the High Courts. It will be seen that there is no direct decision on what is the meaning of "a Court of final appellate jurisdiction" in S. 75, Provincial Insolvency Act, although there is a strong trend of authority suggesting that no Court is a Court of final appellate jurisdiction over which another Court has revisional powers. The trend of authority is therefore in favour of the view urged by the appellant that the District Court is not a Court of final appellate jurisdiction. But our attention has been drawn to the decision of the Judicial Committee in 20 All 412.[9] The facts of that case are very common in India. A petitioner alleged that owing to an irregularity in an auction sale, property worth Rs. 10,000 was sold for Rs. 670. A petition to the District Munsif to set aside the sale was dismissed. On an application to the District Judge the sale was set aside. An application was made to the District Judge for a certificate for leave to appeal to Her Majesty in Council under S. 598, Civil P. C. 1882. Holding that his order was a final decree within the meaning of S. 595 (now represented by S. 109 which introduced the words "any decree or final order") the District Judge granted a certificate; and as pointed out in 48 All 226[10] at p. 228, the matter never came before the High Court but in due course it came up for hearing before the Board. Now it cannot be doubted that although no appeal lay from the District Judge's order to the High Court, an application for revision would have been sustainable, but it does not appear that before the Judicial Committee any objection was taken to the maintainability of the appeal on this or on any other ground and it must be borne in mind that the last issue before the District Judge was whether his judgment in appeal was final. It did not appear whether the certificate was granted under S. 595 (a) or S. 595 (c) as suggested by the appellant's learned counsel. This case is relied on by the respondents as being by implication authority for the proposition that a District Judge in certain circumstances analogous to those before us is a Court of final appellate jurisdiction. But in view of the decision in 40 Cal 21[11], we do not consider that the hearing of appeals by the Judicial Committee is necessarily to be regarded as a ruling relating to their maintainability. That this is so is clear from 40 Cal 21[11] where their Lordships held that no appeal lay to His Majesty in Council from a decision of the Chief Court of Lower Burma on a reference under the Land Acquisition Act. Appellant's learned counsel then relied in argument on the fact that appeals had been entertained by the Board under the Land Acquisition Act on previous occasions. In view of the fact that in 20 All 412[9] there was no actual decision or even discussion with regard to the maintainability of the appeal, we do not consider we are precluded from deciding the matter before us.

The matter is of considerable importance because Mr. T. M. Krishnaswami Iyer here has contended before us that the test as to

6. Secretary of State v. British India Steam Navigation Co., (1911) 13 C L J 90=9 I C 183 =15 C W N 848.
7. Harish Chandra v. Nawab Bahadur of Moorshidabad, (1911) 13 C L J 688=11 I C 65 =15 C W N 879.
8. Shew Prosad Bungshidhur v. Ram Chunder Haribux, A I R 1914 Cal 388=23 I C 977= 41 Cal 323.
9. Saadamand Khan v. Phul Kuar, (1898) 20 All 412=25 I A 146=7 Sar 380 (P C).
10. Suraj Singh v. Phul Kumari, A I R 1926 All 202=90 I C 904=48 All 226=23 A L J 997.
11. Rangoon Botatoung Co., Ltd. v. Collector, Rangoon, (1913) 40 Cal 21=16 I C 188=39 I A 197=6 L B R 150 (P C).

whether a Court is a Court of final appellate jurisdiction is whether its findings on facts are final and not open to reconsideration by any other Court. If this is so, it would appear to follow that in second appeals it would be open to a Subordinate Judge sitting in first appeal from a Munsif's decision to grant a certificate for leave to appeal to the Privy Council, provided that the case came within the provisions of S. 109 (c), Civil P. C. That at least is the argument before us. In this connexion it must be noticed that certificates under S. 109 (a) and (b) are rigidly circumscribed by considerations as to valuation and S. 109 (c) is not so limited ; and even in revision petitions there is a precedent for the High Court granting a certificate in an appropriate case : 42 M L J 78.[12] In order to arrive at a decision in this matter, a consideration of the terms of S. 75, Provincial Insolvency Act, is as important as a consideration of S. 109, Civil P. C. It has been pointed out to us that Art. 163, Lim. Act, and O. 43, R. 1 (v) contemplate the position that there may be Courts of final appellate jurisdiction subordinate to the High Court. Except the case now argued before us, no examples have been given and no precedents have been quoted to us other than the case in 20 All 412,[9] to which reference has already been made, in which a Court other than the High Court has granted leave to appeal to His Majesty in Council. It may be that the Legislature contemplated that there might be such Courts ; but what we have to decide is whether a District Judge sitting in appeal from a Subordinate Judge under S. 75 is such a Court. The matter is obviously not free from difficulty. Giving the best consideration we can to this matter, we have come to the conclusion that S. 75, Provincial Insolvency Act, is all-comprehensive and self-contained. The Legislature could have distinguished, had it thought fit, between appeals valued at more than Rs. 10,000 and those under Rs. 10,000. It has not done so. It is true that the decision of the District Judge in appeal is stated to be final, but what follows immediately after ? There is provision for the widest form of revision which at least enables a High Court to go into facts if it thinks fit. We have indicated that the Court seldom does so.

The methods of applying the powers of revision under S. 25, Provincial Small Cause Courts Act, 9 of 1887 which correspond in its terms to the revisional powers in S. 75, Provincial Insolvency Act, are dealt with in 1 Rang 372,[13] 3 Rang 471[14] and 21 Bom 250.[15] But whatever view a Court may take as to its powers under S. 25, Provincial Small Cause Courts Act, if there seems to be an apparent injustice, we consider that a Court can and will deal with the matter as fully as if it were a first appeal. S. 75 seems to be deliberately framed and it would appear to be the intention of the Legislature that the finding of the District Judge, whatever the subject matter, are to be subject only to the revisional powers of the High Court there given. There is further a right of second appeal in matters coming within the provisions of S. 4, Provincial Insolvency Act. For it must be remembered that had this been a matter involving a question of title under S. 4 it would have been open to the appellant to file an appeal from the District Judge to the High Court, an appeal limited in form no doubt but still an appeal in its strict sense. But the respondents' counsel contends that even in such a case if the value of the subject matter exceeds Rs. 10,000, he is entitled, disregarding the special remedy provided by the section, to appeal direct to His Majesty in Council. The argument therefore comes back to this: that the District Judge is a Court of final appellate jurisdiction if the value of the property exceeds Rs. 10,000 but not so if it is less than Rs. 10,000. Can it be said that a Court expressly subject to wider powers of revision than those given under S. 115, Civil P. C., and whose decision in certain cases can be questioned in second appeal can be regarded as a Court of final appellate jurisdiction ? We are of the opinion that it cannot be so regarded. We think this view is in agreement with the decisions to which we have referred and the intention of the Legislature. As Venkatasubba Rao, J. observes in (1937) 1 M L J 453[4], the view that there is no decided difference between a remedy by way of revision and by way of appeal is considerably reinforced by the

12. Raja Rajeswara Sethupathi v. Kamith Ravuthan, A I R 1922 Mad 34 = 66 I C 686 = 42 M L J 78.

13. Valab Das v. Maung Ba Than, A I R 1924 Rang 54=85 I C 362 = 1 Rang 372 = 26 Cr L J 523.

14. Siva Dass Dey v. Ashabi, A I R 1925 Rang 310=91 I C 679=3 Rang 471.

15. Poona City Municipality v. Ramji, (1897) 21 Bom 250.

observations of the Judicial Committee above quoted and this is of assistance in considering the meaning of the words 'Court of final appellate jurisdiction'. That the result is unsatisfactory is, we venture to say, apparent; but in view of what follows our view is academic—at least so far as this case is concerned.

The next point that arises for consideration is whether an appeal lies against the order of the District Judge granting permission to appeal to the Privy Council. If such permission had been granted in an ordinary civil suit, undoubtedly no appeal would lie because O. 43, Civil P. C., while providing for an appeal against an order of refusal in sub-s. 1 (v), makes no provision for an appeal as against an order granting a certificate. It is however contended that although no appeal lies under the Civil Procedure Code, S. 75, Provincial Insolvency Act, makes provision for appeals from all orders passed by a District Judge otherwise than in appeal from an order made by a Subordinate Court, upon leave being granted by the District Court or by the High Court. Although the District Judge may be said to have ordered the grant of a certificate before he actually granted the certificate, is the order he passed of the kind contemplated in S. 75? A somewhat similar question arose in (1891) A C 210,[16] a case decided by the House of Lords. By O. 58, R. 15, which governs the right of appeal from the Court of Appeal to the House of Lords, it is laid down that:

> No appeal to the Court of Appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of 21 days . . . .

In that case no appeal was filed within 21 days and so the leave of the Court of Appeal for filing an appeal to the House of Lords was sought and that leave the Court refused. An appeal was then filed in the House of Lords against the order of the Court of Appeal refusing leave to appeal; and it was argued that the refusal of leave was an order and that therefore there was a right of appeal against that order within 21 days. Lord Halsbury, L. C. says in his judgment, which represented the opinion of six Lords of Appeal:

> Although it may be that in some sense the leave of the Court, whether it is given or withheld, becomes an order, that is not the ordinary mode in which it would be described. It is to be something that is done by the order of the Court . . . . It might well be that nevertheless by reason of the context it would come within the obvious meaning and purpose of the statute; so that although it was no one of those things in name, it might be one of those things in substance, and therefore would come within the general provision that an appeal should lie. But when I look not only at the language used, but at the substance and meaning of the provision, it seems to me that to give an appeal in this case would defeat the whole object and purview of the order or rule itself; because it is obvious that what was there intended by the Legislature was that there should be in some form or other a power to stop an appeal —that there should not be an appeal unless some particular body pointed out by the statute should permit that an appeal should be given.

And later:

> How could any Court of review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal? And if the intermediate Court could enter and must enter into that question, then the Court which is the ultimate Court of Appeal must do so also.

No doubt a distinction could be made between the conditions under which an appeal can be preferred before the House of Lords and those governing an appeal to the Privy Council in India. The word 'order' is actually used in O. 43, R. 1 (v), and the Court of Appeal had to grant or refuse leave, whereas the Courts in India have to grant or refuse a certificate which has to be granted under certain conditions; but we think that the reasoning of their Lordships of the House of Lords in the case above quoted applies equally cogently to the case before us. As has been pointed out by Mr. T. M. Krishnaswami Iyer, if an order passed by the District Judge refusing permission to appeal to the Privy Council is an order falling within the mischief of S. 75, Provincial Insolvency Act, then the order granting leave to appeal to this Court against the order granting permission to appeal to the Privy Council is also an appealable order, and so on *ad infinitum*. Thus if the argument of the appellant be correct, this Court will have to consider whether the leave to appeal to this Court given by the District Judge was properly given and after it has decided that point, it would have to decide the main point in appeal. This process could have been rendered endless if other petitions had also been filed for leave to appeal against the order granting leave to appeal to this Court against the order granting leave to appeal to the Privy Council and so on.

16. Lane v. Esdaile, (1891) A C 210=40 W R 65 =64 L T 666=60 L J Ch 644.

Turning to the actual wording used by S. 75 itself, we cannot resist the conclusion, reading the section as a whole, that it concerns itself with orders passed under the Provincial Insolvency Act determining the rights of parties. It seems extremely unlikely that the Legislature intended to apply S. 75 to orders passed under the Civil Procedure Code which are governed with respect to appeals by O. 43, Civil P. C. Mr. Sitarama Rao for the appellant has quoted a decision of Wadsworth, J. in 59 Mad 1049[17] to support his contention that the word 'order' in S. 75 is all embracing. There the District Judge refused to set aside an ex parte order passed by him in appeal and it was argued that this was an order passed by him in appeal and so according to S. 75 (1), it was final and against it no appeal lay. Wadsworth, J. very rightly, if we may say so, held that when the appeal had been dismissed for default, the appeal was at an end and that any order passed subsequently under O. 9, R. 13 was not an order made in appeal and that therefore an appeal was not barred by virtue of S. 75. We do not however see how this decision can in any way help us. An order passed under O. 9, R. 13 is appealable under O. 43, Civil P. C. If the District Judge in that case had passed an order setting aside the ex parte decree, would it have been open to the other side to contend that although no appeal is provided for by the Civil Procedure Code against an order passed under O. 9, R. 13 setting aside an ex parte decree, an appeal would nevertheless lie under S. 75, Provincial Insolvency Act? We do not think so. *A fortiori*, no appeal would lie against an order granting permission to appeal to the Privy Council; for undoubtedly the right of a party to appeal to the Privy Council is something that is beyond the scope of the Provincial Insolvency Act and not governed by it.

In 39 Mad 617[18] it was contended that as the Forest Act made no provision for appeals to the High Court and was self-contained in the matter of appeals, an appeal to the High Court did not lie. Their Lordships repelled this argument and accepted the contention of the respondents that though an appeal from a District Judge to the High Court is not provided for in the Madras Forest Act in a claim to lands which have been notified as reserved forest lands under the Act, such an appeal will lie under the provisions of the Civil Procedure Code; where in such proceedings the District Court is reached, that Court is appealed to as one of the ordinary Courts of the country with regard to whose procedure, orders and decrees the rules of the Civil Procedure Code are applicable. In such a case the ordinary incidents of litigation could only be excluded by specific provisions to that effect. If therefore the right of appeal to the Privy Council is something beyond the Provincial Insolvency Act and is one of the ordinary incidents of litigation, how can appeals to the Privy Council be regulated by S. 75 of that Act? We are clearly of opinion that S. 75 does not govern appeals to the Privy Council and that as no appeal is provided against an order passed under O. 45, R. 3, no appeal lies to this Court.

The appellant has however also filed a revision petition against the order of the learned District Judge; and it has been contended by the respondents that even a revision petition to the High Court does not lie. We have no doubt, however, that S. 115, Civil P. C. is applicable to an order passed granting or refusing a certificate under O. 45; for if subordinate Courts acted without jurisdiction in passing an order of this nature, it will be intolerable if this Court had no power to control them. The right of the High Court to interfere in revision is as much an incident of litigation as the right of an aggrieved person to appeal from the decree of a District Judge. We are not however of the opinion that this is a proper case for interference in revision. The question whether a subordinate Court can under certain circumstances grant permission to appeal to the Privy Council is of very considerable public importance and has not been covered by authority. Although we have held that an appeal does not lie direct from an order of a subordinate Court to the Privy Council, yet the cases above considered do not preclude the possibility that the term "final appellate jurisdiction" used in S. 109 (a), Civil P. C., has a more restricted meaning. Moreover, our decision in this matter has been governed by the fact that even if this Court interfered in

17. Basappa v. Hansaji Gulabchand Firm, A I R 1936 Mad 660=164 I C 959=59 Mad 1049=71 M L J 333.
18. Secy. of State v. Chellikani Rama Rao, A I R 1916 P C 21=35 I C 902=43 I A 192=39 Mad 617 (P C).

revision, it would be open to the respondents to apply for permission to appeal to the Privy Council against the order passed in revision; and in view of the importance of this case and its pecuniary value, we would feel ourselves compelled to grant a certificate that it was a matter of great public importance and ought to be adjudicated upon by the highest tribunal. We therefore dismiss the appeal and the revision petition. As both sides' contentions have succeeded in part, there will be no order as to costs.

C.R.K./A.L. *Appeal & revision dismissed.*

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* * A. I. R. 1937 Madras 937

FULL BENCH

BEASLEY, C. J., VENKATASUBBA RAO AND MOCKETT, JJ.

M. Krishnammal — Petitioner.

T. Balasubramania Pillai, Power of Attorney Agent of *M. Krishnammal* — Respondent.

in

Thayarammal v. *Kuppuswami Naidu*

Appln. No. 1964 of 1936, in T. O. S. No. 7 of 1935, Decided on 21st April 1937.

*** * (a) Power of Attorney—Agent authorized to conduct judicial proceedings has no right of audience—Principal intending to conduct proceedings himself or through another advocate—Agent is not entitled to any notice.**

An agent with a power of attorney to appear and conduct judicial proceedings, but who has not been so authorized by the High Court, has no right of audience on behalf of the principal, either in the appellate or original side of the High Court. [P 938 C 2; P 939 C 1]

Therefore such an agent is not entitled to notice, if his principal wants to appear and conduct the proceedings himself or appoint an advocate to appear for him, as his power of attorney authorizing him to plead is of no force: *C. M. P. No. 498 of 1911*; *A I R 1916 Cal 181* and *A I R 1934 Cal 563*, *Rel. on.* [P 939 C 2]

(b) Power of Attorney—Power of attorney and vakalat—Vakalat, though a kind of power of attorney, is confined to pleaders.

There is no warrant whatever for putting a power of attorney given to a recognized agent to conduct proceedings in Court in the same category as a vakalat given to a legal practitioner, though latter may be described as a power of attorney. The latter power of attorney or appointment is confined only to pleaders, that is those who have a right to plead in Courts. [P 939 C 2]

*** * (c) Power of Attorney—Agent—Status of—Agent is not entitled to all rights of legal practitioner—Power of attorney agent cannot carry on business as attorney or solicitor and charge fees to principal—Isolated instance amounts to carrying on business.**

The power of attorney agent cannot be accorded all the rights and privileges which are enjoyed by the members of the legal profession, whose qualifications for admission to its ranks are laid down in the rules made by the Bar Council with the sanction of the High Court and whose professional conduct thereafter is regulated by rules of practice and professional etiquette and who are subject to the disciplinary control of the High Court; whereas the power of attorney agent need possess no qualifications whatsoever as regards education and character and is not bound by rules of professional conduct or etiquette and is not subject to the disciplinary control of the High Court or of any one. [P 940 C 1, 2]

Therefore the power of attorney agent cannot carry on business as a solicitor or attorney, drafting, engrossing and filing plaint, judge's summons, affidavits and generally issuing legal process and cannot charge fees to the principal. For to carry on business in such capacity is to practise. What constitutes carrying on business is a question of fact. But even one isolated instance amounts to carrying on business or practice, rendering such person liable to be dealt with under law: (*1905*) *2 K B 103*, *Ref.* [P 937 C 2; P 939 C 2; P 940 C 1]

T. R. Srinivasa Iyengar: for Petitioner.

T. Balasubramania Pillai, Power of Attorney agent, *in person*.

T. M. Krishnaswamy Iyer — for Advocates' Association.

R. N. Aingar — for Bar Council.

O. T. G. Nambiar — for Attorneys' Association.

Beasley, C. J.—This matter has been referred to us by Gentle, J. The following questions have been raised, viz. (1) Whether an agent with a power of attorney to appear and conduct judicial proceedings has the right of audience in Court; (2) whether the agent is entitled to notice if his principal wants to appear and conduct the proceedings himself in person or appoints an advocate to appear for him; and (3) whether the power of attorney agent can carry on business as a solicitor or attorney, drafting, engrossing and filing plaint, Judge's summons, affidavits and generally issuing legal process and charge fees to the principal.

That all three questions stand to be answered in the negative seems to us to be clear; but as the respondent has definitely asserted a right to the notice specified in question 2, and certainly by strong implication if not by his conduct to the right of audience stated in question 1 and the matters in question 3 also arise both out of his conduct and claim, we consider that this matter which is of course of extreme importance to the legal profession

should be fully discussed by us. The matter arises in the following way: The respondent is the holder of a power of attorney given to him by one Krishnammal, a widow. Krishnammal had filed a suit in the Madras City Civil Court against her sister Thayarammal to get her half share in the assets of one Palla Kuppammal, deceased, and it was necessary to apply for a search and get copies of the records in O. P. No. 58 of 1935 (T. O. S. No. 7 of 1935) on the file of the High Court and to take further proceedings therein. Being unable to stay in Madras she appointed the respondent as agent

to search the records and apply for copies thereof in the above matter, to file into and receive from Court all papers relating thereto, to swear affidavits, to file necessary petitions and to verify and sign the same, to appear and plead in Court in person on my behalf, to engage advocates if necessary and to sign in their vakalats, to do all acts necessary in the conduct of the above proceedings and in furtherance thereof.

In the before-mentioned litigation (T. O. S. No. 7 of 1935) a petition was posted on 16th November 1936 before the Master, and on that date, when the petition was called on, Mr. T. R. Srinivasa Iyengar appeared on behalf of Krishnammal having been given a vakalat by her. The petition was adjourned and the respondent filed an affidavit on 26th November 1936, stating that Krishnammal had neither orally nor in writing intimated to him that she did not wish him to appear in the litigation and without revoking his power of attorney (which he marked as an exhibit) had engaged Mr. T. R. Srinivasa Iyengar, and he further stated that Krishnammal did this in order to deprive him of the remuneration due to him payable by her; and he claimed that the power of attorney was of the same force and validity as that of a vakalat and that, unless it was revoked by formal proceedings through Court, no orders could be passed on the petition. Therefore, by reason of the authority given to him in the power of attorney, he claimed the same right as a legal practitioner who has been given a vakalat; and since the power of attorney authorizes him to plead in Court, it follows that he claims that right; and indeed we are informed that either in these proceedings or in some other, Lakshmana Rao, J. allowed him to address the Court. In view of the claim put forward by the respondent in the affidavit referred to, the Master posted the matter before Gentle, J. for orders and he has referred the matter to us and it has been fully argued here by the learned counsel for the petitioner, Krishnammal, the Bar Council, the Advocates' Association and the Attorneys' Association; and we have also heard the respondent in person.

We may say at once that there is an unreported Bench decision of this High Court directly in point on the first question in C. M. P. No. 498 of 1911, where it was held by Benson and Sundara Ayyar, JJ. that a right to appear in Court for his principal given to a recognized agent by O. 3, Rr. 1 and 2, Civil P. C., does not include a right to plead, that it means simply that one can take proceedings to submit oneself to jurisdiction that the High Court has under the Letters Patent and the Legal Practitioners' Act and under Ss. 119 and 122, Civil P. C., power to make rules as to who shall plead for parties before the High Court in its original and appellate jurisdiction and in the lower Courts, that S. 10, Letters Patent, makes provision with regard to who alone can plead before the High Court and that others such as recognized agents cannot have the right to plead. There are also two decisions of the Calcutta High Court upon this point, viz. 19 C W N 64[1] and 61 Cal 324.[2] In the former, a recognized power of attorney agent claimed a right to plead in Court on behalf of his principal under O. 3, R. 1, Civil P. C., but it was held by Jenkins, C. J. and Chaterjea, J. that he had no right of audience; and in the latter case, a director of a company holding a power of attorney, authorizing him to appear for and on behalf of the company, to conduct and represent the company in the proceedings, claimed the right of audience on behalf of the company and, applying the ruling in the former case, it was held that he had no right of audience. It is plain from these three cases that Rr. 1 and 2 of O. 3, Civil P. C., do not give the recognized agent any right to plead in Court on behalf of his principal either in the appellate or Original Sides of the High Court and, even if it could be contended successfully that O. 3 gives a right to a recognized agent to plead in Court on the appellate side, it is clear that he can have no such right of audience on

1. Harchand Ray v. B. N. Ry. Co., (1916) 3 A I R Cal 181=28 I C 838=19 C W N 64.
2. In re Eastern Tavoy Minerals Corporation, Ltd., (1934) 21 A I R Cal 563=151 I C 753=61 Cal 324.

the Original Side because of S. 119 which provides that :

Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its Charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

The respondent certainly has not been authorized by the High Court to do so. In this connexion Cls. 9 and 10, Letters Patent, are important. Cl. 9 relates to the powers of the High Court as to the admission of advocates, vakils and attorneys, and such advocates, vakils and attorneys as have been approved, admitted and enrolled by the High Court are authorized to appear for suitors in the High Court and plead or act for them according as the High Court may by its rules and directions determine and subject to such rules and directions; and Cl. 10 gives the High Court power to make rules for the qualifications and admission of proper persons to be advocates, vakils and attorneys, and empowers the High Court to remove or suspend from practice on reasonable cause advocates, vakils or attorneys, and enacts thus :

No person whatsoever but such advocates, vakils or attorneys shall be allowed to act or to plead for, or on behalf of any suitor in the said High Court, except that any suitors shall be allowed to appear, plead or act on his own behalf or on behalf of a co-suitor.

These two clauses are sufficient to dispose of the respondent's claim and in addition, S. 8 of the Bar Councils Act is equally definite. It is as follows :

No person shall be entitled as of right to practise in any High Court unless his name is entered in the roll of the advocates of the High Court maintained under this Act; provided that nothing in this sub-section shall apply to any attorney of the High Court.

Section 9 empowers the Bar Council with the previous sanction of the High Court to make rules to regulate the admission of persons to be advocates of the High Court. It must be observed that S. 8 is not limited to the right to 'plead' but to the right to 'practise'. The Legal Practitioners Act is similarly decisive as regards the mofussil Courts. The answer to Question No. 1 is so clear that no further reference to statutes or decided cases is necessary and it must be in the negative.

The respondent's contention regarding Question No. 2 is based on the claim that because of his power of attorney he stands in the same position as that of an advocate holding a vakalat by reason of O. 39 of the Original Side Rules. R. 1 of that Order prohibits a pleader from appearing, pleading or acting in any suit unless he has filed his vakalat in Court in accordance with the rules and his appointment continues under R. 2 until the death of his client or it is revoked under R. 3, which provides that the appointment may be revoked by an order upon a Master's Summons in Chambers. Under R. 2-A, if there is already a pleader on record, a pleader proposing to file an appointment in the suit may not do so unless he produces the written consent of the pleader on record or unless, where the consent of such pleader is refused, he obtains the special permission of the Court ; and R. 5 prevents a party who has filed an appointment of a pleader from appearing before the Court except in the absence of his pleader or to make any application or do any act in person so long as the appointment is in force ; and there are similar provisions in the Appellate Side Rules. By reason of these rules the respondent claims that as his power of attorney authorizing him to appear in Court and plead on behalf of Krishnammal has not been revoked, she is not entitled to give an appointment to Mr. T. R. Srinivasa Aiyangar to act for her. But as an agent under a power of attorney has no right of audience in Court, it follows that the power of attorney authorizing him to plead is of no force whatsoever and upon that ground alone his contention must fail. But quite apart from that difficulty, there is no warrant whatever for putting a power of attorney given to a recognized agent to conduct proceedings in Court in the same category as a vakalat given to a legal practitioner, though probably the latter may also be described as a power of attorney. The very rules upon which the respondent relies show that such a power of attorney or appointment as it is called is confined only to pleaders, that is, those who have a right to plead in Courts ; and Question 2 must therefore also be answered in the negative.

Question 3 raises some important points and, as it is drafted, does not present any difficulty. Obviously a power of attorney agent cannot carry on 'business' as a solicitor or attorney. To carry on business in such capacity is to practise. What exactly the word 'practise' used in S. 8, Bar

Councils Act, means is not defined in the Act but it certainly must be taken to mean and include everything that a legal practitioner does as such in the High Court such as Question 3 refers to, namely, drafting, engrossing and filing plaints, Judge's summons, affidavits and generally issuing legal process, and although it is not necessary to say what would constitute carrying on a 'business', and each case would depend upon its facts, a clear case of it would be where an agent has made a habit of doing so, though even one instance might be sufficient, or if an agent were to take business premises and to hold himself out as a law agent prepared to act in such matters for remuneration. Even one isolated act has in England been held to constitute "acting as a solicitor" rendering persons guilty of such conduct liable to be dealt with under S. 26, Solicitors Act of 1860, for contempt of Court : (1905) 2 K B 103.[3] In that case an unqualified person gave as agent for the defendant in an action the notice of appearance to the writ required by O. 12, R. 9 of the Supreme Court Rules, to be given by the defendant to the plaintiff or his solicitor and he was held to be acting in contravention of S. 2, Solicitors Act of 1843, which prohibits any unqualified person from "acting as a solicitor" or "carrying on any proceeding" in the superior Courts. There, the unqualified person does not appear to have done this for remuneration at all and there does not seem to be any reason why even one isolated instance here should not suffice to constitute carrying on business or practising. As it stands, therefore, Question 3 has clearly to be answered in the negative also.

In conclusion, we would add the following general observations with regard to what the claim put forward by the respondent really amounts to. It is that he should be accorded all the rights and privileges which are enjoyed by members of the legal profession whose qualifications for admission to its rank are laid down in the rules made by the Bar Council with the sanction of the High Court, and whose professional conduct thereafter is regulated by rules of practice and professional etiquette and who are subject to the disciplinary control of the High Court; whereas the respondent need possess no qualifications whatsoever as regards education and character and is not bound by any rules of professional conduct or etiquette and is not subject to the disciplinary control of the High Court or of any one ; and there can be no better example than this case itself affords of the highly objectionable result such a claim may lead to, and actually has led to here, because the respondent claims to be remunerated by his principal for his services in question and before us stated that the condition regulating his payment is that he is to receive it only if the result of the proceedings is successful but not otherwise. On his own admission, this is a transaction which, if entered upon by a legal practitioner, would at once render him liable to strong disciplinary action, for to engage in speculative litigation is a grave breach of professional conduct. Yet his claim is that he is free to undertake such business and this is only one example of probable resultant evils.

V.B.B./R.K. *Answered in negative.*

3. In re Ainsworth; Ex parte Incorporated Law Society (1905) 2 K B 103=74 L J K B 462=92 L T 652=53 W R 533.

A. I. R. 1937 Madras 940

VARADACHARIAR, J.

S. N. T. Kumaraswami Chettiar — Petitioner.

v.

Board of Commissioners for Hindu Religious Endowments, Madras and others — Respondents.

Civil Revn. Petn. No. 954 of 1935, Decided on 19th February 1937, from order of Dist. Court, Trichinopoly, D/- 31st January 1935.

(a) Madras Hindu Religious Endowments Act (2 of 1927 as amended in 1930) S. 84 (2) — Any person affected by decision under S. 84 (1) has right to apply under S. 84 (2).

The right to apply under S. 84 (2), Hindu Religious Endowments Act (as amended in 1930) is given to any person affected by the decision under Cl. (1) of that section. Therefore, even persons who claim that a certain temple is public or communal temple subject to the control of the village community and fail in that contention in an application under S. 84 (1) before the Board, have locus standi to proceed under S. 84 (2) of the Act, as amended in 1930. [P 941 C 2]

(b) Madras Hindu Religious Endowments Act (2 of 1927 as amended in 1930), S. 84 — Whether persons other than trustees can file regular suit (*Quaere*).

Quaere.—Whether the effect of the amendment in 1930 is to deprive persons other than trustees of their right to resort to a regular suit to establish any claim inconsistent with the order of the Board under S. 84 (1)? [P 941 C 2]

(c) Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (5)—Right of management by village community is not management by 'hereditary right'.

The right of management by the village community is certainly not the same as management by 'hereditary right' which is required by Cl. (5) of S. 9, Hindu Religious Endowments Act, as an essential requisite in the case of 'excepted temples'. The temple therefore which is subject to the control of the village community, does not satisfy the definition of an 'excepted temple' in S. 9 (5). [P 942 C 1]

K. V. Sesha Ayyangar and *T. V. Ramanatha Iyer* — for Petitioner.

K. Rajah Iyer, *Rangachari*, *K. Subba Rao* and *C. A. Vaidhyalingam* — for Respondents.

Order.—In this petition, I am asked to revise an order of the District Judge of Trichinopoly dismissing an application under S. 84, Cl. 2, Religious Endowments Act. The dispute between the parties relates to a communal temple. The petitioners here seek to maintain that no particular families have any hereditary right to the trusteeship in connexion with the said temple, and that it is merely subject to the general management of the community resident in the village. The respondents have all along been maintaining that they have the hereditary right of management. When the matter was before the Endowments Board, the respondents proceeded further and claimed that it was a private temple. The Endowments Board rejected that claim; but it was of opinion that the present trustees who represented three families have been managing the temple hereditarily. The Board accordingly held that the temple was an "excepted" temple. The present petitioners filed an application under S. 84, Cl. 2 to set aside the order of the Board in so far as it held that the suit temple was an excepted temple, because that conclusion was rested on the finding that the respondents were hereditary trustees. For instance, in para. 6 sub-para. (j) of the petition in the lower Court, the petitioners say that the temple being public or communal, controlled by the villagers must have been treated to be a non-excepted temple, negativing the exclusive hereditary claims of management by the respondents 2 to 4. The learned District Judge has dismissed the petition more on what he thought to be an objection to the locus standi of the petitioners than on the merits of the case, though there are some observations in his order which may be read as expressing his views on the merits.

It is not clear that the learned Judge sufficiently realized the implication of the change effected by the Amending Act of 1930 in the language of S. 84, Cl. 2. Prior to the amendment, the right to apply to the Court under that section was given only to the trustee affected by the decision and that would have implied that the rights of other people were left unaffected and could be agitated in an independent suit. But by the amendment of 1930, the right to apply under S. 84, Cl. 2 is given to any person affected by the decision under Cl. (1) of that section. I do not wish to decide whether the effect of this change is to deprive persons other than trustees of their right to resort to a regular suit to establish any claim inconsistent with the order of the Board; but it must be said that having regard to the fact that the Legislature has deliberately widened the class of people entitled to apply under S. 84, Cl. 2, such a contention is possible. I cannot therefore agree that the petitioners have no locus standi to apply under S. 84, Cl. 2 or that their only remedy is by an independent suit.

The learned District Judge next says that the dispute between the parties really is as to who is entitled to be appointed trustees. Whether this is what was in their mind or not is not a matter for the Court to consider. We can only deal with the case stated by them in the pleadings. According to the pleadings, the petitioners have certainly been more consistent in putting forward their case than the respondents. The petitioners claim that it is a communal tempie subject to the control of the village community, and they are not asking that they should be appointed or recognized as hereditary trustees. It would not therefore be fair to interpret their petition as merely raising a dispute as to who is to be the hereditary trustee, as though it was common ground that one or another of the people in the village was the hereditary trustee of the temple. Nor does it seem to me right to say that even on the allegations in the petition, the temple will any how be an 'excepted' temple, within the meaning of the definition in Cl. 5 of S. 9. If it is subject to the control of the village community, I am

unable to see how it will satisfy the definition of an 'excepted temple'. The fact that the villagers as a body—whoever may happen to be villagers for the time being—will have the right of management does not mean that any one of them has got hereditary right thereto. For instance, if new members of that community should come and settle in the village, they might well claim that as part of the village community they have got the right to take part in the management of the temple. Such a claim cannot certainly be based on any title by hereditary right. Whether this claim will be made out in that particular case is another matter; I give the illustration only to show that the right of management by the village community is certainly not the same as management by 'hereditary right' which is required by Cl. 5 as an essential requisite in the case of excepted temples. I must accordingly hold that the learned District Judge was not justified in dismissing the petition in limine in the way he has done. The civil revision petition must be allowed and the case sent back for disposal in due course of law. Costs to abide.

C.R.K./S.C. *Case remanded.*

A. I. R. 1937 Madras 942

VENKATARAMANA RAO, J.

Maya Kone — Appellant.

v.

Periasami Kone and *others* — Respondents.

Second Appeal No. 214 of 1933, Decided on 19th March 1937, against decree of Sub-Judge, Madura, in A. S. No. 56 of 1932.

Hindu Law—Debts—Necessity and benefit to family—Promissory note by manager to accommodate third party and not for family benefit—Transaction resulting in purchase of lands—Purchase not for family necessity or benefit—Major portion of purchase money coming from joint family fund—Shares of junior members held not liable for debts by manager—In insolvency proceedings against manager, junior members successfully asserting their right to share property purchased—Claim advanced by junior members in insolvency held did not amount to ratification.

The manager of a joint Hindu family cannot render the family estate liable by borrowing money for the purchase of other lands for the family in the absence of a justifying necessity or benefit. Further, to found a decision on the doctrine of ratification, it must have been clearly alleged and proved that the junior members affirmed the transactions with full knowledge of all the circumstances attending the same.

[P 943 C 2; P 944 C 1]

The manager of a joint Hindu family executed a promissory note to accommodate a third party and was not for the benefit of the family. It resulted in his purchasing the lands from the said third party and this purchase of lands too was not supported by justifying necessity or benefit to the family. The major portion of the purchase money had come out of the joint family fund and the purchased land became an accretion to the joint family property. The manager was adjudged insolvent and in insolvency proceedings the junior members successfully asserted their right to a share in the property purchased as joint family property on the ground that the properties were purchased in the name of the insolvent, in his capacity as a manager of the joint family, from and out of the joint family funds and the manager had no exclusive right to the properties. In a suit on the promissory note, it was contended that although the purchase was not for the benefit or family necessity, the junior members must be deemed to have affirmed the same and incurred all the liability in connection therewith :

Held : **that the family estate was not liable for the borrowing of the manager for such purpose and as such shares of the junior members could not be held liable : *41 M L J 459* and *A I R 1924 Mad 472, Ref.*** [P 944 C 1]

Held further : **that the claim advanced by the junior members in the insolvency proceedings did not amount to ratification.** [P 944 C 1]

K. Rajah Ayyar and *G. S. Venkataramа Iyer* — for Appellant.

W. S. Krishnaswami Naidu — for Respondents.

Judgment.—This second appeal arises out of a suit instituted by the plaintiff to recover a sum of Rs. 1,300 and interest thereon on a promissory note dated 16th January 1924 executed in his favour by defendant 1. Defendants 2 and 3 were impleaded as his undivided brothers on the ground that the debt was contracted by defendant 1 as the manager of the joint family for family purposes and for the benefit of the family of the defendants. Defendant 4 is the son of defendant 1 and as such he is sought to be made liable in addition to his being a member of the joint family. The suit was filed on 3rd October 1929. To get over the bar of limitation, an endorsement of payment by defendant 1 dated 10th January 1927 was relied on. Defendants 2 and 3 pleaded that there was no family necessity to incur the said debt, that they became separate from defendant 1 in 1925 and that any payment or acknowledgment of liability thereafter by defendant 1 would not save limitation. Both the Courts have concurrently negatived the plea based on division.

The only question therefore that remains for decision is whether the debt was incurred for family necessity or benefit

which would render the defendants liable in respect thereof. The material facts necessary for the disposal of the said question are these. On 15th October 1919 (Ex. A-1) defendant 1 and one Tirumala Nadar became indebted to the plaintiff in the sum of Rs. 580 on a promissory note bearing the said date. The said liability was incurred by defendant 1 to accommodate the said Tirumala Nadar and therefore it was in no sense incurred for and on behalf of the joint family of the defendants. Defendant 1 was also indebted in respect of another sum of Rs. 300 on a promissory note (Ex. A-2) executed by him in favour of the plaintiff, which liability was incurred to accommodate his brother-in-law. Therefore this debt also was one which was not incurred for the benefit of the family. On 21st December 1921 (Ex. F) Tirumala Nadar executed a mortgage in favour of defendant 1 for a sum of Rs. 3,000 in and by which he mortgaged certain immoveable property belonging to him. The document recites that Rs. 1,550 was paid in cash and the balance of the consideration was stipulated to be paid for by defendant 1 undertaking to discharge the debt due under Ex. 1 in favour of the plaintiff and the other debts of Tirumala Nadar. On 16th August 1923 Tirumala Nadar executed two sale deeds (Exs. G and H) bearing the same date in and by which he conveyed the property mortgaged under Ex. F and other property to defendant 1. Ex. H was for a sum of Rs. 2,500 and it was stipulated therein that the property conveyed thereunder was subject to a mortgage in favour of one Nageswara Ayyar for Rs. 1,400 and the balance was to be in partial discharge of Ex. F. The other sale deed Ex. G was for Rs. 1,000 in discharge of the balance due under Ex. F. Subsequent to the execution of these two sale deeds, defendant 1 executed in favour of the plaintiff Ex. A, the suit note for Rs. 1,300, part thereof being Rs. 840, the amount due under Ex. A-1 and part thereof Rs. 460 being the amount due under Ex. A-3. The recital in the said promissory note is to this effect :

> Regarding the promissory note executed by me and Tirumala Nadar on 5th October 1919 (Ex. A-1), the amount due from me alone under the said pronote, upon my purchasing the said Tirumala Nadar's land is Rs. 840.

It will be seen from these transactions that all the loans incurred up to the date of Ex. F by defendant 1 were for the benefit of Tirumala Nadar and Ex. F itself was to accommodate Tirumala Nadar. It was for a sum of Rs. 3,000 and a part thereof was advanced out of the joint family funds. The remaining consideration was the liability undertaken by defendant 1 for discharging the indebtedness of Tirumala Nadar. It cannot therefore be said that the transaction Ex. F was for the benefit of the joint family. Further, on 16th August 1923 when the sale deeds Exs. G and H were taken, Rs. 2,100 only remained due under the mortgage and apparently Rs. 900 was paid by Tirumala Nadar. From the evidence it does not appear how and when that sum of Rs. 900 was paid and why the said sum of Rs. 900 was not utilized in the discharge of the liability undertaken under Ex. F by defendant 1. So far as the sale covered by Ex. H is concerned, the property conveyed thereunder was admittedly subject to a prior mortgage.

As pointed out by the learned Subordinate Judge, taking the most favourable view of the transactions, a sum of Rs. 820 due and payable under Ex. A-1 must be deemed to represent a portion of the sale price payable under Exs. G and H and Ex. A must be deemed to be a borrowing for the said purpose. But it has not been established in this case that the mortgage or the sales were transactions entered into for the benefit of the family. The manager of a joint Hindu family cannot render the family estate liable by borrowing money for the purchase of other lands for the family in the absence of a justifying necessity or benefit. In 41 M L J 459,[1] a mortgage of the joint family property was executed by the managing member of the joint Hindu family for the purpose of purchasing other lands for the family; out of Rs. 10,000 paid for the purchase of the property, Rs. 4,000 was borrowed on a mortgage of the joint family property. In a suit on the mortgage, the minor members of the family disputed their liability to pay the debt. Their Lordships, Sadasiva Iyer and Spencer, JJ., following an earlier decision in 25 M L J 563[2] held that it was not competent for the managing member to mortgage the family lands so as to bind the junior members' share therein and

1. Subramania Chetty v. Chidambara Mudali, (1921) 41 M L J 459=69 I C 756.
2. Subramania Nadan v. Ramaswami Nadan, (1913) 25 M L J 563=21 I C 656.

exonerated the minor's interests in spite of the fact that the purchased lands became an accretion to the joint family property. If the principle of these decisions is to be followed, there can be no question that defendants 2 and 3 are not liable for the suit claim.

But Mr. Rajah Ayyar contends that defendants 2 and 3 must be deemed to have ratified the act of defendant 1 in incurring the suit liability. How he puts this contention is this : Defendant 1 was adjudicated insolvent in 1927; in insolvency proceedings defendants 2 and 3 successfully asserted their right to a share in the property purchased under Exs. G and H as joint family properties; and therefore even though the transactions under Exs. G and H may not have been for any family necessity or benefit, they must be deemed to have affirmed the same and all the liability incurred in connexion therewith. But what they stated was that certain properties were purchased in the name of the insolvent and in his capacity as manager of the joint family from and out of the joint family funds and the insolvent had no exclusive right to the properties. So far as the properties purchased under Exs. G and H are concerned, the statement is partly true, as a major portion of the purchase money came out of the joint family funds. I do not see how a claim advanced under such circumstances can be said to amount to ratification. To found a decision on the doctrine of ratification, it must have been clearly alleged and proved that the defendants affirmed the transactions with full knowledge of all the circumstances attending the same. As pointed out by the learned Subordinate Judge in para. 6 of his judgment, on the evidence on record it is not possible to find a case of ratification. Mr. Rajah Ayyar asked me to raise an issue on this point and remand the case to the lower Court for a finding thereon. But, as no definite plea of ratification was raised in the pleadings and no evidence specifically directed in regard thereto and as the remand would necessitate fresh evidence, I am not inclined to accede to his request.

In these circumstances, the plaintiff is not entitled to a decree against the joint family properties in the hands of defendants 2 and 3; in my opinion the decree passed by the learned Subordinate Judge was proper and is similar to the one passed in 47 Mad 449.[3] In the result the second appeal fails and is dismissed with costs. Leave to appeal refused.

C.R.K./S.C. *Appeal dismissed.*

3. Burrayya v. Ramayya, A I R 1924 Mad 472=78 I C 90=47 Mad 449=46 M L J 49.

A. I. R. 1937 Madras 944

KING, J.

In re *Malai* and *others*—Accused.

Criminal Revn. Case No. 333 and Ref. No. 24 of 1937, Decided on 18th August 1937, referred by Dist. Magistrate, Trichinopoly, D/- 6th May 1937.

Criminal P. C. (1898), Ss. 252, 242—Magistrate issuing summons only for offence triable as summons case — He can reconsider offences disclosed by complaint before proceeding with enquiry and can proceed under S. 252 instead of under S. 242.

A Magistrate has power to change his mind in regard to the exact offences which a complaint discloses before he begins to enquire into the case. [P 945 C 1]

Where therefore a Magistrate issues summons to the accused for an offence only under S. 426, Penal Code, an offence triable as summons case, upon a complaint made to him, he can reconsider the offences disclosed by the complaint before proceeding under S. 242, Criminal P. C., and can proceed under S. 252, if necessary : *A I R 1932 Mad 369 (F B)* and *29 Mad 126, Rel. on; A I R 1936 Mad 341, Expl.* and *Disting.* [P 944 C 2]

Public Prosecutor — for the Crown.

Order.—This reference is made on the assumption that the facts are governed by a decision of my own reported in 59 Mad 442.[1] The facts are obviously distinguishable. In 59 Mad 442[1] I had to deal with a case in which the Magistrate had not only taken cognizance of an offence triable only under Ch. 20 of the Code but had actually applied Ss. 242 and 244 and taken evidence. In the present case, though the Magistrate had issued summons to the accused for an offence under S. 426 only, he did not apply S. 242 when the accused was brought before him, but informed him then and there that on re-consideration he held that other offences also were disclosed by the complaint, and proceeded from that moment to apply S. 252. It is no doubt stated with some lack of precision in 59 Mad 442[1] that when once a Magistrate has 'taken cognizance of' an offence which is triable only according to

1. Rajaratnam Pillai v. Emperor, A I R 1936 Mad 341=1936 Cr C 384=161 I C 846=37 Cr L J 501=59 Mad 442=70 M L J 340.

the procedure applicable to summons cases, etc., but the argument is clear that I was concerned solely with Ch. 20 and the provisions of S. 246. A situation such as has now arisen was not then contemplated and was obviously not being considered. I accordingly hold that the decision in 59 Mad 442[1] does not and cannot apply to the facts of this case.

That a Magistrate has power to change his mind in regard to the exact offences which a complaint discloses before he begins to enquire into the case cannot be denied on general principles—and even if it be argued that in the present case he has impliedly dismissed a complaint under other sections of the Penal Code than S. 426, he still has power to re-entertain a complaint on the same facts without the need of any action by any superior Court: *vide* 29 Mad 126[2] and 55 Mad 622.[3] In the result I am unable to accept the learned Magistrate's reference and must decline to interfere.

C.R.K./K.B. *Reference rejected.*

2. Emperor v. Chinna Kaliappa Goundan, (1906) 29 Mad 126=3 Cr L J 274=16 M L J 79.
3. Ponnuswami Goundan v. Emperor, A I R 1932 Mad 369=1932 Cr C 359=137 I C 317 =55 Mad 622=33 Cr L J 454=62 M L J 469 (F B).

A. I. R. 1937 Madras 945

VENKATARAMANA RAO, J.

Sri Neelakanta Rajendra Patro — Appellant.

v.

Balaji Patro Mondolo and *others* — Respondents.

Second Appeal No. 209 of 1933, Decided on 14th April 1937, against the decree of Court of Agent to Governor in Ganjam, Chatrapur, in C. S. A. No. 2 of 1931.

Customary Dues—Customary payment for years—Presumption against voluntary nature—Courts can infer legal origin if legally possible — Payment though unconnected with nature of holding yet can be upheld.

Where a customary payment has been made for a long series of years, the presumption generally is that payment was not made voluntarily or out of generosity. It is open to the Courts to infer a legal origin for such a payment where it is legally possible. Even though the payment is one unconnected with the use or nature of the holding, still it can be upheld on the ground of usage if a legal origin can be proved or presumed: *17 Mad 63, Expl.*; *A I R 1919 Mad 535, Rel. on*; *13 M L J 379, Ref.* [P 947 C 1, 2]

1937 M/119 & 120

S. A. Seshadhri Iyengar for *B. Jagannadha Das* — for Appellant.

C. S. Venkatachariar — for Respondents.

Judgment. — The substantial question for decision in this second appeal relates to the claim by the trustees of Jagannadhaswami temple at Udayagiri, Ramagiri Taluk, in the Agency Tracts of the Ganjam District, to recover four garces of paddy annually for the temple from the Mandolo or the Muttadar of Titisingi Mutta in the same taluk. The said mutta is held by an officer called the Muttadar who, according to the usage, is appointed by the Government, the office being recognized more or less hereditary. The officer is remunerated by the emoluments derived mainly from the income of Titisingi Mutta. The claim is thus laid in the plaint:

> The plaintiff and defendant 2, as well as their ancestors who are Patros of Ramagiri-Udayagiri Mutta, used to collect from Balaji Patro Mondolo, defendant 1, as well as from his ancestors of the Titisingi Mutta, four garces of paddy for the Amrutha Monohi (daily offerings) of the said deity ... Balaji Mondolo who at present holds the office of Mondolo of the Titisingi Mutta of this taluk has, as per records, to deliver on the day of Pongal every year four garces of paddy a year with the measure current in the country ... This had been going on from generation to generation.

Defendant 1 in his written statement filed on 17th July 1925 stated that he was either bound to pay Rs. 300 in cash to the zamindar of Bodokimedi or four garces of paddy, and as he had to pay Rs. 300 in cash to the said zamindar he was not bound to give four garces of paddy. In the written statement filed on 10th September 1925 he stated that the payment was purely voluntary and could not support a legal claim, that the income derived from Titisingi Mutta formed the emoluments of the office of Mutta head and was inalienable and therefore any claim for payment out of such emoluments was unenforceable in a Court of law. The defendants adduced no evidence, either oral or documentary, but the plaintiff examined a number of witnesses and also filed certain documents. The oral evidence was believed by the Courts below. The facts that can be said to have been established from the oral testimony are that the main source of income for the maintenance of the deity is four garces of paddy paid annually by the Muttadar of Titisingi Mutta, that the said payment has been made from a time long before living memory and, at any rate, by the defendants' family ever since their connection with the Titisingi Mutta, that

whoever held the office of the Muttadar of Titisingi Mutta had to make this payment to the trustees of the temple, that the ryots used annually to come and deliver the said four garces of paddy and that the same has been utilized for the daily offerings to God and for the maintenance of the temple servants. Defendant 1 also admitted that this was made by virtue of a custom which has been long prevalent. In his letter to the Deputy Tahsildar dated 18th January 1925, he made the following statement :

> We being a Savara tribe my father and grandfather had been making payment according to former custom which has been in vogue till this day, but I consider that I am not liable to make payment.

It is also in evidence that the Muttadar of Titisingi Mutta, in addition to these four garces of paddy was making a cash payment of Rs. 300 to the zamindar of Bodokimedi. This is also evidenced by what is called Taylor's Memoir which was a record of mamools prepared in 1891 by the then Collector of the District, and in this it is stated that the Patro (Muttadar) pays four garces to Udayagiri Mutta or temple annually. There is also another document which is filed in the case, Ex. D, which purports to be a takid register maintained by the zamindar of Bodokimedi, wherein it is stated that the Muttadar of Titisingi Mutta has to pay Rs. 300 to the zamindar and that he should also deliver paddy necessary for the Sri Jagannadhaswami temple in accordance with the custom. Both the relevancy and admissibility of this document has been disputed in the Courts below, and the same objection has been repeated on behalf of defendant 1 by his learned counsel Mr. Venkatachariar before me. I shall assume the objection to be valid and proceed to deal with the case on the said footing.

The Special Assistant Agent, Balliguda Division, who originally tried the case, came to the conclusion that this paddy had been paid annually to the trustees by the Muttadars of Titisingi Mutta even though they had no belief in the worship of Jagannadhaswami and that the payment could not be said to have been voluntary. When his decision had been carried in appeal, the Agency Additional District Judge, Mr. Arndt, was of the opinion that mamools could be fixed only by the Agent, that interference by Civil Courts was considered undesirable, that from the fact that payment had been made for a very long time the Court could not arrogate to itself the power that was vested in the Agent alone of deciding whether the continuance of the payment is desirable, that legality can be given to the obligation for the payment of mamools only by the executive, that though the payment cannot be said to be voluntary, no legal origin can be presumed from the evidence of longstanding custom; and he gave time to the plaintiff's vakil to produce a certificate from the Agent recognizing the said mamool The necessary certificate was obtained by the plaintiff and the matter again came up before Mr. Galletti, the Agent to the Governor in Ganjam, who came to the conclusion that such customary payments are not based on contract but on status which is ascertained or determined from time to time by the executive power, and that since the certificate recognizing the payment had been filed showing that the mamool is due by defendant 1 to the trustees, he confirmed the decision of the Special Assistant Agent. A second appeal was filed against that decree in the High Court which originally came on before Phillips and Odgers, JJ. who called for a report from the Agent as to the grounds for his holding that a certificate by the executive authority is conclusive before a Civil Court. In answer to that, the Agent referred to Taylor's Memoir. After the receipt of that information, the matter came up before Ramesam, J. who held that Civil Courts have got to find the legal basis on which the defendant's liability rested and that they could not regard the Agent's certificate as conclusive. He then remarked thus :

> The defendant Mandolo holds his office of Mutta on some kind of tenure under the zamindar of Peddakimedi. It is said that he also pays Rs. 300 as kattubadi to the zamindar of Peddakimedi. Whether there are other incidents of tenure under which he holds the Mandolo office I am not able to say. It is for the lower Court to enquire into all the incidents of defendant's tenure and to find whether any legal basis for the liability exists.

He also permitted Taylor's Memoir to be admitted in evidence which was excluded by the Special Assistant Agent who tried the case. On remand by the High Court the matter came up before Mr. Vellodi, the Agent to the Governor in Ganjam. On the evidence he held that it was the practice for Tittisingi Mutta to pay the four garces of paddy for the upkeep of the temple. He further held

that Taylor's Memoir, though not an official authority, has been looked upon as a book of reference whenever disputes arose regarding the question of mamools and that it has always been the practice to see that as far as possible these mamools as they are found in Taylor's Memoir are enforced. He also took the view that the administration of mamools in the Agency has been a matter entirely for the executive to undertake, and endorsed the opinion of Mr. Arndt that legality can be given to the obligation for the payment of mamools only by the executive, but no presumption should be made that it was made voluntarily. He finally held that from the mere fact of a longstanding payment he could not infer a legal obligation to pay the same and concluded by saying that the payment was purely a voluntary one and dismissed the suit. It is against this decision that the second appeal has been preferred.

The question for decision therefore is whether on the facts established the payment was voluntary or whether the plaintiff could enforce the payment as a matter of legal right. Before deciding this, I may at the outset state that there is nothing in the evidence to warrant the observations of the learned Judge in the Court below that the administration of mamools in the Agency is a matter entirely for the executive to undertake and that legality can be given to the obligation for such payment only by the executive. He says that a study of the question convinced him of the fact, but it was his duty to place all the materials upon which his opinion was based, and in the absence of such evidence, no Court can recognize this; it is this view that seems to have coloured the learned Judge's conclusion on the matter. The origin of this payment is unknown save that this custom has existed beyond the time of living memory. Where a customary payment has been made for a long series of years, the presumption generally is that payment was not made voluntarily or out of generosity. It is open to the Courts to infer a legal origin for such a payment where it is legally possible. What Mr Venkatachariar contends is that the said presumption is not made in cases of payments made towards charity and that in cases of landlord and tenant a cess paid as and by way of contributions for repair and maintenance of a temple was held not obligatory on the tenant and was considered to be a voluntary payment. In 17 Mad 43,[1] one of the cases relied on by him, the fee claimed by the landlord was the fee payable to Sivaganga goddess and it was observed by a Bench consisting of Muthuswami Iyer and Best, JJ. thus:

> A duty to contribute to the expense of a temple is not an ordinary incident of the relation of landlord and tenant, nor has it any connexion with the jirayati tenure on which the ryot holds his land. Prima facie, the contribution is voluntary, and unless the fee is shown to be a charge on the land it cannot be treated as a payment which the zamindar can legally compel the ryot to make.

This case seems to indicate that if the fee is an incident of the tenure, or is shown to be a charge on the land, it can be levied. The same view was taken in 13 M L J 379.[2] In 42 Mad 197[3] Kumaraswami Sastri, J. observed thus:

> Where the cesses are in their nature unconnected with the object for which land is let, they can only be claimed by the landlord under a contract between him and ryots supported by consideration or under a usage for which a legal origin is either proved or presumed from the nature of the case and long course of payments.

Thus it will be seen that even though the payment is one unconnected with the use or nature of the holding, still it can be upheld on the ground of usage if a legal origin can be proved or presumed. In this case therefore, it has to be considered whether a legal origin can be presumed for the customary payments of the four garces of paddy. In the first place this payment is not made by a tenant to a landlord. What appears from the facts already established is that whoever holds the office of Muttadar of Titisingi Mutta was paying four garces of paddy to the trustees of the temple direct. Though there is not direct evidence in the case, the fact of payment in kind seems to suggest that it was to be paid out of the produce of Titisingi Mutta which formed the emoluments of the office of the muttadar: see also the plea of para. 3 of the written statement filed on 10th September 1925. From the evidence it appears that it is the practice for the ryots of Titisingi Mutta to measure and deliver this paddy, and Ex. A, which is a receipt for the delivery of paddy, shows that it relates to the appraisement of the

1. Siriparapu Ramanna v. Mallikarjuna Prasada Nayudu, (1894) 17 Mad 43.
2. Ramalingam Chettiar v. Ramaswami Aiyan (1903) 13 M L J 379.
3. Vadamalai Thiruvanatha Savuga Pandia Thevar v. Sankaramoorthi Naidu, A I R 1919 Mad 535=49 I C 688=42 Mad 197=36 M L J 109.

crop of the year 1922, which seems to suggest that the payment was intended to be made from and out of the produce of the Mutta. It is well-known that Hindu Sovereigns in ancient days made similar grants of annuity to Hindu temples for their upkeep and when payment is intended or directed to be made from and out of the produce, it is held to be a charge and such charges are not unknown to Hindu law. There is also the significant fact in this case that the Savaras, to which caste defendant 1 belongs, do not believe in the worship of the Hindu deities and therefore, when such a payment is made by one who is not accustomed to worship them and therefore cannot be said to have been done as an act of piety, it must be presumed that there was some reason which obliged a person like the Muttadar of Titisingi Mutta, a non-worshipper, to make the payment. The presumption of a voluntary payment which arises in the case of an ordinary worshipper would not arise in this case. As it is established from the evidence that whoever is the office-holder makes this customary payment, it must be deemed that the payment is one which attaches to the Mutta. It can therefore be inferred in the circumstances of this case that this payment is payable *virtute tenuræ*. I am therefore inclined to hold that defendant 1 is under a legal obligation to make the said payment by virtue of his holding the office of mutta and the plaintiff is entitled to claim the same. In the result the decree of the lower Appellate Court is reversed and that of the Special Assistant Agent restored with costs. (Leave refused).

C.R.K./B.D. *Appeal allowed.*

A. I. R. 1937 Madras 948

VENKATARAMANA RAO, J.

Chuduvalathur Devaswom, Uralars Narayana Nambudri and *others* — Petitioners.

v.

Sub-Collector and Land Acquisition Officer, Malappuram — Respondent.

Civil Revn. Petns. Nos. 1587 and 1588 of 1935, Decided on 23rd April 1937, from orders of Sub-Judge, Ottapalam, D/- 29th August 1935.

Land Acquisition Act (1894), S. 32—Application under, for investment in land—Court must satisfy itself as to propriety of purchase before it directs Collector to investigate into its title, value and other particulars—But Collector's opinion is not final—On receiving report from Collector Court can take additional evidence if it thinks fit before making final order.

In an application for re-investment in purchase of land made under S. 32, Land Acquisition Act, if the Court is satisfied as to the propriety of the purchase, it can direct the Collector to make an investigation into its value, into its title and all other particulars that may be necessary to enable the Court to make a final order directing the investment of the money in the purchase of specific lands which it has proposed to purchase. In referring the matter to the Collector, the Court should ordinarily direct the Collector to receive all the evidence and any information which the parties may place before him and consider the same along with the information which he would independently obtain and submit a report to the Court. On receipt of the said report the Court should hear the parties and pass such appropriate order as it thinks necessary. If the Court thinks that any evidence is necessary by way of supplementing what has been already adduced before the Collector or that an expert's testimony is necessary, it is open to the Court to give such direction in regard thereto and have such evidence taken. It is open to the Court to disregard the report of the Collector and arrive at an independent valuation after the consideration of the report and direct the purchase accordingly. If it directs purchase it can give appropriate directions to the parties to place the draft conveyance before the Court, and after approval of the same send it to the Collector for completion of the transaction, that is for engrossment on stamp paper, for registration and for payment of the money, and the Court can issue a cheque in favour of the Collector for the necessary payment : (*1853*) *9 Hare App II, LXXXIV*; (*1853*) *22 L J Ch 248*; *A I R 1932 Cal 844* and *A I R 1935 Cal 29*, *Rel. on.*

[P 949 C 1, 2]

P. Govinda Menon — for Petitioners.

Govt. Pleader — for Respondent.

Order. — These two revision petitions arise out of an order passed by the Subordinate Judge of Ottapalam declining to order payment of two sums of money being the compensation money in respect of certain lands belonging to Chuduvalathur devaswom acquired by the Government and lodged into Court under the provisions of the Land Acquisition Act. The petitioners, who are the trustees, desired to purchase certain immoveable properties on the ground that the present investment of the said money in the Government securities did not yield sufficient income. On application made by the trustees under S. 32, Land Acquisition Act, the Subordinate Judge of Ottapalam appointed a Commissioner to examine the properties and he seems to have given a favourable report in regard to the pur-

chase. Subsequently the Court called for a report from the Collector and the Collector seems to have stated that the properties were insufficient for the amount. Thereupon the Court refused to make an order for the purchase, and the petition was dismissed. The trustees then filed petitions, out of which these revision petitions arise, to have the said order reviewed and requested the Court to give the petitioners an opportunity of adducing fresh evidence for showing that the properties are sufficient and to order payment of the moneys. The learned Subordinate Judge took the view that inasmuch as the Collector stated that the properties were insufficient for the amount, there is no provision of law for enabling the Court to proceed further in the matter and therefore he declined to review the order already passed.

It seems to me that the view taken by the learned Subordinate Judge that the Collector's opinion regarding the purchase is the final word on the matter is unsound and cannot be sustained. In regard to the moneys deposited in Court under sub-s. 2 of S. 31, Land Acquisition Act, the Court is invested with certain powers under S. 32. One of such is that the Court shall order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held; and even in the case of moneys that have been invested in Government or other approved securities, the Court is also given power to have them re-invested in the purchase of other lands. It will be seen that this duty is laid on the Court; it is a judicial function which has to be performed by it. A judicial act must therefore be done in accordance with the procedure usually attributed to it, that is, after hearing the parties, taking such evidence as is necessary and appropriate for the particular act. The Court therefore must be satisfied as to the propriety of the purchase, the value and the title, and it is only after it is satisfied in regard to these particulars it can make an order for investment.

Reliance was placed by the lower Court on a rule framed under the Act and published in the Civil Rules of Practice that the purchase of lands under S. 32 should be effected through the Collector of the district. This only means that the actual purchase must be made through the Collector, that is, if the Court is satisfied as to the propriety of the purchase, it can direct the Collector to make an investigation into its value, into its title and all other particulars that may be necessary to enable the Court to make a final order directing the investment of the money in the purchase of specific lands which it has proposed to purchase. It seems to me that in referring the matter to the Collector the Court should ordinarily direct the Collector to receive all the evidence and any information which the parties may place before him and consider the same along with the information which he would independently obtain and submit a report to the Court. On receipt of the said report, the Court should hear the parties and pass such appropriate order as it thinks necessary. If the Court thinks that any evidence is necessary by way of supplementing what has been already adduced before the Collector or that an expert's testimony is necessary, it is open to the Court to give such directions in regard thereto and have such evidence taken. It is open to the Court to disregard the report of the Collector and arrive at an independent valuation after the consideration of the report and direct the purchase accordingly. If it directs purchase, it can give appropriate directions to the parties to place the draft conveyance before the Court and after approval of the same, send it to the Collector for completion of the transaction, that is, for engrossment on stamp paper, for registration and for payment of the money and the Court can issue a cheque in favour of the Collector for the necessary payment. This section (S. 32), it may be noticed, was modelled on S. 69, Land Clauses Act of 1845.

The English practice appears to have been to a similar effect. In(1852)9 Hare App.I, IX =68 E R 759[1] an application was made for the reinvestment of moneys in land under the said section. Vice Chancellor Turner required first to be satisfied by affidavit that the purchase proposed to be made was a fit and proper investment of the fund; and having been satisfied by the evidence on that point directed a note to be taken by the registrar that the Court

1. In re Caddick's settlement, (1852) 9 Hare App. I, IX=68 E R 759.

approved of the proposed purchase and adjourned the petition until the opinion of the conveyancing counsel as to the title was produced. After the title was approved by the conveyancing counsel, the Court insisted upon the approval of the title being verified by affidavit being filed and the application was adjourned to enable the counsel to settle the draft conveyance and place it before the Court. After the approval of the conveyance, the Vice Chancellor made the order that upon the completion of the engrossment and upon due execution of the conveyance by all proper parties to be verified by affidavit, the sum should be paid out of Court to the vendor: *vide* (1853) 9 Hare App. II, LXXXV = 68 E R 806.[2] In (1853) 22 L J Ch 248[3] on a similar application by the trustees of a hospital, the Master of the Rolls passed the following order:

> The only order that I can now make is, that I approve of the purchase and the value, and also the propriety of the investment, but before I can make any other order, the petitioner must obtain the certificate of one of the conveyancing counsel of the Court approving of the title, and an affidavit verifying the title; in the meantime the petition must stand over.

It will thus be seen that it is the Court that finally comes to the conclusion as to the propriety of the purchase, the value and the title, though in order to save the time of the Court, it either gets the necessary information by means of affidavit or by reference to conveyancing counsel in regard to the title and by reference to experts in regard to the value. Anyhow, the order ultimately passed is a judicial order made by the Court. The system of conveyancing counsel does not exist in India and it is not possible to follow the English practice literally. That is why the machinery of the Collector has been provided for, but the Collector is not the final authority on the matter. In 59 Cal 1272[4] an application was made under S. 32, Land Acquisition Act. The president of the Calcutta Improvement Tribunal directed that compensation money should be invested in the purchase of a property. He referred the matter to the Collector who valued the property at Rs. 9,72,000. On the receipt of the report from the Collector, the President obtained an independent valuation by an outside expert without giving the parties concerned an opportunity to examine the report or cross-examine the expert and directed the purchase of the land for a sum of Rs. 9,83,000, which was Rupees 11,000 higher than the Collector's figure. Pearson, J. was of the opinion that this procedure was irregular and observed thus:

> The President in these proceedings was a Judge and was bound to exercise his functions in a judicial manner, whereas in adopting this procedure he has clearly acted illegally.

A similar view was taken in another case reported in 62 Cal 154.[5] In that case the President of the Calcutta Improvement Tribunal ordered certain moneys which remained in the Government securities to be re-invested in the purchase of land. An objection was taken that it was not desirable to make a re-investment. The learned Judges observed:

> The President, while exercising his judicial function, should therefore consider whether the re-investment is expedient in view of the allegations of the petitioner for whose benefit the investment has been made;

and held, before the President desires whether the money should be re-invested, he must hear the parties. It therefore seems to me that the view taken by the lower Court in regard to the powers of the Court is unsound. The question is whether these revision petitions are maintainable. As contended by Mr. Champakesa Ayyangar, the proper procedure which the petitioners should have adopted was to have the order dismissing the petition corrected by this Court. On this ground the revision petitions fail, but as no question of res judicata arises and as the learned Subordinate Judge has not gone into the propriety of the purchase and other matters relating thereto, it is open to the petitioners even now to make an independent application pointing out the desirability of making the purchase of the said property and the Court will be at liberty to consider the propriety of its purchase and then make a reference to the Collector in the light of the remarks contained in this judgment. In the result the civil revision petitions are dismissed but I allow costs to the Government in one petition, namely, in C. R. P. No. 1587 of 1935.

C.R.K./K.B. *Petitions dismissed.*

2. In the matter of Caddick's settlement, (1853) 9 Hare App. II, LXXXV=68 E R 806.
3. In re Martin, (1853) 22 L J Ch 248.
4. Nawab Bahadur of Murshidabad v. Deenendra Mullick, A I R 1932 Cal 844=140 I C 866=59 Cal 1272=36 C W N 848.
5. Sarala Dassi v. President, Calcutta Improvement Tribunal, A I R 1935 Cal 29=154 I C 772=62 Cal 154=60 C L J 88.

* A. I. R. 1937 Madras 951

BURN AND LAKSHMANA RAO, JJ.

In re *Mylaswami Goundan* and *another* —Accused.

Referred Trial No. 60 and Criminal Appeal No. 275 of 1937, Decided on 2nd August 1937, referred by Sess. Judge, Coimbatore, D/- 17th April 1937.

*** Evidence Act (1872), S. 45—Foot-print expert—Evidence of — Evidence of similarity of impressions of foot can be admitted as circumstantial evidence — Such expert lays points of similarity or dissimilarity before Court from which Court draws its own conclusions.**

The evidence of similarity of the impression of the foot, shod or unshod, is admitted by the Courts in India and in Great Britain and in every other country, though there is no science of such impressions. The fact is that such evidence comes under the head of circumstantial evidence. It is not the opinion of the expert that is of any importance but the facts that the expert has noticed. It is quite clear that a person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dissimilarity than one who has made no such study. He is able to lay these points before the Court and from his evidence the Court draws its own conclusions : *A I R 1928 Bom 158, Rel. on.* [P 952 C 2]

N. Somasundaram and *K. Krishnamurthy*—for Accused.

R. N. Aingar for *Public Prosecutor* — for the Crown.

Burn, J.—The two prisoners have been convicted and sentenced to death for the murder of a woman named Unnamalai which they are said to have committed on the morning of 7th June 1936. Along with another, they were tried by another Sessions Judge in C. C. No. 135 of 1936. They were convicted on 4th December 1936, and sentenced to death; accused 3 was acquitted. On appeal to this Court in R. T. No. 7 of 1937, the learned Judges Mockett and Horwill, JJ. set aside the convictions of these two accused and ordered that they should be retried largely for the reason that one Rangaswami Gounden who had been examined as a witness in the Court of the committing Magistrate was not cited at the Sessions Court. This Rangaswami Gounden has now been examined as P. W. 8. He was cross-examined with regard to enmity and he denied all the insinuations made against him by the accused in the cross-examination; and the learned advocates who have appeared for the accused in this case have not been able to show from the evidence of any other witness that the charges of enmity against Rangaswami Gounden were well founded or that he had anything to do with the concoction of a false case against them. The case was of a very simple nature. There was no eye-witness. P. W. 5, a woman, deposed that when she went to the house of Unnamalai to borrow money from her, she saw accused 2 come out of the kitchen followed by accused 1, that she saw blood on the clothes of accused 2, and asked him where Unnamalai was. Accused 2 is alleged to have told her that she was not there and ordered her to go away. She became afraid, and when she was about to go, accused 2 stopped her and warned her not to tell anyone saying "Don't tell anyone that we have cut Unnamalai. We will give you Rs. 25".

The rest of the evidence against both the accused is entirely circumstantial. The house of accused 1 was searched the same night, but nothing of an incriminating nature was found. On 8th June it is alleged that both these accused separately gave information to the police which led to the discovery of the important facts Accused 2 is said to have given them information about the disposal of the blood-stained clothes which he was wearing at the time of the murder. A statement, Ex. C, was recorded and accused 2 took the police to the place where his clothes, M. Ws. Nos. 7 to 9, were found buried. The evidence of the police and other witnesses is that the clothes were wet when they were taken out and appeared to be stained with blood, because there were certain brown stains upon them. When they were submitted for examination to the Chemical Examiner, Madras, he found blood only on one of the clothes M. O. 8, and when this was submitted to the Imperial Serologist, Calcutta, the report came back that the stains were too much disintegrated to enable the Imperial Serologist to express an opinion whether the blood was human blood or not. Accused 1 is said to have told the police that he had buried the jewels taken from the body of the woman at the time of the murder and that he would go and show them the place where he had buried them. This information was recorded in Ex E; and accused 1 is said to have led the police to his own backyard and dug out a mud pot (M. O. 10) in which was found a cloth pouch (M. O. 16) containing three jewels (M. Os. 13, 14 and 15), which are identified by P. W. 6 as the

jewels belonging to his late wife, Unnamalai. Of these two M. Os. (M. Os. 13 and 15) were found by the Chemical Examiner and the Imperial Serologist to be marked with human blood. In addition to these, there is the evidence regarding certain foot-prints observed by the Inspector of Police, P. W. 9, in the room in which the body of the deceased was found.

It is to be noted that from about 10 o'clock, when the murder must have been committed till about 3-30 p. m., when the village munsif came to the scene, we have no evidence regarding the persons who entered the house. After the village magistrate arrived he prevented anyone else from going in; and the Inspector, when he noticed the foot-prints, took particular precaution to see that no one should go in to disturb them. He sent a requisition to the foot-print expert from Vellore, who came a fortnight later and took impressions of these foot-prints. He compared them and gave evidence as P. W. 14 regarding the results of his comparisons of the marks on the floor of the room with the impressions taken from the feet of these accused persons. His opinion was quite definite that all the foot-prints found in the room where the woman lay murdered had been made by the feet of accused 2. He pointed out many dissimilarities between the impressions made in the room and the impressions by accused 1's foot. He pointed out several similarities between the impressions made in the room and accused 2's foot. Mr. K. Krishnamurthi for accused 2 has contended that the evidence of the expert was inadmissible and referred to S. 45, Evidence Act. He points out that though provision is made for expert evidence regarding finger impressions, there is no provision for expert evidence regarding impressions of feet. He also contends that the study of foot-marks is not worthy of the name of science and that therefore the evidence regarding foot-marks cannot be brought under the general description given in S. 45. There is some force in this contention. It is quite clear that the science, if it could be so called, of foot-prints has not yet progressed very far. There is equally no doubt whatever (as was observed in 52 Bom 223[1] at p. 226) about the fact that :

> **Evidence of similarity of the impressions of the foot, shod or unshod, is admitted by the Courts in India and in Great Britain, and as far as I know, in every other country, though there is no science of such impressions.**

The fact is that such evidence comes under the head of circumstantial evidence: *vide* Wills on Circumstantial Evidence, page 285. In a case of this kind it is not the opinion of the expert that is of any importance but the facts that the expert has noticed. It is quite clear that a person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dissimilarity than one who has made no such study. He is able to lay these points before the Court and from his evidence the Court draws its own conclusions. This is precisely what has been done in the present case. P. W. 14 has explained the grounds of his opinion and these grounds are such as can be appreciated by any ordinary person. He has pointed out several points of similarity between the foot-prints in the room where the woman's body was found and the foot-prints of which he took impressions from the feet of accused 2. The most important and the most easily verifiable of these are that on accused 2's left foot the little toe is rather further away from the fourth toe than usual, whereas the second toe is rather unusually close to the big toe. Again, there is, as P. W. 14 says, a very rare projection of the heel just below the hollow in both the feet; and finally there is a very remarkable circumstance that the left foot of accused 2 is 1/3 inch shorter than his right foot; and P. W. 14 was able to say from the tracings which he made of the foot-prints found in the room that the left foot of the man who had walked in the blood in the room was 1/3 inch shorter than the right foot. We think that the only possible conclusion that can be drawn from these facts is that the impressions made in the room where the body was found were made by accused 2.

Neither of the accused made any attempt to explain the facts appearing in evidence against them. Both alleged that the case against them was wholly false. They both alleged that P. W. 7 (the village munsif), P. W. 8, and P. W. 15 (the karnam) had given false evidence against them on account of enmity. We have already noticed that the learned advocates for the accused were not able to point

1. Emperor v. Babulal, A I R 1928 Bom 158=108 I C 508=29 Cr L J 410=52 Bom 223=30 Bom L R 321.

to anything in the evidence which could indicate that P. W. 8 had any motive to give false evidence against the accused. The same must be said with regard to the village munsif and the karnam. There is nothing to show that they had any motive to bring a false case against the accused or that they in fact took part in anything of the kind. The evidence, though circumstantial, is conclusive. There was some contradiction between the evidence of P. W. 5 in the Sessions Court and what she said in the Court of the committing Magistrate; but these contradictions were not on matters of importance.

We agree with the learned Sessions Judge, who was himself in agreement with the majoriry of the assessors, in holding that the only reasonable inference to be drawn from the facts established against the accused is that they jointly murdered the woman Unnamalai. The sentence of death is the only appropriate sentence in this case and we are not prepared to refrain from confirming that sentence merely on the ground that these accused have been twice tried. The main reason why they have had to undergo the ordeal of a second trial was that they succeeded in persuading the learned Judges who heard their appeal on the former occasion that the absence of Rangaswami Goundan, P. W. 8, from the prosecution witness-box was a matter of importance to them. We confirm the convictions and sentences of death passed upon both the accused and dismiss the appeal of accused 1.

C.R.K./S.C. *Appeal dismissed.*

A. I. R. 1937 Madras 953

BEASLEY, C. J.

Maharajah of Venkatagiri—Petitioner.

v.

Ardhamala Yagadu and *others* —

Respondents.

Civil Revn. Petns. Nos. 1009, 1029 and 1030 of 1935, Decided on 6th January 1937, from decrees of Dist. Munsif, Tirupathi, in S. C. S. Nos. 641, 636 and 627 of 1934 respectively.

Easements Act (1882), S. 15—Tenants using water for raising second crop in manyam lands for over 20 years openly without landlord's permission — Landlord not claiming compensation during same period—Easement to use water held acquired by prescription and landlord not entitled to recover compensation.

Where the tenants had used the water from landlord's tank for raising the second crop in manyam lands for over 20 years openly and without interruption and the landlord had not claimed or recovered compensation for the water so taken during the said period and no attempt was made to show that the tenants were doing so with the permission of the landlord or any facts to negative the claim as of right :

Held : **that the tenants started with a presumtion in their favour that they were using the water as of right and the presumption not having been rebutted by the landlord, the tenants had acquired a title by prescription to use the water and the landlord was not entitled to recover compensation. And the fact that in some years there may not have been enough water to irrigate as large an area as in other years is not a bar to the acquisition of such right by prescription : *Case law discussed.*** [P 953 C 2 ; P 956 C 2]

R. Ramamurthy Iyer — for Petitioner.

V. N. Shama Rao (in C. R. P. No. 1029), *K. Krishnamurthy* and *T. R. Tyagarajan* Amicus Curiae (in C. R. P. Nos. 1009 and 1030)—for Respondents.

Order. — These three Civil Revision Petitions can be taken together, the facts with the exception of a small difference in C. R. P. No. 1029 of 1935 being exactly similar. The only claim in the suits which arises to be considered here is the claim of the plaintiff, the Maharajah of Venkatagiri, to recover compensation for water taken by the respondents, his tenants, to raise a second crop on the manyam lands. The respondents resisted that claim on the ground that they had obtained a prescriptive right to the user of the water for the second crop without any liability to pay for it. The learned District Munsif accepted the respondent's evidence that at no time for considerably over 20 years did the petitioner claim or recover compensation for the water taken by the respondents for the second crop raised on these lands and he accordingly held that the respondents had acquired the easement for the user of the water and dismissed the petitioner's claim to payment for that water. The lower Court's finding on the question of fact, namely the user of the water for over 20 years, must of course be accepted, and it is only the legal position arising from that finding that has to be considered here. It is clear that this finding means that the respondents have used the water for the period in question openly and without interruption. Indeed these points were not contested in the lower Court as the evidence on the plaintiff's side shows. P. W. 1, the karnam, in cross-examination stated : "To my knowledge, second crop

has been raised in manyam from a very long time past." There is no evidence whatsoever of any interruption in such user. The petitioner takes two points here : (1) that it has not been proved that the respondents used the water under any claim to do so as of right, and (2) that the easement claimed is one incapable of being prescribed for as being of a precarious nature, it being contended that at the most the user of the water must be taken to have been subject to the condition that there would be sufficient water in the tank and after the zamindar had satisfied his own requirement.

On the first point 44 Mad 534[1] was cited. In that case the question was whether the appellants were entitled to charge for water taken by the tenants for a second crop, and it was held that the landlord is prima facie entitled to claim such additional charge, provided it is not against the established custom of the estate or express or implied contract between the parties; and the burden of proving such established usage or express or implied contract was placed upon the tenants. 56 Cal 927,[2] which is certainly more in point than the case just referred to, was also cited. There it was held that for the creation of a right of easement by prescription, there must not only be a peaceable and open enjoyment without interruption for 20 years, but that enjoyment must be an enjoyment as of right, that long user is not sufficient for a finding of an enjoyment as of right, that whether an enjoyment is as of right or not is a pure question of fact and that enjoyment as of right cannot be inferred as a matter of course from a finding of user only.

On the second point, reference is made to (1901) 2 Ch 502.[3] In that case it was held that a precarious easement is unknown to the law. This decision turned upon the circumstances in that case, it being held that the watercourse which was constructed, diverting water from a natural stream, was for a temporary purpose ; and a number of authorities bearing upon this point are referred to in the very learned judgment of Farwell, J. The argument of Mr. Upjohn, K. C., which was accepted by Farwell, J. was that the watercourse was constructed simply for the purpose of the mill and as there could be no expectation that it would be continued if the mill were abandoned, the purpose was merely temporary and the plaintiff acquired no easement and that the right claimed to use water, the supply of which could be entirely discontinued at the defendant's will, was a precarious right unknown to the law and repugnant to the nature of the easement. In 56 Mad 696[4] Bardswell, J., who delivered the judgment of the Bench, on page 704 observed :

> And further as is shown in para. 7 of the first appellate judgment, there has not been a continuous and consistent use of the water by the plaintiffs or their predecessors by the aid of which they could raise their crops and which could be deemed beneficial. In some years there has been insufficient water for the raising of crops and in some years there has been an excess of it. When such is the case, I do not see how there can be either an implied engagement or the acquisition of an easement. Nor is it a case of natural flow. It is a matter of water overflowing from higher lands to lands lying lower down. The supply of water is precarious and when in the circumstances the plaintiffs cannot be held to have obtained any prescriptive right, they cannot insist on its coming down in any sufficient quantity to enable them to raise crops or even on its coming down at all.

I was myself a party to that judgment and entirely agree with those observations which were founded on the facts proved in that case and are not present here. The learned counsel for the petitioner then addressed himself to one distinguishing feature which he contended appeared from the facts in C. R. P. No. 1029, namely that the right claimed was only shown to relate to a supply of water to an area marked out each year by the tenants and that as this area was not shown to be the same each year, no right of easement could be claimed in respect of it. On the other side, in C. R. P. No. 1009 the legal position has been most ably argued by Mr. Krishnamurthi as amicus curiae and in C.R.P.No. 1030 by Mr. Thyagarajan also as amicus curiae, and I am very much indebted to both of them and also to Mr. Shama Rao who appeared for the respondents in C. R. P. No. 1029 for their great assistance.

1. Midnapore Zamindari Co., Ltd. v. Muthapudayan, A I R 1921 Mad 195=62 I C 337=44 Mad 534=40 M L J 213.
2. Siti Kanta Pal v. Radha Gobind Sen, A I R 1929 Cal 542=119 I C 293=56 Cal 927 = 33 C W N 517.
3. Burrows v. Lang, (1901) 2 Ch 502 = 70 L J Ch 607 = 84 L T 623 = 49 W R 564 = 17 T L R 514.
4. Ayyanna v. Secretary of State, A I R 1933 Mad 646 = 145 I C 594 = 56 Mad 696 = 65 M L J 179.

Mr. Krishnamurthi referred to a number of cases and the first of them is a decision of Ramesam, J., namely 59 M L J 111,[5] where exactly the same right of easement was claimed by tenants of the same estate as that here. There the suit was by the zamindar claiming the same reliefs as in this suit, the right of the tenants to use the water of the tank for the first crop being admitted, but as regards the second crop disputed, and it was held that as the evidence established the defendant's user of the water of the suit tank for raising a second crop for 20 years and more, the defendants were entitled to an easement by prescriptive right. The question of whether the water was being used under a claim as of right was not argued before Ramesam, J., nor was it contended that at the most it could only be a precarious easement; and this decision cannot therefore be taken as covering the contentions raised by the petitioner here.

The next case referred to was 54 Mad 427[6], a decision of the Privy Council. There water flowed naturally through the inamdars' channel so as to water their first crop. For a long period, the inamdars during the drier season constructed a temporary dam in the zamindar's channel so as to raise the level of the water therein and cause it to flow down their channel. By this means they raised a second crop. The right to use the natural flow of the water for the first crops was admitted by the zamindar, but the right to do it for the second crops was disputed. The tenants claimed the right to do so either by an agreement made when their channel was constructed or by long user. It was held that the long continued user must be ascribed to a lawful origin or had to be implied from the circumstances and relation then existing and that the right was sufficiently definite to be acquired by prescription; and this latter finding is sufficient to dispose of the petitioner's second contention. It is true that in that case the tenants had constructed a dam in order to cause a flow of water down a small channel irrigating the lands in question to which otherwise in ordinary years the water would not flow; and in 119 E R 748[7], a decision referred to in the judgment of their Lordships' Board, the position was somewhat similar. There the plaintiff had been in the habit of going on the defendant's land for the purpose of damming a brook at such times as the lowness of the water in the brook rendered it necessary so as to force the water into an artificial channel which ran across to the defendant's land from the plaintiff's land. The water was used for the plaintiff's cattle, but it was not always available as at certain seasons of the year it was used by the occupiers of the defendant's land for irrigation. The indefiniteness of the right to dam the brook when necessary and to take the water when available was not considered to be any bar to its acquisition by prescription. This case also is decisive on the first question but in that case there were also overt acts performed by the owner of the dominant tenement.

A I R 1930 Cal 289[8] was also relied upon by Mr. Krishnamurthi in support of his argument that evidence of long user was sufficient to support a claim to such an easement. That was a decision of Rankin, C. J. in a criminal revision case arising out of an alleged offence under S. 430, I. P. C., i. e. of committing mischief by doing an act which caused or which was known to be likely to cause a diminution of the supply of water for agricultural purposes. The question there considered was whether the complainant had a right to take the water from the tank to irrigate the lands, and Rankin, C. J. observes :

> It appears to me that if the evidence is that a person has the occupation of lands and has been taking water to irrigate his lands through a channel from this tank, that is pretty good evidence that he has some right so to do. This is not one of these things that can be concealed or that can be done behind the back of people so that nobody in the neighbourhood can possibly get to know of it. It is done openly and on the face of it it appears to me that the fact of enjoyment of such a right as that is some evidence of the right itself.

Another case is 45 Mad 633,[9] a decision of Kumaraswami Sastri and Devadoss, JJ., which I consider to have the most important bearing upon the first point raised.

5. Pitchiah v. Govinda Krishna Yachendra Varu, A I R 1930 Mad 941=128 I C 523=59 M L J 111.
6. P. Venkanna v. Rajah of Bobbili, A I R 1931 P C 129=131 I C 312=58 I A 195=54 Mad 427 (P C).
7. Beeston v. Weate, (1855) 119 E R 748=5 El & Bl 986.
8. Ismail Biswas v. Emperor, A I R 1930 Cal 289=1930 Cr C 377=124 I C 829=31 Cr L J 751.
9. Kunjammal v. Rathnam Pillai, A I R 1922 Mad 5=66 I C 11=45 Mad 633=42 M L J 417.

There the plaintiff proved that his scavenger was cleaning his privy for the last 30 years and more by passing through the defendants' house and it was held that the presumption was that the user was of right and that the plaintiff had acquired a right of way by long user apart from S. 15, Easements Act, and that the presumption of right from long user is not in India the presumption *de jures et de jure* but is one which can be rebutted by proof of facts which are inconsistent with or militate against the inference. On page 637 it is stated :

> Where user is proved, the presumption is that it is of right till the contrary is proved. Gale on his valuable treatise on easements observes : 'The effect of the user would be destroyed if it were shown that it took place by the express permission of the owner of the servient tenement, for in such a case the user would not have been had with the intention of acquiring or exercising a right. The presumption, however, is that a party enjoying an easement acted under a claim of right until the contrary is shown.

It was contended in that case, however, that the presumption in favour of the exercise being as of right rather than license does not apply to India and a number of cases upon that point were referred to, which are considered in the judgment and after a consideration of them it is stated on page 639 :

> We do not think that the cases cited by the appellant's vakil establish that no presumption should be raised by user and that in this country enjoyment of a right of way should be presumed to be by licence till the contrary is proved. All that they decide is that there are conditions and circumstances to be taken note of in this country before the Court can come to the conclusion that the exercise of a right of way can be held to have been as of right. What the circumstances are which militate against the user being exercised as of right must like any other fact be pleaded, and it is for the Court to consider whether having regard to the existence of all or some of the conditions and considerations referred to by Banerjee, J. a reasonable presumption can be drawn as to the exercise being of right. The presumption of right from long user is not in this country a presumption *de jures et de jure*. It only starts a party with a presumption in his favour which can be rebutted by proof of facts which are inconsistent with or which militate against the inference which in the absence of evidence by the defendant would entitle plaintiff to a decree.

The decision in that case, which of course is binding on me and with which I entirely agree, is of the greatest assistance to me. The respondents having clearly proved long user for a period of 20 years and more started with a presumption in their favour that they were using the water as of right and no attempt was made to show that they were doing so with the permission of the zamindar or any facts to negative the claim as of right. Other cases cited upon this point by Mr. Krishnamurthi in support of his argument were 30 Cal 281,[10] in which reference is made to 4 Cal 633,[11] 6 Cal 394[12] and 50 Cal 356,[13] where it was held that in India a tenant can establish his right to irrigate his field from his landlord's tank by proof of open and continuous user from time immemorial. Mr. Tyagarajan in support of his argument referred me to A I R 1923 Cal 200[14] and A I R 1926 Lah 522.[15] In the latter case it was held by Shadi Lal, C. J. and Le Rossignol, J. that :

> There is ample authority for the proposition that an open user continued without interruption for a long time and not shown to be attributable to any permission on the owner's part is prima facie evidence of enjoyment as of right.

For the respondents in C. R. P. 1029, Mr. Shama Rao contended that the easement there claimed was sufficiently definite as regards the area and extent of land in respect of which the easement was claimed. As I understand the facts, they are that each year an area was marked out by the tenants of a sufficient size to be irrigated by the water flowing from the tank. These tenants, therefore, by long user have established a right to get an amount of water sufficient to irrigate a portion of the lands. In some years there may not have been enough water to irrigate as large an area as in other years and in some years there may have been an amount sufficient to irrigate a larger area than in other years—though upon this point there has been no evidence, I take that to be the admitted position—and having regard to (1855) 119 E R 748,[7] the right claimed is sufficiently definite to be capable of being prescribed for. The result is that these civil revision petitions must be dismissed with the costs of the respondents in C. R. P. No. 1029.

C.R.K./D.S. *Petitions dismissed.*

10. Madhub Doss Bairagi v. Jogesh Chunder Sarkar, (1903) 30 Cal 281.
11. Ramessur Persad Narain Singh v. Koonj Behari Pattuk, (1879) 4 Cal 633=6 I A 33=3 Sar 856 (P C).
12. Rajrup Koer v. Abdul Hoosein, (1881) 6 Cal 394=7 I A 240=7 C L R 529=4 Sar 199 (P C).
13. Tinkori Pathak v. Ram Gopal, A I R 1923 Cal 8=70 I C 663=50 Cal 356=36 C L J 161.
14. Ali Mohammed v. Sheik Khatu, A I R 1923 Cal 200=70 I C 263=36 C L J 280.
15. Piare Lal v. Ishaq Lal, A I R 1926 Lah 522=95 I C 269.

A. I. R. 1937 Madras 957

VENKATARAMANA RAO, J.

Annaswami Naicken-and *others* —
Appellants.

v.

C. Manicka Mudaliar and *others* —
Respondents.

Second Appeal No. 511 of 1933, Decided on 16th April 1937, against decree of Sub-Judge, Vellore, in A. S. No. 36 of 1923.

Easement—Ryotwari lands— Water supply — Ryotwari land-holders diverting water of natural stream and for 30 years augmenting supply of tank, source of their irrigation — Cultivation of registered wet lands under ayacut of tank impossible without such additional supply—Government held impliedly recognized it as customary method of supply for irrigation of wet lands and such right could not be interfered with — Absence of channel or stream as source of irrigation in Settlement Registers held did not curtail right.

A ryot in respect of his ryotwari land is entitled to receive from the Government a supply of water necessary and sufficient for irrigation of his registered wet fields. The Government have got the right to regulate the method and manner of supply. They can therefore indicate to him the source or method of supply and he is bound to accept those indicated. But as incident to the tenure, there is a right in the ryot to receive the said water, call it contractual or proprietary. There is a corresponding duty on the part of the Government, though in one sense negative, to see that the supply shall be at his disposal by the usual and customary method. [P 959 C 2]

Where the water of a natural stream falling into a thangal and exclusively used by the plaintiffs holding the ryotwari lands was diverted into a tank and for over 30 years it had been the customary method to take the water of the stream from that channel to augment the supply of the tank without which it would have been impossible to cultivate the land registered as wet under the ayacut of the tank ;

Held : that the Government must be taken to have impliedly recognized that as the customary method of supply for the time being for the irrigation of the wet fields. The fact that the stream or channel was not pointed out as the source of irrigation in the Settlement Register could not curtail the right of the plaintiffs to receive water which was absolutely necessary for the irrigation of their wet fields according to the customary method and it was not even open to the Government to interfere with that method of supply.

[P 959 C 2 ; P 960 C 1]

M. S. Venkatarama Ayyar —
for Appellants.

T. M. Krishnaswamy Iyer —
for Respondents.

Judgment. — This second appeal arises out of a representative suit brought by the plaintiffs for themselves and on behalf of the villagers of Devanandal against the defendants as representing themselves and all other villagers of Adayur. The subject matter in dispute relates to the right to the water from the natural stream which flows through the village of Devanandal which is marked A to B in the plaintiff's plan and A to H in the Commissioner's plan. The plaintiffs claim the right to divert the water by means of a dam at the point D in the plaintiffs' plan through a channel D E to the tank F known as the Devanandal Eri for the purpose of irrigating the lands east of the said tank which is registered as wet under the ayacut of the said tank. The extent of acreage which was thus registered on the date of suit was 94 acres 73 cents. The necessity for the suit was that the defendants obstructed the plaintiffs from repairing the dam and also dug a channel nearby which prevented the water being taken to the Eri thus resulting in loss and damage to their lands. It is the plaintiffs' case that the water in this channel originally emptied itself in a thangal at the point C in the plan and thereafter the water was utilized for the irrigation of the lands adjacent thereto, but in or about 1893 and thereafter the water was diverted by means of a dam at the point D and carried to the Eri and during the course of 30 years from the said date there has been an increase of cultivation from 11 acres 65 cents to 94 acres, a fact which was recognized by the Government and in respect whereof the wet assessment has been levied. It is only after the irrigation of the plaintiffs' lands both previous to the diversion and thereafter that the surplus water flowed and fell into a cross channel J K wherefrom water was taken to the Adayur Eri and the defendants have no right to the said water except to the said surplus. The plaintiffs alleged that they had a right to the said water and the defendants unlawfully interfered with the said rights. In addition to their alleging in the plaint that they have been according to mamul diverting the water and irrigating their wet lands forming its ayacut, they also set up a prescriptive and easement right thereto.

The District Munsif, who tried the suit, held that the water originally before 1891 never went beyond the Thangal, that from 1893 there has been a diversion and the defendants had no right to obstruct the plaintiffs' enjoyment of the said water. He therefore gave a decree in favour of the

plaintiffs restraining the defendants from interfering with the plaintiffs' enjoyment of the said right. The learned Subordinate Judge, who heard the appeal from the said decision, thought that there was no definite finding as regards the date of the erection of the dam and as to whether the surplus water flowed to Adayur village and whether the diversion by the plaintiffs interfered with the accustomed flow and remanded the case for a finding on those points. The learned District Munsif, who heard the case on remand, gave a finding to the effect that the dam was put up somewhere between 1893 and 1896, that the surplus water flowed in a different channel to the Adayur village and that by reason of the diversion by the plaintiffs no damage had been caused to the defendants. The learned Subordinate Judge, who happened to be not the same Judge who originally remanded the case, upset all the findings hitherto arrived at by both the District Munsifs and came to an independent conclusion in regard to the rights of the parties. He was of the opinion that the water in the stream never emptied itself at the thangal prior to 1893, that there was a direct flow as far as Adayur village, that the dam was not constructed in 1893 or 1894 and that the facts necessary for the acquisition of the right of easement or prescriptive enjoyment have not been established. He therefore dismissed the plaintiffs' suit. In second appeal, Reilly, J. was not prepard to interfere with the findings of fact arrived at by the learned Subordinate Judge but he made the following remarks :

> If, as is represented for the plaintiffs, their right to irrigate as wet land an increased area which it would be impossible to irrigate without diverting water to their tank by the dam in question has recently been recognized by the Government, the proper course for them to follow in order to protect their interests appears to be to apply to the Government with a prayer that the Government will maintain or allow them to maintain the dam.

There was a Letters Patent appeal against the decision of Reilly, J. which was heard by a Bench consisting of Waller and Pandalai, JJ. Pandalai, J who delivered the judgment, was of the opinion that to leave the litigants to the mercy of the Government authorities was an unsatisfactory position for the Courts after 12 years of litigation and proceeded to deal with the matter before them on the state of the record then available before them. He pointed out that the learned Subordinate Judge who heard the case after remand, entirely missed the real points in issue and went behind even the admissions of parties. He further pointed out that there was no dispute about the existence of the dam and the only question was whether the dam was built in 1893 or 1909. He was further of the opinion that the fact that the plaintiffs failed to prove an easement of the right does not entail the dismissal of the suit if in fact there has been a dam and a diversion of water with the knowledge and approval of the Government in view of the fact that as a result of the water of the stream being used for irrigation by diversion to the tank some 94 acres of wet land paying wet ryotwari assessment to Government has come into cultivation between 1890 and 1920 and the Munsif finds that this does no harm to the defendants. The learned Judge was of the opinion that the necessary points which would lead to a satisfactory decision of the case have not been considered and he therefore thought that the case must be sent back for a finding on the following points :

> Whether the registered or recognized source of irrigation for the plaintiffs' ryotwari wet lands is the tank or the stream or both, and whether with the knowledge and approval of Government the water of the stream in question has been diverted by a dam and channel to the tank for the purpose of irrigating these lands : If and to the extent the above question is answered in the affirmative, whether the defendants have established any right to interfere with the plaintiffs' enjoyment.

In so doing he made the following observations :

> The first point is that the plaintiffs' failure to prove that an easement by prescription had been acquired by them in respect of the dam and diversion of water thereby is not sufficient to dismiss the suit, if the plaintiffs as ryotwari ryots of the village, being entitled to water from Government for irrigation of their wet fields have been with the knowledge and consent of Government using the water of the stream for that purpose and have done so by diverting the water into the Devanand taluq by means of a dam and channel. So long as that is, as apparently it is, the mode of irrigation recognized by Government for irrigation of the plaintiffs' ryotwari wet lands. . . .
>
> It would therefore seem that in the opinion of the Bench that even though the stream is not shown as the registered source of irrigation, still if with the knowledge and consent of the Government water had been diverted and utilized for the purpose of irrigation, it would be a mode recognized by Government and the

interference by the defendants would be actionable, and therefore, so far as the parties to the suit are concerned, they would be bound by this adjudication. The learned Subordinate Judge in pursuance of the directions contained in the High Court called for findings from the District Munsif. The learned District Munsif went into the matter very fully and came to the following definite conclusions: (1) The recognized source of irrigation is the Devanandal tank and not the stream; (2) the water has been diverted from 1893 to the Devanandal tank with the knowledge and approval of the Government; (3) the wet ayacut increased from 11 acres 65 cents to 94 acres 73 cents and it would have been impossible to irrigate such a large extent without the aid of the water which has been diverted; (4) the Government kist for the village which was Rs. 381 in 1890-1891 had increased to Rs. 889 6-0 in Fasli 1328 and by the revision of re-settlement this was further increased to Rs. 1,010-2-0: (5) the diversion channel is shown in the survey plan Ex. H: (6) no diminution of supply to the defendants' tank has been proved in consequence of the diversion.

He therefore concluded that in the absence of any explanation as to how the tank got the larger additional supply and the admitted circumstances that the water from this odai which was used to fill up the private pudu thangal had been diverted at least since 1893 to the Eri and the fact that the Government has classed a much larger extent of lands in Devanandal as wet ayacut of the village to be irrigated by the tank without indicating any fresh source of irrigation or extending the area of the tank or in any way improving it substantially, is in support of the plaintiff's case. The learned Subordinate Judge on appeal concurred in every one of the conclusions arrived at by the learned District Munsif Hence the appeal by the defendants. The main contention urged on behalf of the defendants before me by Mr. Venkatarama Ayyar may be outlined thus. The lands being admittedly ryotwari and the stream being on the lands of the Government and therefore the property of the Government, and it not having been recognized as the registered source of irrigation, the plaintiffs have acquired no right thereto to sustain a suit for a declaration or for an injunction; the mere fact that the water has been diverted for a long time would not furnish any cause of action as against the Government, it being conceded that there has been no prescriptive user for over 60 years and therefore in law no declaration or injunction could be given to a person who has not perfected his right to an easement either by prescription or otherwise. I may at once say that there is authority for the proposition that before a right ripens into an easement, there is no right of action against anybody who interferes with it though there is also authority for the contrary view.

It is not necessary for me to go into that question on the facts of this particular case. The lands in respect whereof relief is claimed in this suit are admittedly ryotwari and a ryot in respect of such land is entitled to receive from the Government a supply of water necessary and sufficient for the irrigation of his registered wet fields The Government have got the right to regulate the method and manner of supply. They can therefore indicate to him the source or method of supply and he is bound to accept those indicated. But there is no doubt that, as incident to the tenure, there is a right in the ryot to receive the said water, call it contractual or proprietary. There is a corresponding duty on the part of the Government, though in one sense negative, to see that the supply shall be at his disposal by the usual and customary method. In this case, no doubt, the tank is pointed out as the registered source of irrigation and I may also state that the source of supply to the tank is indicated as rain. But it cannot be forgotten that the water of the natural stream, which was until 1893 falling into the thangal and exclusively used by the plaintiffs, was diverted in 1893 into the tank, and for over thirty years it has been the customary method to take the water of the stream from that channel to augment the supply of the tank without which it would be impossible to cultivate the 94 acres registered as wet under the ayacut of the tank. Therefore the Government must be taken to have impliedly recognized this as the customary method of supply for the time being for the irrigation of the wet fields. The fact that the stream or the channel is not pointed out as the source of irrigation in the Settlement Register cannot curtail the right of the plaintiffs to receive water which was

absolutely necessary for the irrigation of their wet fields according to the customary method, and in my opinion it would not even be open to the Government to interfere with this method of supply, and much more so to the defendants, and such interference would furnish a cause of action.

As Pandalai, J. held, if with the consent and approval of the Government water had been diverted from 1893 and with the state of affairs existing the Government chose to permit wet cultivation of such a large extent of acreage as 94 acres and 73 cents knowing full well that without the aid of such water it would not be possible for the plaintiffs to do so, the plaintiffs must be deemed to have a right conferred on them by the Government, a right to the said water, and any interference of such right is actionable. In the circumstances therefore, the plaintiffs are entitled to a declaration that they have got a right to divert the water of the stream by means of the customary dam at the point D and take as much water as is necessary for filling up the Devanandal tank sufficient for the irrigation of 94 acres 73 cents of wet lands registered under that tank and the defendants are restrained by an injunction from doing anything so as to interfere with the said right. In the result, the second appeal fails and is dismissed with costs. Leave to appeal is refused.

C.R.K./V.B.B. *Appeal dismissed.*

A. I. R. 1937 Madras 960

BURN AND LAKSHMANA RAO, JJ.

Sri Jagannadha Rajamoni Raj Deo — Appellant.

v.

V. Ramchandra Rao — Respondent.

Appeal No. 424 of 1936, Decided on 26th July 1937, against order of Sub-Judge, Chicacole, D/- 9th September 1936.

Madras Court of Wards Act (1 of 1902), S. 45—Decree for payment of money—Decree is capable of execution by sale of immoveable property—Nature of decree does not vary with mode of execution adopted.

The expression "decrees capable or execution by sale of immoveable property" in S. 45, Madras Court of Wards Act, is not restricted to decrees in which applications have already been made for attachment and sale of immoveable property. The nature or character of a decree does not depend upon or vary with the mode of execution adopted by the decree-holder. A decree for the payment of money is therefore decree capable of execution against the ward's immoveable property within the meaning of S. 45, even though the decree-holder may have filed an application for attaching the treasury deposit of the judgment-debtor.

[P 961 C 1, 2]

Advocate General — for Appellant.

B. Jagannadha Das — for Respondent.

Burn, J.—This appeal is preferred by the Court of the Wards from the order of the learned Subordinate Judge of Chicacole, passed in E. P. No. 29 of 1936 in O. S. No. 57 of 1931. The respondent holds a decree against the son and the adopted son of the late zamindar of Mandasa directing them to pay the plaintiff from out of the properties of the Mandasa estate in their hands Rs. 7,966-10-9 with interest thereon at six per cent. per annum from 7th November 1931 till payment. The decree-holder prays for attachment of the amount of Rs. 15,000 belonging to the Mandasa estate in the possession of the Sub-Treasury of Ichchapur under O. 21, R. 52. The Sub-Collector of Chicacole who has taken over the management of the estate takes exception on the ground that under S. 45, Madras Court of Wards Act, the Local Government has declared that :

The execution of decrees passed by the Civil Court which are capable of execution by sale of any immoveable property of the said ward..... shall be transferred to the Collector of the Vizagapatam district.

As the learned Subordinate Judge observes, the question for consideration is what is the meaning of the expression "decrees capable of execution by the sale of any immoveable property of the ward" ? The learned Advocate-General contends that this description is wide enough to cover an ordinary decree for the payment of money such as this one, since a decree for the payment of money can at any time be executed by attachment and sale of the immoveable properties of the judgment-debtor. The contention raised for the decree-holder, which is supported by Mr. Jagannadha Das in this Court, is that the expression 'capable of execution by the sale of immoveable property' must be understood with reference to the execution proceedings that have actually been taken. The suggestion is that since the decree-holder has not in fact applied for attachment and sale of immoveable properties, therefore the decree is not one which is capable of execution by the sale of immoveable property. The learned Subordinate

Judge has accepted this argument but in my opinion he has been misled in so doing. The learned Subordinate Judge says that "the decree-holder's capacity to sell the property is co-existent with his desire to sell the same". This in my opinion displays some confusion of thought. It is not correct to say that the decree-holder's capacity is co-existent with or in any way dependent upon his desires. He may be perfectly capable of selling the property but may not wish to do so. In fact, that was the state of mind in which he was when this execution petition was lodged. No one could allege that the decree-holder had not the capacity to bring the judgment-debtor's immoveable property to sale. He was fully clothed with that capacity by the provisions of the Civil Procedure Code but he had no desire to sell the immoveable property. What he preferred to do was to attach the cash in the sub-treasury. The learned Subordinate Judge appears to have confused the question of the description of the decree with the method which the decree-holder may adopt to execute his decree. The expression 'decree capable of execution by sale of immoveable property' appears to me to be intelligible and clear and I am not prepared to restrict it in the way suggested by Mr. Jagannadha Das. In my opinion it would be wrong to hold that this description only applies to decrees in which applications have already been made for attachment and sale of immoveable property. I think that the character of the decree is not in any way altered from time to time by the procedure which the decree-holder may adopt in execution of it. It is common place to say that an ordinary money decree may be executed by attachment and sale of moveable or immoveable property or by an arrest and detention or by the appointment of a receiver. All these remedies may be adopted in succession; but it would be wrong to say that the character of the decree was varied from time to time in accordance with the method adopted by the decree-holder for enforcing it.

Mr. Jagannadha Das is prepared to argue that if this wide meaning is allowed to the expression 'capable of execution by the sale of immoveable property', almost any kind of decree can be brought within it. I am not prepared to enter upon a discussion of whether it would be feasible, e. g., to bring a decree for restitution of conjugal rights within this or not. I am quite clear that this decree which is for the payment of money is one which is capable of execution by sale of immoveable property of the ward and therefore disagreeing with the learned Subordinate Judge I hold that it is a decree which in pursuance of the notification of the Government G. O. Mis. No. 1236 Rev. dated 7th June 1936 must be transferred for execution to the Collector of Vizagapatam district. For these reasons, I think the appeal should be allowed and the order of the learned Subordinate Judge set aside. The respondent decree-holder will pay the costs of the appellant.

Lakshmana Rao, J.—I agree and would only add that the nature or character of a decree does not depend upon or vary with the mode of execution adopted by the decree-holder. The decree in this case is undoubtedly capable of execution by sale of immoveable property of the ward and S. 68, Civil P. C., has no bearing. The language too is different and it is not permissible to construe S. 45, Court of Wards Act, with reference to the terms of S. 68, Civil P. C., which provides for transfer of the execution of decrees against immoveable property in any local area to the Collector.

C.R.K./K.B. *Appeal allowed.*

A. I. R. 1937 Madras 961

LEACH, C. J. AND VARADACHARIAR, J.

C. Muniswami Naidu — Appellant.

v.

S. Rangachari and *another* — Respondents.

Original Side Appeal No. 73 of 1936, Decided on 9th August 1937, from order of Wadsworth, J., D/- 5th October 1936.

Presidency Towns Insolvency Act (1909), S. 9 – Suspension of payment of debts generally, and not of particular debt, constitutes act of insolvency—Agreement between debtor and creditor to treat non-payment of instalment under mortgage as act of insolvency does not estop debtor from contending to contrary.

The law of estoppel does not operate and cannot operate to prevent the provisions of the Presidency Towns Insolvency Act having effect. It is an act of insolvency if a debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts, but it must be noticed that he is suspending the payment of his debts generally and not that he is suspending the payment of a particular debt. The fact that the insolvent and his creditor had agreed that default in payment of an instalment under a mortgage should be treated as an act of

insolvency does not make it incumbent upon the Court to regard it as an act of insolvency. What the Court has to consider is whether an act of insolvency, as defined by the Act, has been committed and in deciding the question it can only look at the provisions of the Act. [P 962 C 2]

Satagopa Srinivasaraghavan — for Appellant.

E. R. Krishnan — for Respondents.

Leach, C. J.—In 1935 the appellant was indebted to one S. Rangachari in the sum of Rs. 317-12-0 (in respect of which a decree had been obtained against him) and a sum of over Rs. 2,000 due under a promissory note. In execution of the decree the creditor attached a house belonging to the appellant. The attachment continued for more than 21 days and this was made the basis of a petition filed in February 1936 in this Court asking that the appellant be adjudicated an insolvent. This petition was withdrawn in April of that year as the result of an arrangement made between the parties. It was agreed that the appellant should execute a mortgage in favour of Rangachari to secure his indebtedness to him and that the appellant should repay this indebtedness in the following instalments: Rs. 400 to be paid on or before 15th July 1936; Rs. 500 to be paid on or before 15th December 1936; and the balance in two equal instalments within a period of one year from 15th December 1936. It was also agreed that in case of default in the payment of any instalment, the creditor should be at liberty to take "further" proceedings in insolvency. It was also provided in the document which was drawn up that :

The mortgagor shall not raise any objection thereto and this act of default itself will then be treated as an act of insolvency on the part of the mortgagor as amounting to a suspension of payment within the meaning of the Act.

It was on these terms that the petition for adjudication was dismissed. The appellant failed to pay the first instalment and on 15th August 1936 his creditor filed a fresh petition for adjudication. In this petition three acts of insolvency were alleged : (1) that the insolvent had suspended payment "as per the terms of the said deed of 17th April 1936 and had thus committed an act of insolvency under S. 9"; (2) that he had departed from his dwelling house with intent to delay his creditors; and (3) that he had secluded himself so as to deprive the creditors of the means of communicating with him. The learned Judge before whom the petition came ordered the adjudication of the appellant on the first ground and did not deal with the two other grounds. The learned Judge was of the opinion that inasmuch as the appellant had agreed to treat the failure to pay an instalment as a suspension of payment within the meaning of S. 9, Presidency Towns Insolvency Act, he was estopped from raising a contention to the contrary. With great respect, we are unable to concur in this decision.

The law of estoppel does not operate and cannot operate to prevent the provisions of the Presidency Towns Insolvency Act having effect. It is an act of insolvency if a debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts, but it must be noticed that he is suspending the payment of his debts generally and not that he is suspending the payment of a particular debt. The fact that the insolvent and his creditor had agreed that default in payment of an instalment under the mortgage should be treated as an act of insolvency, does not make it incumbent upon the Court to regard it as an act of insolvency. What the Court has to consider is whether an act of insolvency, as defined by the Act, has been committed and in deciding the question it can only look at the provisions of the Act. In our opinion the agreement between the parties cannot be deemed to constitute the non-payment an act of insolvency. The appeal will therefore be allowed and the case remanded to the insolvency Court for investigation of the two other grounds alleged in the petition. We make no order as to costs.

C.R.K./D.S. *Case remanded.*

A. I. R. 1937 Madras 962

VENKATASUBBA RAO AND NEWSAM, JJ.

Rm. Al. Rm. Alagappa Chettiar and *another* — Appellants.

v.

Kannappa Chettiar and *others* — Respondents.

Appeal No. 228 of 1935, Decided on 3rd August 1937, against decree of Sub-Judge, Devakottai, in O. S. No. 75 of 1931.

(a) Provincial Insolvency Act (1920), S. 28—Hindu father — Insolvency of—Power to sell sons' share is asset of insolvent father.

The word 'asset' is sufficiently wide to embrace the father's right to bind his son's share for proper reasons. The power therefore of a Hindu father, manager of a trading family, to sell his sons' share is an asset of the insolvent father. [P 963 C 2]

(b) Insolvency — Administration of insolvent's estates—Realization and distribution of assets should be carried out by official agency to avoid fraud — Purchaser from Official Assignee should not be allowed to pay creditors direct out of purchase money.

A composition between an insolvent and his creditors, and a sale of an insolvent's assets by the Official Assignee, are two distinct things and should be kept distinct. When the two are combined in one hybrid transaction, the issue of the unnatural union must necessarily be of doubtful character. [P 964 C 1]

Any deviation from the letter or the spirit of insolvency law is calculated to open the door to fraud and profiteering. Both the realization and the distribution of the assets of an insolvent should be entirely carried out by official agency. That is the only safeguard provided both for the insolvent and for his creditors. A purchaser therefore from the Official Assignee of an insolvent's assets should never be allowed to pay creditors direct out of his purchase money. [P 963 C 2; P 964 C 1]

B. Sitarama Rao and *V. Ramaswami Iyer* — for Appellants.

S. Parthasarathy and *V. K. Thiruvenkatachariar* — for Respondents.

Newsam, J.—The plaintiffs' suit for a declaration of their title to a house has been decreed. The two defendants appeal. The relevant facts may be briefly stated as follows: In I. P. No. 2 of 1927 on the file of the Rangoon High Court, a firm of Nattukottai Chettiar, of which the father of each defendant was a partner, was adjudicated insolvent. On 17th January 1928, what is described as a composition scheme was approved by the Court in an order which has been exhibited as D. The terms were as follows: The Official Assignee was to be paid his expenses and his commission; the creditors agreed to receive and were guaranteed payment of five annas in the rupee by two Chettiar firms, who were described as sureties but who were in reality purchasers of the entire assets of the insolvent firm. In pursuance of this scheme, the purchasers of the assets paid Rs. 52,173-9-9 privately to certain creditors and Rs. 55,450 to the Official Assignee for distribution to the remaining creditors. These payments amounted to paying five annas in the rupee of the insolvent firm's liabilities. Thereupon by a deed of indenture dated 22nd February 1928 (Ex. E), the Official Assignee transferred all the assets of the insolvents described in their schedule with all the right, title and interest of the said insolvents therein to the sureties (or rather purchasers). On 28th September 1929 the purchasers sold the suit house to the plaintiff (Meyappa Chetty) for Rs. 75,000.

The defendants (appellants) are the undivided sons of the insolvent partners. The chief argument developed on their behalf is that the order of the High Court, Rangoon, only empowered the Official Assignee to convey "assets of the insolvents now vested in him". The power of a Hindu father, manager of a trading family, to sell his sons' share is not, it is argued, an asset of the insolvent father. It is an obligation of the sons to their father's creditors, it is said, on the contrary, we are of opinion that it is a pious obligation of the sons to their father, which can only be evaded by attacking the father's debts as immoral. No such attempt has been made in this case. We further think that the word "asset" is sufficiently wide to embrace the father's right to bind his son's share for proper reasons. It undoubtedly enhances a Hindu father's credit that he is entitled to pledge his sons' shares for the good of the family business. This right is therefore an asset. The same result can be reached in another way: Admittedly the insolvent fathers' power to sell their sons' share does vest in the Official Assignee. Admittedly also, this power was exercised by the Official Assignee under Ex. E, for he conveyed all the right, title and interest of the insolvents. There is absolutely nothing in the order of the High Court (Ex. D) which negatived or forbade the exercise of this power. Consequently the sons' share was validly conveyed.

We overrule this contention. But before leaving this part of the case it may not be out of place to make a few general remarks on the administration of bankrupt estates. Any deviation from the letter or the spirit of insolvency law is calculated to open the door to fraud and profiteering. It is far from our purpose to criticize what has happened in this case, but to express our views as to what ought to be done in all cases. We think that both the realization and the distribution of the assets of an insolvent should be entirely carried out by official agency. That is the only safeguard provided both for the insolvent and for his creditors. Incidentally it is the

only way in which the Official Assignee can properly earn his commission. We are strongly of the opinion that a purchaser from the Official Assignee of an insolvent's assets should never be allowed to pay creditors direct out of his purchase money.

Moreover, a composition between an insolvent and his creditors and a sale of an insolvent's assets by the Official Assignee are two distinct things and should be kept distinct. When the two are combined in one hybrid transaction, the issue of the unnatural union must necessarily be of doubtful character. We express ourselves thus strongly because, while aware of the practice which exists both here and elsewhere, we think that a stricter adherence to the underlying principles of the Insolvency Act would clarify its complexities and inspire greater confidence by reducing the opportunities for fraud and speculation in bankrupt estates.

The other point taken in appeal is that there was a secret agreement between one of the insolvents (defendant 2's father) and the transferees from the Official Assignee whereby the latter, in return for the former's help in realizing assets and a cash consideration of Rs. 5,000 promised to leave each insolvent brother his house. Now this was obviously a fraudulent agreement, assuming it to be a true agreement. It is an agreement which we cannot countenance, being a secret collusive agreement by the appellants' insolvent fathers and the purchasers of their assets from the Official Assignee not to make all their assets available to their creditors but to reserve something—in other words to defeat the very object of the insolvency proceedings. That is clearly against public policy, and we can only add that the very fact that such an agreement should be openly pleaded is evidence that in insolvency matters dishonesty is a commonplace. We dismiss this appeal with costs.

C.R.K./A.L. *Appeal dismissed.*

A. I. R. 1937 Madras 964

VENKATASUBBA RAO AND NEWSAM, JJ.

Kamalathachi and *others* — Petitioners.

v.

Meenakshi Achi and *others* —

Respondents.

Civil Misc. Petn. No. 2800 of 1937, Decided on 9th August 1937, for leave to appeal to His Majesty in Council against judgment of High Court in Appeal No. 75 of 1931.

Civil P. C. (1908), S. 110—Reversing judgment—In suit for possession and accounts trial Court decreeing plaintiff's claim to one fourth share and ordering partial account—High Court dismissing plaintiff's claim with regard to one-fourth share and so not deciding defendants' liability to account—Judgment of High Court held one of reversal on question of accounts.

In a suit by the plaintiff against her three sisters claiming a fourth share in the suit property in the possession of defendant 1 who claimed exclusive title and also for accounts, the trial Court upheld the plaintiff's title and as regards accounts passed a decree for partial accounts. On appeal the High Court, on the question of title, held that defendant 1 was solely entitled and consequently did not get any relief on the question of accountability. The plaintiff applied for leave to appeal to the Privy Council and defendant 1 contended that no leave could be granted on the question of accountability on the ground that the judgment was an affirming one and that it did not involve a substantial question of law :

Held: that the lower Court's finding that the plaintiff was entitled to a fourth part of the property was tantamount to holding that defendant 1 was liable to account in respect of the sum covered by it and that defendant 1 herself was entitled only to a fourth part and not to the entire property as claimed by her. Therefore the High Court, which negatived the lower Court's finding, could not be said to be an affirming judgment but was a reversing one. [P 965 C 1]

T. V. Muthukrishna Ayyar for *N. A. Krishna Ayyar*, *S. R. Subramania Ayyar*, *M. S. Venkatarama Ayyar* and *N. K. Ananthapadmanabhan* — for Petitioners.

K. S. Krishnaswami Ayyangar, *R. Gopalaswami Ayyangar*, *S. Ramanujam*, *T. R. Sreenivasa Ayyangar* and *S. Sankara Ayyar* — for Respondents.

Venkatasubba Rao, J.—This is an application for leave to appeal to His Majesty in Council. The plaintiff in the suit claimed that the property in question belonged in four equal shares to herself and her three sisters, defendant 1, 2 and 3. The suit was resisted by defendant 1, who asserted that she was exclusively entitled to the property and denied that it was divisible into four shares. There was a further prayer in the plaint that defendant 1 should be directed to render an account of her management of the property. First dealing with the question of title, the learned trial Judge accepting the plaintiff's contention held that the property was divisible into four shares. Then as regards the claim to an account, the learned Judge held, on the analogy of the principle applicable to the manager of a Hindu coparcenary, that defendant 1's

liability to account was restricted to the property as it existed at the time of the suit. There was a mortgage for about Rs. 65,000 representing the income from the estate, executed by defendant 1's husband, one Balaguruswami Odayar, in her favour, and the learned Judge held that in respect of this item alone defendant 1 was liable to account, and passed a decree to the effect that the mortgage interest belonged to all the four sisters. There was an appeal to the High Court, and the learned Judges held on the question of title that defendant 1 was solely entitled to the property. The title put forward by the plaintiff having been thus negatived, it necessarily followed that no relief could be granted on the basis of defendant 1's accountability. The learned Judges therefore did not give any finding, and indeed there was no need to do so, on the question of defendant 1's liability to account.

The present application for leave by the plaintiff's legal representative and defendants 2 and 3 is opposed on behalf of defendant 1, but the opposition is partial as will be seen. The plaintiff's claim is divisible, it is said, into two parts: first, the right to the property itself; secondly, the right to an account. It is not disputed that the requirement of S. 110, Civil P. C., as to the pecuniary value of the subject matter is fulfilled. In regard to the first part of the claim, the High Court's judgment being a reversing one, the request for leave is not opposed. But it is said that the High Court's judgment in regard to the second part of the claim is an affirming one and it must therefore be shown that the appeal involves some substantial question of law. From the facts adverted to above, this contention, it will be seen, is obviously wrong. The lower Court did not wholly disallow the claim to an account. The finding that the mortgage belonged to the four sisters is tantamount to holding that defendant 1 was liable to account in respect of the sum covered by it, in other words, the finding involved that defendant 1 was not solely entitled to the amount but her right extended only to a fourth part of it. This being so, the judgment of the High Court which negatived this right cannot be said to be an affirming judgment. The respondent's contention must therefore be overruled.

Further, to give effect to this contention would lead to an anomaly. Supposing the Privy Council, disagreeing with the High Court, should find in favour of the plaintiff, is the restricted leave (which alone under this contention we can grant) to fetter their Lordships and prevent them from giving effect to their decision, that is, by passing a decree for an account? There can be no doubt whatsoever that we ought not to make an order leading to an anomaly of this sort. It has been contended that when there are two claims made, one to property and the other to an account, it should be deemed that there are two distinct subject matters (*vide* 44 M L W 533[1]) and that for the purpose of the granting of leave each should be considered separately. In the view we have taken, it is unnecessary to consider this question. In the result we hold that the judgment of the High Court is a reversing one and certify that as regards the value of the subject matter, the case fulfils the requirements of S. 110. (Leave is granted).

C.R.K./K.B. *Application allowed.*

1. Venkitasami Chettiar v. Sakkutti Pillai, A I R 1936 Mad 881=166 I C 251=I L R (1937) Mad 121=71 M L J 580=44 M L W 533.

A. I. R. 1937 Madras 965

VENKATARAMANA RAO, J.

Sengava Naick and *another*—

Appellants.

v.

Perumal Reddiar and *others*—

Respondents.

Second Appeal No. 281 of 1932, Decided on 10th March 1937, against decree of Sub-Judge, Ramnad at Madura, in A. S. No. 151 of 1929.

Mortgage—Mortgage of items X and Y to *B*—Subsequent mortgage of items X and Z to *C*—Purchase of X and Y by *B* in discharge of his mortgage—Suit by *C* on his mortgage—Decree in his favour subject to prior mortgage of *B*—Suit by *B* on his mortgage—Suit held maintainable and question of marshalling did not arise—*B* held entitled only to sum proportionate to value of property X.

A mortgaged two items of properties X and Y to *B* and then subsequently mortgaged two items X and Z to *C*. Then *A* conveyed the properties X and Y by a sale deed to *B* in discharge of the mortgage. In a suit filed by *C* on the mortgage in his favour, *B* was impleaded as a party and a compromise decree was passed in and by which *C* agreed to a decree in his favour subject to the prior mortgage in favour of *B*. The properties were brought to sale in execution of the decree and purchased by one *D*. *B* filed a suit on his mortgage and *D* defended it on the ground that the suit was not maintainable and that *B* could

not sue to recover the mortgage amount without deducting therefrom the value of the property Y retained by him by virtue of the sale in his favour :

Held : that *B*'s suit on the mortgage in his favour was maintainable : *A I R 1936 Mad 61, Foll.* [P 966 C 2]

Held further : that as *C* had notice of the mortgage in favour of *B*, S. 81, T. P. Act (before amendment) could not apply and no question of marshalling arose and that *B* was not entitled to recover the entire mortgage debt but only a sum proportionate to the value of the mortgaged property X (over which the mortgage in his favour subsisted) : *22 All 284* and *A I R 1920 Mad 375, Foll.* [P 966 C 2 ; P 967 C 2]

K. S. Ramabhadhra Ayyer — for Appellants.

T. R. Srinivasa Iyer — for Respondents.

Judgment.—The point for decision in this second appeal lies within a narrow compass. The material facts are as follows : On 29th September 1910, one Aiyyappa Naick executed a registered deed of mortgage in favour of one Sundara Reddi for Rs. 150 payable on 29th September 1911. The said mortgage comprised two sets of properties described in schs. 1 and 2 to the plaint. By virtue of an assignment dated 30th June 1916 from Sundara Reddi, the rights under the said mortgage became vested in the plaintiffs. The said Aiyappa Naick died subsequent to the date of the mortgage and his widow Lingammal executed a mortgage on 20th April 1920 to defendant 1 in and by which she mortgaged the properties in the said sch. 1 and also some other properties. Subsequent to this mortgage she conveyed the properties comprised in both the schedules to the plaintiffs by a sale deed dated 6th August 1921 in discharge of the mortgage debt and a cash payment of Rs. 76. Defendant 1 instituted a suit on his mortgage (O. S. No. 618 of 1921) in the Court of the Principal District Munsif of Srivilliputtur and in that suit the plaintiffs were impleaded as parties. There was a compromise decree in and by which defendant 1 agreed to a decree being passed subject to the prior mortgage in favour of the plaintiffs. Defendant 1 brought the properties to sale in execution of the said decree and the properties were purchased by defendant 4. This suit has been instituted by the plaintiffs to enforce the mortgage dated 29th September 1910, the rights under which vested in them as aforesaid and were recognized by Ex. D. The contention of defendant 4 was twofold : (i) the suit is not maintainable on the mortgage ; and (ii) the plaintiff cannot sue to recover the mortgage amount without deducting therefrom the value of the properties of sch. 2 to which, by virtue of a sale in their favour, they became absolutely entitled. The District Munsif overruled both the contentions and held that the plaintiffs are not entitled to recover the entire mortgage debt but only a proportionate sum by virtue of their having retained sch. 2 properties. He found that the value of sch. 1 properties was Rs. 700 and that of sch. 2 properties Rs. 800. He therefore gave a decree for 7/15th share of the amount claimed with interest. The learned Subordinate Judge took a different view. He held that the suit is not maintainable. He further held that the plaintiffs must give credit to the entire value of sch. 2 properties and if such credit was given, the plaintiffs will not be entitled to claim any portion of the mortgage amount. He therefore dismissed the suit. It is against this decision that the second appeal is preferred.

So far as the maintainability of the suit is concerned, in view of the recent decisions of this Court it cannot be contended that a suit does not lie : *vide* 59 Mad 44.[1] The next question is, what is the amount which the plaintiff is entitled to recover. It is contended by Mr. Ramabhadra Iyer on behalf of the plaintiffs that they were entitled to recover the entire mortgage amount, whereas Mr. Srinivasa Iyer, on behalf of defendant 4, contends that they can only sue for such amount that will remain after deducting the value of sch. 2 properties. It seems to me that neither of the contentions is sound. At the outset I may make one matter plain. No question of marshalling arises in this case, as under S. 81, T. P. Act, as it stood before the amendment, which governs this case, defendant 1 had notice of the mortgage in favour of the plaintiffs. The view of the lower Appellate Court was largely influenced by the fact that defendant 1 could have claimed the right of marshalling. The mortgagee is entitled to recover the entire mortgage debt from every item of the properties mortgaged to him. But an exception is made in the cases where, the mortgage security is split up by the mortgagee himself and he himself acquires the share of one of the mortgagors or any item

1. Polayya Dora v. Anantha Patro, A I R 1936 Mad 61=160 I C 757=59 Mad 44=69 M L J 903.

of the mortgage property himself. In 43 Mad 372[2] it was held, following the Full Bench decision in 22 All 284,[3] that :

> When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage.

This principle was also extended to a case where the mortgagee purchases the property in execution of a mortgage decree without impleading a person who is interested in the equity of redemption : *vide* 8 I C 153.[4] The reason of the rule is discussed by Banerjee, J. at pp. 289 and 290 in 22 All 284.[3] Referring to S. 82, T. P. Act, 1882, the learned Judge says thus :

> The primary liability on each of several properties included in a mortgage being thus a proportionate share of the mortgage debt, every person who purchases one of those properties incurs a liability to that extent. There can be no doubt that if persons other than the mortgagee purchase different parcels of the mortgaged property, their liability inter se is, as stated above, proportionate to the relative value of the property purchased by each of them, and it is immaterial what price was paid for it. If any such purchaser has to discharge the whole of the mortgage debt, he is entitled to claim contribution from the owners of the remainder of the mortgaged property, and this right subsists even if the price of the parcel purchased by him was grossly inadequate and the difference between that price and the actual market value of the property was in excess, not only of the amount of the proportionate liability of the property, but also of the whole amount of the mortgage debt . . . . . There appears to be no difference in this respect between the case of a purchase by a stranger and that of a purchase by the mortgagee.

This reasoning was accepted by Wallis, C. J. when delivering the Full Bench judgment at p. 379 in 43 Mad 372.[2] In 48 M L J 100,[5] a case which was relied on by the learned Subordinate Judge in the Court below, the learned Judges seem to suggest that where a suit is filed by a prior mortgagee against the puisne mortgagee, the above rule would not apply (p. 102). It seems to me that the view is opposed to the Full Bench ruling in 43 Mad 372[2] and the reasoning on which it was based. The puisne mortgagee in cases where he is not able to claim the benefit of marshalling does not get higher rights than the mortgagor as will appear from S. 75, T. P. Act, 1882, before the amendment which runs thus :

> Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees.

If the rights of the puisne mortgagee are the same as those of the mortgagor, and if as against the mortgagor it is conceded, as was done by the learned Judges in 48 M L J 100,[5] that only a proportionate part of the mortgage debt was wiped out by the mortgagee purchasing a portion of the mortgaged property, I do not see why a different rule should apply in the case of the puisne mortgagee. It seems to me that the principle of the Full Bench decision must govern this case, and following the same I reverse the decision of the learned Subordinate Judge and restore that of the District Munsif with costs allowed by him. In the result I direct each party to bear his own costs both here and in the Court below.

C.R.K./D.S. *Decree reversed.*

2. Ponnambala Pillai v. Annamalai Chettiar, A I R 1920 Mad 375=55 I C 666=43 Mad 372=38 M L J 239 (F B).
3. Bisheshwar Dial v. Ram Sarup, (1900) 22 All 284=1900 A W N 69 (F B).
4. Venkatasami v. Ramanathan, (1910) 8 I C 153.
5. Ramaswami Pillai v. Narayanaswami Pillai, A I R 1925 Mad 483=86 I C 548=48 M L J 100.

A. I. R. 1937 Madras 967

PANDRANG ROW AND VENKATARAMANA RAO, JJ.

Gaddam Ademma and *another* — Appellants.

v.

Anam Hanuma Reddi and *others* — Respondents.

Appeal No. 391 of 1931, Decided on 12th August 1937, against decree of Sub-Judge, Nellore, D/- 11th August 1930.

Hindu Law—Succession—Bandhus—Precedence—Father's half sister's son is preferential heir to mother's brother's son.

Between bandhus of the same class the spiritual benefit that they confer upon the propositus is a ground of preference. [P 968 C 1]

Father's half sister's son and mother's brother's son are both atma-bandhus. It is the former that confers greater spiritual benefit upon the propositus than the latter. Between the two the former is therefore the preferential heir to the deceased dying intestate: *A I R 1931 P C 268* and *16 Mad 23, Rel. on.* [P 968 C 1]

P. S. Raghavarama Sastri — for Appellants.

K. Bhashyam Ayyangar, V. R. Venugopala and *Kasturi Seshagiri Rao*— for Respondents.

Venkataramana Rao, J.—The question raised in this appeal is whether the father's half sister's son or the maternal uncle's son is the preferential heir to the estate of one dying intestate. The learned Subordinate Judge of Nellore was of the opinion that the maternal uncle's son is the preferential heir. It is against this decision that this appeal has been preferred. It seems to us that this matter is concluded by the recent decision of the Privy Council in 59 Cal 576.[1] In that case the conflict was between father's half sister's son and mother's sister's son and their Lordships held that father's half sister's son is the preferential heir. The ground of the decision is this. Both are atma-bandhus and between bandhus of the same class "the spiritual benefit they confer upon the propositus is a ground of preference". This was the principle laid down in 16 Mad 23,[2] which was re-affirmed. Their Lordships held that a greater spiritual benefit is conferred upon the propositus by the father's half sister's son than by the mother's sister's son, and as a measure of propinquity the spiritual benefit which they respectively confer should be taken in deciding the question of preference. So far as the mother's brother's son and mother's sister's son are concerned, there is no difference in the application of this principle. Following the said principle we allow this appeal and hold that the father's half sister's son is the preferential heir.

The decree of the lower Court is reversed and the case remanded to the lower Court for disposal of the further issues raised in the case. The appellant is entitled to the costs of this appeal which we fix at Rs. 150 from the respondents. As the appellants have filed the appeal in forma pauperis and as the court-fee if paid will have to be refunded, we make no order as to the court-fee.

C.R.K./A.L. *Appeal allowed.*

1. Jotindranath Roy v. Nagendranath Roy, A I R 1931 P C 268=135 I C 637=58 I A 372 =59 Cal 576 (P C).
2. Muthusami v. Muthukumarasami, (1893) 16 Mad 23=2 M L J 296.

A. I. R. 1937 Madras 968

KING, J.

K. V. Ramaswami Naick and *another* — Petitioners.

v.

Rangaswami Chettiar — Complainant.

Criminal Revn. Case No. 761 and Petn. No. 710 of 1936, Decided on 5th April 1937, from order of Sess. Court, Ramnad Division, at Madura, D/- 4th July 1936.

(a) Criminal Trial—Revision — Concurrent findings of fact—Interference by Revisional Court, when justified.

A Court of revision will not interfere with concurrent findings of fact. But where Courts below have not approached the case with either a clear appreciation of the issues involved or a clear understanding of the principles of criminal law, the interference by the revisional Court is justified and proper. [P 969 C 2]

(b) Criminal Trial—Conviction—Burden of proof lies on prosecution though defence be false.

A conviction should not be based on the failure of the accused to make good the defence. Even if the defence is palpably false, the burden still rests upon the prosecution and it must be established beyond reasonable doubt that no other alternative than the truth of the prosecution case will explain the facts. [P 969 C 2]

(c) Penal Code (1860), S. 403 — Accused authorized to take and sell cotton of another —His act of selling it does not amount to misappropriation of cotton itself—For wrongful refusal to pay, remedy lies in Civil Court.

Where the accused, who are authorized to take cotton belonging to another, sell it, their act of selling it cannot amount to misappropriation of the cotton itself, within the meaning of S. 403, I. P. C., and if after selling the cotton they refuse to pay money due to the owner, his remedy lies only in Civil Court. [P 969 C 2]

K. S. Jayaram Iyer and *G. Gopalaswami* — for Accused (Petitioners).

Public Prosecutor — for the Crown.

V. Rajagopalachari — for Complainant.

Order.—The petitioners, who are father and son, have been convicted by the Joint Magistrate of Sivakasi for the dishonest misappropriation of five bandy loads of cotton, the property of P. W. 1, on 19th June 1934 and sentenced to pay a fine of Rs. 1,000 each. The conviction and sentences have been confirmed on appeal by the learned Sessions Judge of Ramnad. The undisputed facts of the case are that P. W. 1 sent the cotton from a ginning factory at Erichanatham to Virudhunagar on 19th June; that accused 1 was a creditor of P. W. 1 who came to Erichanatham on that day to demand payment of his

debt, which according to himself amounted to Rs. 360, that petitioner 1 accompanied the bandies to Virudhunagar, that at Virudhunagar petitioner 1 sold the cotton to an agent of Volkart Bros.; and that on 21st June petitioner 2 was paid Rs. 1,200 for the cotton.

The points of difference between prosecution and defence are the following: P. W. 1 says he bought the cotton from P. Ws. 13 and 16 and other sellers; petitioner 1 says it was he who sold the cotton to P. W. 1 and that P. W. 1 was unable to pay him for it. P. W. 1 says that when petitioner 1 demanded payment of the debt he (P. W. 1) authorized petitioner 1 to obtain payment of Rs. 150—which alone P. W. 1 admitted—from one Palani Nadar in Virudhanagar. It was to Palani Nadar that the cotton was being despatched. Petitioner 1's case is that P. W. 1 authorized him to sell the cotton and pay his debt from the sale proceeds, less the charges due to P. W. 1 for ginning. The petitioners were first prosecuted on a charge of cheating. They were discharged by Mr. Wood, the then Joint Magistrate of Sivakasi. Further enquiry was ordered by the Sessions Judge. The judgment of Mr. Corleston, who convicted the petitioners under S. 403 being possibly influenced by the Sessions Judge's order, seems to assume that a case has been made out against the petitioners which necessitates their conviction, if they cannot rebut it. In paras. 1-3 he states the facts and mentions that he has framed a charge. Almost the whole of the rest of the judgment is taken up with the criticism and rejection of the case for the defence. In appeal, the learned Sessions Judge states the issues briefly in para. 5 as follows:

> To succeed, the prosecution must establish that the cotton belonged to P. W. 1, and that the appellants had no right to take the sale proceeds.

In para. 6 he holds that the cotton undoubtedly belonged to the complainant. In para. 7 he holds that as it is admitted that petitioner 2 received the money for selling the cotton, there is a presumption against the appellants which they must rebut. In para. 8 he refuses to attach any importance to discrepancies on the question whether the petitioners were 'put in charge of' the cotton or not, because of the existence of this presumption; finds that the petitioners were not authorized to sell; and finally holds that even if they were so authorized they had no instructions or right to 'keep the whole of the proceeds'.

Now of course the essential issues in this case are issues of fact, and normally a Court of revision will not interfere with concurrent findings of fact, but enough has been said already to make it evident that the Courts below have not really approached this case with either a clear appreciation of the issues involved, or a clear understanding of the principles of criminal law. A conviction should not be based upon the failure of the appellants to make good their defence. Even if a defence is palpably false, the burden still rests upon the prosecution, which must establish beyond reasonable doubt that no other alternative than the truth of the prosecution case will explain the facts. Then, to come to the judgment of the learned Sessions Judge, para. 5 is clearly an inaccurate statement of what is required to be proved. The learned Sessions Judge seems to have forgotten that the petitioners were charged, not with misappropriating Rs. 1,200 or any specific sum of money, but with misappropriating the cotton itself. The prosecution must therefore prove that the petitioners did misappropriate the cotton and did so dishonestly. The hypothesis referred to in para. 8 that even if the creditor did authorize the petitioners to sell the cotton, they cannot have authorized them to keep the whole of the proceeds, cuts at the very root of the prosecution case, based upon this specific charge, for if the creditor authorized the petitioners to take charge of and to sell the cotton, the act of selling it cannot amount to misappropriation. If after selling the cotton the petitioners then refused to pay money due to the creditor, the creditor's remedy lies in the Civil Courts.

In para. 6 the learned Sessions Judge finds that the cotton belonged to the complainant. That is not disputed. Petitioners' case is that they sold the cotton to P. W. 1 who however had not yet paid them for it. The real issue is whether this cotton originally came from the petitioners or from other sellers. On this point neither Ex. D nor the evidence of P. Ws. 13 and 16 is in any way conclusive. Nor has there been any clear direction of the learned Judge's mind to a decision on this point. He assumes (see the end of para. 6 and the beginning of para. 7) that because the cotton belonged to the creditor the story

that the creditor had bought it from the petitioners and could not pay for it must be false—a conclusion which by no means follows.

Even, however, if it were established beyond reasonable doubt that this cotton never belonged to the petitioners, the prosecution must still show that their plea that the creditor authorized them to sell it on his behalf is not only not proved but not true. To establish this there is only the evidence of P. W. 1 himself. The evidence of P. W. 1 is lengthy. Neither of the Courts subjects it to any kind of detailed scrutiny. Neither Court refers to his demeanour or says explicitly that it believes him. He has stated in the sworn statement itself that he 'entrusted' the cotton to petitioner 1; he had admitted that he gave no definite instructions to the bandy men as to where they should take it; he raised no protest whatever when he saw his own cotton in Volkart's yard on the 20th with petitioner 1's initials on the bales; and he explains this by saying that he thought petitioner 1 was a trustworthy man and that he could somehow recover the money even though he had been cheated. It is impossible, I think, to hold on these admissions, that there is not a reasonable doubt as to the authorization to sell, or that one must believe P. W. 1 when he says that all petitioner 1 was authorized to do was to ask Palani Nadar for Rs. 150. I am therefore of opinion that this Court is entitled to interfere in revision and that the petitioners should be acquitted and the fine, if paid, refunded.

C.R.K./D.S. *Accused acquitted.*

✻ A. I. R. 1937 Madras 970

PANDRANG ROW, J.

R. Krishnaswami Iyengar—Appellant.

v.

Sri Kallalagar Devastanam, Madura—Respondent.

Second Appeal No. 337 of 1933, Decided on 30th March 1937, against decree of Dist. Court, Madura, in A. S. No. 125 of 1930.

✻ Religious Endowment—Temple committee and trustee — Powers of temple committee explained — Committee making budget allotment — Trustee exceeding budget allotment for purposes binding on temple — Trustee is not bound to make good excess amount spent by him — Trustee is not in position of guardian of minor — Performance of festival — Trustee is to be guided by his judgment.

The temple committee have no doubt power of general superintendence over the endowments for the purpose of seeing that the endowments are appropriated for the purpose for which they are granted. They have also the power of appointing trustees or managers and of calling for accounts from them and scrutinize the account. They may also possess the power of calling for budgets every year and of passing them with or without modification. But the mere exceeding of the budget allotments by the trustee or manager is not in itself a sufficient ground for compelling the trustee or manager to make good the excess amount spent by him for a purpose binding on the temple.

[P 971 C 1, 2]

Expenditure on festivals in temples by trustees should not be wholly guided by considerations similar to expenditure by guardians for the minors' necessaries or benefit. Festivals and other ceremonies conducted in honour of God cannot be regarded as being similar to necessaries in the case of minors; so long as the temple or endowment can stand the strain, the celebration of a festival on a grand scale cannot be regarded as being unreasonable or extravagant, and the conduct of such a festival in such a manner by a trustee or manager should not be regarded as a breach of trust or negligence. He has only to do his duty according to the best of his judgment and to the satisfaction of the worshippers whose contributions add to the income of the temple.

[P 972 C 1, 2]

K. Rajah Ayyer — for Appellant.

B. Sitarama Rao, P. N. Marthandam Pillai and *C. Rangaswami Iyenger*— for Respondent.

Judgment.—This is an appeal from the decree of the District Judge of Madura dated 18th October 1932, affirming on appeal the decree of the Principal Subordinate Judge of Madura dated 28th February 1930 in O. S. No. 120 of 1928 which was a suit for recovery of Rs. 4,625 from the defendants, three in number. The principal allegations were that defendant 1 who was the trustee of the plaint mentioned devastanam, Sri Kallalagar Devastanam, from 1919 to April 1926, had been grossly negligent as regards certain items set forth in sch. 2 to the plaint, and that his negligence had caused loss to the Devastanam which he was bound to make good. The other two defendants were impleaded on the ground that they had executed a security bond binding themselves to make good to the Devastanam any loss that might be caused by defendant 1's breach of duty or negligence, etc. The suit was dismissed by the trial Court as against defendants 2 and 3, and the only item in respect of which negligence was found to be proved by the trial Court was in respect of the special festival celebrated in June 1924 at

the temple, known as the Thailaprithishtai and Jyeshtabhishekam. As regards the other items charged, the trial Court found that defendant 1 was not guilty of any negligence. As regards the money spent for this special festival by defendant 1, the trial Court was of opinion that though the temple was a rich one and was in a position to spend Rs. 4,000 and even more for the Jyeshtabhishekam, defendant 1 was not justified in spending more than the Rs. 1,000 that was sanctioned by the temple committee. In other words, his finding was that though the temple could very well afford the amount actually spent on the festival, nevertheless defendant 1 was only a subordinate of the committee and had exceeded the allotment of Rs. 1.000 fixed by the committee, and he was therefore liable to pay back the excess spent by him, namely, Rs. 3,633, and passed a decree accordingly. On appeal this decree was confirmed by the District Judge who was of opinion that because defendant 1 ignored the limit of expenditure imposed by the temple committee, he did so at his peril and that he cannot shelter himself behind an allegation that the allotment was unreasonable. Defendant 1 is the appellant in this second appeal.

A great deal has been said in the course of the argument before me as to the powers of the temple committee to issue directions to the temple trustee or manager. Reference has been made to the decisions in 21 Mad 179,[1] 39 Mad 700[2] and also to 15 M L J 185.[3] There is no doubt that the temple committee have the power of general superintendence over the endowments for the purpose of seeing that the endowments are appropriated for the purpose for which they were granted. They have also the power of appointing trustees or managers and of calling for accounts from them and scrutinize the accounts. It may be they also possess the power of calling for budgets every year and of passing them with or without modification. No authority has been brought to my notice in which it has been held that the mere exceeding of the budget allotments by the trustee or manager is itself a sufficient ground for compelling the trustee or manager to make good the excess amount spent by him though for a purpose binding on the temple. Exceeding of budget allotments is not rare even in the best regulated establishments, and it is difficult to believe that cases of such exceeding of budget allotments would have been very rare in the administration of temples by trustees or managers. It is therefore significant that there has been no reported case at all in which anyone has sought to recover from a trustee or ex-trustee or manager the amount spent by him in excess of the amount allotted in the budget. It would appear as if no temple committee or no subsequent trustee ever conceived the idea of making any temple manager or trustee liable to make good the amount spent by him in excess of the budget allotments.

In this particular case the exceeding of the budget allotment was, if I may say so, quite justifiable in the circumstances; it was the committee itself who wanted the trustee or manager to celebrate the festival which is a special one held only very occasionally, once in 20 years or so. Immediately on receipt of this order by the trustee, the latter represented to the committee that it was impossible to celebrate the festival at a cost of Rs. 1,000 which was the amount sanctioned by the committee. To this letter the committee made no reply, and the festival was conducted on a befitting scale by the appellant in the presence of and with the active assistance of one prominent member of the temple committee, one Mr. Alagappa Chettiar, who unfortunately died before the evidence in the suit was recorded. Another member of the committee appears also to have been present at the festival. The findings of the Courts below are to the effect that the money was actually spent for the festival; in other words, there is nothing to show that any portion of the amount was misappropriated. The temple is very ancient and important and enjoys considerable repute. The annual income is something over Rs. 60,000 and the festival in question was a special one, the object of which was to restore the lost or diminished lusture of the idol. This process appears to involve elaborate preparation of costly oils and it is impossible to say that the festival could have been fittingly performed within the amount

1. Seshadri Ayyangar v. Nataraja Iyer, (1898) 21 Mad 179.
2. Sitharama Chetty v. Subramania Iyer, A I R 1917 Mad 551=32 I C 211=39 Mad 700=30 M L J 29.
3. Subba Naidu v. Gopalaswami Naidu, (1905) 15 M L J 185.

sanctioned by the committee. Full accounts were submitted to the committee by defendant 1 and practically no objection was taken to the accounts, the only objection taken being to a very small item of cart hire and the supply of a small quantity of Madras snuff and tobacco to the establishment. As the learned District Judge observes in his judgment, the committee was to some extent to blame for what happened because they passed no orders on the appellant's report to the effect that the festival could not be celebrated at a cost of anything like Rs. 1,000 and also because they never took any steps either to repudiate the excess expenditure actually incurred or to regularize it after the accounts were received by them. The accounts were received by the committee some time in November 1925, and the present suit was instituted only in October 1928. During all this period there was never any complaint about the exceeding of the budget allotment in respect of this festival. The learned District Judge, while saying that it is not necessary to go into details, has nevertheless permitted himself to observe that :

> The huge sums spent on fireworks, public feeding and such matters could easily have been reduced to proportions more suitable to the financial resources of the temple.

As a matter of fact the details show that the amount spent on fireworks is only Rs. 69 which certainly cannot be regarded as a huge sum. Public feeding which cost about Rs. 900 was a necessity as the temple is situated in a place where admittedly there are no hotels or eating houses and the worshippers who had come to attend the festival would have had to starve if the trustee had not made arrangements for feeding them. The financial resources of the temple, as stated above, are more than sufficient to stand an expenditure of the amount incurred in this connextion. As the learned trial Judge remarks, "the temple is rich and is in a position to spend Rs. 4,000 and even more for the Jyeshtabhashikam". I am unable to appreciate the contention that even though the temple had enough money and could afford to celebrate the festival magnificently, nevertheless the trustee was bound to celebrate it as economically as possible. I do not think expenditure on festivals in temples by trustees should be wholly guided by considerations similar to expenditure by guardians for minors' necessaries or benefit. Festivals and other ceremonies conducted in honour of God cannot be regarded as being similar to necessaries in the case of minors; so long as the temple endowment can stand the strain, the celebration of a festival on a grand scale cannot in my opinion be regarded as being unreasonable or extravagant, and the conduct of such a festival in such a manner by a trustee or manager should not in my opinion be regarded as a breach of trust or negligence. He has only to do his duty according to the best of his judgment and to the satisfaction of the worshippers whose contributions add to the income of the temple. There has been in this case no misappropriation of any kind and the temple is certainly rich enough to afford to spend a sum of Rupees 4,600 on a special festival and there is in my judgment no justification for the view that the temple trustee or manager is liable to make good out of his pocket everything spent by him over and above the amount allotted by the committee. Such a general proposition is in my opinion not in accordance with law. Even otherwise in this particular case the conduct of the committee has been such that the excess expenditure must be deemed to have been ratified by the committee.

Even assuming that the position of the trustee or manager is only that of an agent, bound to obey every direction of his principal, i. e. the committee, nevertheless, when he brings to the notice of the principal the fact that he had exceeded his authority by spending more than what was sanctioned and the principal acquiesces in it and takes no action whatever against him, his act must be deemed to have been ratified by the principal. In this connexion reference may be made to 29 M L J 551.[4] The learned Judge therefore erred in law in coming to the conclusion that though the committee was to some extent to blame for what happened because it passed no orders on the appellant's letter, Ex. G-4, and there should have been prompt action to regularize or repudiate the excess expenditure, the appellant was liable all the same to make good the excess to the succeeding trustee. He did not consider the question whether in these circumstances there was not a

4. Ramaswami Chetty v. Karuppan Chetty, A I R 1916 Mad 1133=31 I C 216=29 M L J 551.

ratification of the appellant's act by the committee. The appeal must therefore be allowed and the decree passed against the appellant set aside with costs in this Court and in the Courts below to be paid out of the temple funds. Leave to appeal is refused.

C.R.K./B.D. *Appeal allowed.*

A. I. R. 1937 Madras 973

VARADACHARIAR, J.

Bhavanam Nagireddi and *others* — Petitioners.

v.

Board of Commissioners for Hindu Religious Endowments, Madras — Respondent.

Civil Revn. Petn. No. 1165 of 1935 and Civil Misc. Petn. No. 3098 of 1936, Decided on 6th August 1937, from order of Dist. Court, Guntur, D/- 26th March 1935.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (2)—Exclusion of outsiders from interference with management—Institution is still 'temple' so long as right of worship is not excluded — Trust deed contemplating kainkaryams in temple being undertaken by outsiders—Deed providing for performance of Paksh Utsavam, Masa Utsavam etc.—Deity taken in public procession once a year—Temple is dedicated to public.

The exclusion of other members from interference with the management will not take away the institution from the definition of 'temple' in the Act. The power of interference by the Court or by the Legislature rests not upon the wishes of the founder but upon principles and provisions of the law. So long as there is no intention to exclude the right of worship, the restriction of the right of outsiders to interfere in the management of the temple is not a determining fact. [P 974 C 2]

Where a trust deed clearly contemplates kainkaryams in the temple being undertaken by outsiders, it cannot be said that the founders did not contemplate worship in the temple by persons unconnected with their family. The provision in the document for the performance of what is familiarly known as Paksha Utsavam, Masa Utsavam etc., is more consistent with the institution being intended to be a public one than with its being a private institution. The fact that the utsav deity is taken in public procession at least once a year is in confirmatory of the idea that the founders were anxious to give all facilities to the public to worship the deity. In the matter of this sort, the reference to the public can only signify such public as is available in the locality and it does not matter even if the outsiders coming and worshipping at the temple are not many. [P 974 C 1]

(b) Madras Hindu Religious Endowments Act (2 of 1927), S. 84—Proceedings before Court under S. 84 are not merely in nature of appeal so as to preclude parties from leading fresh evidence—Materials before Board can be treated as part of record of enquiry before Court.

The proceedings before the District Court under S. 84, Madras Hindu Religious Endowments Act, are not merely in nature of an appeal so as to preclude parties from leading fresh evidence before the Court but the proceedings before the Court are not so wholly de novo that the materials placed before the Board should not be regarded as part of the record of the enquiry. The fact that the evidence before the Board consisted only of affidavits of persons whom the Board did not choose to examine before the Court may be very important circumstance to be borne in mind by the lower Court in appraising the value of such evidence; but the materials that were before the Board can be treated as forming part of the record of the enquiry before the Court. [P 974 C 1]

V. Rangachari — for Petitioners.

K. Subba Rao — for Respondent.

Order.—This petition arises out of an application under S. 84, Madras Hindu Religious Endowments Act. The Board had held the temple in question to be a 'temple' within the meaning of the Act; the petitioners contended before the lower Court and contend before me that the requisites of the definition of a 'temple' as given in S. 9 (12) of the Act are not satisfied in the present case. I cannot ignore the fact that this Court can deal with the matter only subject to the limitations laid down in S. 115, Civil P. C. The learned District Judge cannot be said to have ignored the terms of the definition in the Act, because his order winds up with the very terms employed in that definition. If I were satisfied that on any of the considerations on which his judgment is based he had fallen into such a serious error that it could be said to have fundamentally misled him in dealing with the question, I might perhaps have been disposed to interfere even under S. 115. But far from being so satisfied, I think that there are one or two considerations not adverted to by him which rather go to support his conclusion. For instance, the trust deed Ex. A clearly contemplates kainkaryams in the temple in question being undertaken by outsiders. It is difficult to reconcile this with the idea that the founders did not contemplate worship in the temple by persons unconnected with their family.

I am not able to agree with the petitioners' learned counsel that the clause referring to kainkaryams leaves it to the

discretion of the trustees to permit the kainkaryams to be done or not. What is left to their discretion by the clause is merely the nature and extent of the honours to be shown to the persons who perform such kainkaryams. I cannot also help thinking that the provision in the document for the performance of what is familiarly known as Paksha Utsavam, Masa Utsavam etc., is much more consistent with the institution being intended to be a public one than with its being a private institution. The admitted fact that the utsava deity is taken in public procession at least once a year is confirmatory of the idea that the founders were anxious to give all facilities to the public to worship the deity. It is true that there is not any positive evidence as to many outsiders as coming and worshipping at this temple. That is partly explained by the fact that the most of the residents in the village are Christians and the Hindu inhabitants are very few. But in a matter of this sort the reference to the public can only signify such public as is available in the locality.

Mr. Rangachariar took objection to the learned Judge having acted on the affidavits filed during the proceedings before the Board in proof of the practice of outsiders to come and worship at this temple. He contended that as no evidence on that point had been led by the Board in the course of the trial before the Judge, the Court ought not to have acted upon the affidavits. I cannot agree that that is the proper interpretation of S. 84. It is true that the proceedings before the District Court under S. 84 have been held not to be merely in the nature of an appeal so as to preclude the parties from leading fresh evidence before the Court; but that is very different from saying that the proceedings before the Court are so wholly de novo that the materials placed before the Board should not be regarded as part of the record of the enquiry. The fact that the evidence before the Board consisted only of affidavits of persons whom the Board did not choose to examine before the Court may be a very important circumstance to be borne in mind by the lower Court in appraising the value of such evidence; but it is too much to say that the materials that were before the Board should be treated as not forming part of the record of the enquiry before the Court.

Reliance was also placed by the petitioners' learned counsel on a clause in the trust deed prohibiting interference by anybody with the management by the founders. The learned counsel for the Board asked me to read this prohibition in the light of the context as limited only to interference by the members of the particular family referred to in other portions of the document, viz. Yangalareddi Busi Reddi and he suggested that the expression "none else" had been used there merely to emphasize the anxiety of the founders to exclude any member or descendant of that branch. This may be a possible reading; but even taking it that the prohibition was intended to be wider, I do not think that the exclusion of other members from interference with the management will take away the institution from the definition of "temple" in the Act. The power of interference by the Court or by the Legislature rests not upon the wishes of the founder but upon principles and provisions of the law. So long as there was no intention to exclude the right of worship but on the other hand, as I have endeavoured to show, it was expected that outsiders may worship in the temple and even perform kainkaryams—the restriction of the right of outsiders to interfere in the management of the temple is not a determining fact for the present purpose.

I quite sympathise with the apprehensions of the petitioners, who have undoubtedly spent their property in founding this institution and interested themselves in its maintenance, that the declaration made by the Board under S. 84 may at some time prejudice their rights in the institution. I can only express the hope that the Board will respect their sentiments and may not find any necessity or occasion to interfere with their customary rights or rights of management; but such considerations will not justify my holding that the order of the Board or the order of Court below is not warranted by law. The revision petition is accordingly dismissed with costs. In the view I have expressed above, it is not necessary to pass an affirmative order on C. M. P. No. 3098 of 1936. The document sought to be adduced in evidence through that petition only serves to explain how a particular item of property mentioned in the trust deed came to stand in the name of one Bapiah. That circumstance does

not seem to me of much importance. I accordingly dismiss the petition.

C.R.K./S.C. *Petition dismissed.*

A. I. R. 1937 Madras 975

KING, J.

In re *Ramalinga Goundan*—Petitioner.

Criminal Revn. Case No. 211 and Petn. No. 198 of 1937, Decided on 6th August 1937, from judgment of Sess. Court, Coimbatore Division, in Criminal Appeal No. 7 of 1937.

(a) Criminal Trial—Evidence—Rejection of defence evidence—Position of prosecution is not made better.

When defence evidence is rejected by the Court, the situation simply is as if the evidence had never existed. If the defence evidence is believed, it would rebut the prosecution, but if it is not believed, the prosecution is left just where it was before defence witnesses were called. [P 975 C 2]

(b) Arms Act (1878), S. 19 (f)—Arms and ammunition found in accused's house which was locked—Articles unserviceable—Accused in habit of living at three different houses—No evidence to prove when accused last resided in that house — Accused held could not be convicted.

A was convicted under S. 19 (f). A collection of arms and ammunition was found in his house. There was no other evidence for the prosecution except the finding of the articles. Most of the articles found were quite unserviceable. The accused was in the habit of living in three different houses and the house in which the contraband articles were discovered was locked on that day. Prosecution made no attempt to prove as to when the accused last lived in the house. The defence was that the articles must have been foisted into the house by some one of the enemies of the accused :

Held : that there was sufficient element of reasonable doubt introduced in the case to make it possible that the accused's plea might be true and to warrant his acquittal. [P 976 C 1]

K. S. Jayarama Aiyar for *R. Sadasivan* — for Petitioner.

R. N. Aingar — for the Crown.

Order.—The petitioner has been convicted under S. 19 (f), Arms Act by the Sub-Divisional First Class Magistrate, Coimbatore and his conviction has been confirmed on appeal by the learned Sessions Judge. The evidence for the prosecution shows that on the morning of 9th October 1936 a miscellaneous collection of arms and ammunition was found in a house belonging to the petitioner at Kuppandampalayam. The petitioner had been arrested on a charge of murder in Coimbatore the previous evening. Except the fact that the arms and ammunition were found in the petitioner's house, there is really no evidence for the prosecution and the case against the petitioner depends upon the evidence of the discovery in the house, whether it is of itself sufficient for a conviction or not. The defence was that the contraband property must have been foisted into the house by someone of the petitioner's enemies and an attempt was made to prove by positive evidence that persons had been seen tampering with the roof of the house on the night before the property was seized. Both the Courts have unhesitatingly refused to accept this evidence for the defence and I see no reason to differ from them. They point out the impossibility of any attempt having been made within so brief an interval to foist a case against the petitioner.

The Courts below however appear to have laid very much stress upon this failure of the defence, to reach another conclusion, namely that because the defence put forward was the tampering with the roof within a few hours of the discovery of the property, the petitioner must have himself lived in the house until very shortly before the discovery, and in fact the Courts below seem to me to have proceeded on the assumption that there can have been no possible alternative case between that for the prosecution and that attempted to be proved by the defence. When defence evidence of this kind is rejected, the situation simply is as if the evidence had never existed. If the defence evidence is believed, it would of course rebut the prosecution. If it is not believed, the prosecution is left just where it was before the defence witnesses were called and it cannot be assumed for a moment from the evidence let in by the defence that there is any admission that the petitioner or his family were living in the house until the night before or a day or two before the discovery of the property. The learned Sessions Judge assumes in para. 3 of his judgment that the petitioner and his wife were in the house a day or two previously. The petitioner does not say this in any statement of his own and I have found no trace of any possible statement to that effect in the evidence of his wife. No witnesses were called by the prosecution to prove just at what time the petitioner was in residence in this house

and, the omission to adduce this evidence is of some importance when it is remembered that the petitioner was in the habit of staying at no less than three houses. So far as the evidence goes, it is impossible to be certain that this house had not remained untenanted for a long period. No doubt the house was locked and would normally be locked. No doubt a grave suspicion is cast upon the owner of the house in a case of this kind, but after all the articles found are not prima facie the type of articles which would be kept by a man who wished to shoot with a gun or a revolver without a license most of them are quite unserviceable and there is a mass of miscellaneous collection of cartridges some of which might and some of which could not fit the gun or revolver. The property found therefore of itself suggests the possibility that the plea of foisting put forward by the petitioner in this case may not be altogether unreasonable. If there had been clear evidence that the petitioner had been living in this house until within a short period before the discovery, I do not think I would have been justified in interfering with the conviction. But as no attempt has been made to prove just when the accused was last residing in the house I think a sufficient element of reasonable doubt is introduced into this case to make it possible that the petitioner's plea might be true and to warrant his acquittal. I accordingly set aside the conviction and sentence and direct the petitioner to be acquitted and that his bail bonds be cancelled.

C.R.K./S.C. *Conviction set aside.*

A. I. R. 1937 Madras 976

BURN AND LAKSHMANA RAO, JJ.

J. Ganesh Lala — Appellant.

v.

Ratan Bai and *another*—Respondents.

Appeal No. 225 of 1935, Decided on 5th August 1937, against order of Dist. Court, Trichinopoly, D/- 10th April 1935.

Hindu Law—Minority and guardianship—Hindu widow marrying christian is not proper guardian of her minor son by first husband.

A Hindu widow who has married a Christian is not the proper personal guardian of her Hindu minor son by the first husband. The boy should ordinarily be brought up as Hindu like his father and a Christian household is no proper house for him : *14 M I A 309 (P C), Rel. on.* [P 976 C 2]

A. V. Narayanaswamy Ayyar — for Appellant.

U. Somasundaram and *K. Sundararajan*—for Respondents.

Judgment.—The learned advocate for the respondents cannot support the order of the lower Court in so far as it appointed respondent 1 to be the guardian of the minor girl. There was no application to appoint a guardian for the girl and we agree with Mr. A. V. Narayanaswamy Ayyar, advocate for the appellant, that the learned District Judge's order was without jurisdiction in so far as the girl was concerned. As for the boy, it is clear from the circumstances of the case that the mother, respondent 1, is not a proper guardian. She is a Hindu widow who has now married a Christian. The boy should ordinarily be brought up as a Hindu like his father; a Christian household is no proper house for him: *vide* 14 M I A 309.[1]

The appeal is therefore allowed and the learned District Judge's order appointing the mother as personal guardian of the minors is set aside. We are asked by Mr. Somasundaram, advocate for the respondents, to send the case back for further inquiry but we see no necessity to do so. The appellant is the maternal uncle of the boy and the girl is already living in his house. He resides in Kanadukathan which is in British India. There is nothing established against him in point of character, motive or means. We think the appellant is a fit person to be the personal guardian of the boy and we appoint him accordingly. The respondents must pay the appellant's costs in both Courts.

C.R.K./S.C. *Appeal allowed.*

1. Skinner v. Orde, (1870-72) 14 M I A 309=2 Moo P C (N S) 261=17 W R 77=10 Beng L R 125=2 Suther 521=3 Sar 34 (P C).

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